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LIMITS ON EXPORTING CORPORATE SOCIAL RESPONSIBILITY THROUGH DOMESTIC REGULATION

*Kenneth M. Rosen**

I. INTRODUCTION

In a time of economic crises and scandals resulting in public skepticism of corporate operations, it is natural to focus on whether companies are serving or thwarting the public good. Moreover, it is natural for various parties to explore how to incentivize companies to contribute positively to society and to coalesce around something like a Corporate Social Responsibility (CSR) movement, even though the exact boundaries of such a movement may not be fully defined. Thus, it is not surprising that government regulators, the private sector,¹ and academics² all have focused on CSR.³

* Professor, The University of Alabama School of Law. I previously served as Special Counsel in the Division of Market Regulation of the United States Securities and Exchange Commission, where my work included international matters. I would like to thank Dean Mark Brandon, my colleagues on the faculty, and the Alabama Law School Foundation for their generous support of my research. I also thank the editors of the South Carolina Journal of International Law and Business Law and participants in its symposium on Corporate Social Responsibility (hereinafter “Symposium”).

¹ See, e.g., Devin Thorpe, *Why CSR? The Benefits of Corporate Social Responsibility Will Move You to Act*, FORBES (May 18, 2013), <http://onforb.es/13D6bfr>; *Corporate Social Responsibility*, CISCO, <http://csr.cisco.com> (last visited Oct. 1, 2014).

² See, e.g., *Corporate Responsibility Initiative*, HARV. KENNEDY SCH., <http://www.hks.harvard.edu/centers/mrcbg/programs/csri> (last visited Oct. 1, 2014).

³ One of the great benefits of this Symposium is that it does not focus too much on old CSR literature and debates about issues, such as the term’s exact meaning. Ultimately, such questions are not necessary to move the dialogue forward, and may even cause confusion. For example, Professor Karin Buhmann usefully relayed how in Europe strict focus on the meaning of CSR and whether, by definition, it constitutes only voluntary corporate action may put ideas in boxes that curtail the freedom of policymakers to move

In this article, I seek to add to the ongoing CSR dialogue by analyzing the relative efficacy of certain government regulations aimed at improving the social behavior of companies. More specifically, I examine the use of U.S. financial regulation as a means to influence the behavior of U.S. companies abroad. The tradition of using extraterritorial financial regulation—regulation related to activities outside of U.S. borders—is longstanding. Accordingly, extraterritorial financial regulation provides an interesting case study for broader regulatory evaluation and might offer hints about more optimal regulatory schemes in other nations and sectors as well.⁴

To evaluate the effects of regulation on companies operating across borders, it is useful to categorize different types of regulation. For instance, Professor Peter Muchlinski, in studying multinational

forward effectively in helping firms become better citizens. Karin Buhmann, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015).

⁴ Financial regulation is certainly not the only type of regulation that might be employed to influence CSR, depending on how one defines CSR. For example, as the U.S. government authorized investments by U.S. persons in Burma, the U.S. Department of State also issued the Reporting Requirements on Responsible Investment in Burma. *See Reporting Requirements*, EMBASSY OF THE U.S., RANGOON, BURMA, <http://burma.usembassy.gov/reporting-requirements.html> (last visited Nov. 16, 2015). Such actions can be viewed as a general part of the human rights program of the United States. *See* U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor, *U.S. Government Approach on Business and Human Rights*, HUMANRIGHTS.GOV (May 1, 2013), <http://www.humanrights.gov/u.s.-government-approach-on-business-and-human-rights>. However, this article focuses on financial regulation, not only because it is my area of expertise for which I was called on by the Symposium organizers, but also because of the overall importance of financial regulation, including its indirect relation to other areas of the law. For example, given the broad nature of financial regulatory disclosures, they may include a vast variety of subjects from corporate governance to items not as purely corporate, such as environmental practices. *See* Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 33-6835, 54 Fed. Reg. 22,427 (May 18, 1989) (exploring disclosure of trends with example of Environmental Protection Agency designation of person as potentially responsible party under Superfund). Thus, an analysis of financial regulation potentially offers broad insights.

enterprises, usefully identified how there may be a variety of sites of regulation including self-regulation, non-governmental organization regulation, national regulation, bilateral regulation, regional regulation, and multilateral regulation.⁵ Moreover, Professor Muchlinski usefully distinguishes “home” and “host” country regulation— respectively, regulation from a company’s country of origin as opposed to the rules proffered by the country abroad where the company seeks to operate.⁶ In this article, I similarly seek to draw on such distinctions by examining the relative efficacy of U.S. regulation as home country regulation that seeks to influence the behavior of its companies abroad, which exists in a world where other regulatory alternatives may be available. At the outset, it is useful to note that one might alternatively posit that host country regulations might be a more direct way than such U.S. home regulation to affect company behavior in the host jurisdiction’s boundaries.

Initially, it also is useful to state what I do not seek to accomplish in this article. While this article may be viewed as a critique of home country regulation, it is not within this article’s scope to declare that all extraterritorial regulation is always inappropriate.⁷ The purpose of this article is more nuanced. I seek to suggest how, given certain inherent limits on the efficacy of some types of home regulation, it is prudent to think more broadly about the merits of such home regulation in contrast to possible regulatory alternatives. Such an endeavor is especially useful since regulatory resources are not unlimited.⁸

Accordingly, I proceed in the following fashion: After this introduction in Part I of the article, I continue in Part II to identify how certain U.S. financial regulation might be characterized as an effort to achieve CSR. In Part III, I explore limits on the efficacy of utilizing

⁵ See PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES & THE LAW* 112–21 (2d ed. 2007).

⁶ See generally *id.* at 125–470.

⁷ Indeed, theories for bases for extraterritorial regulation and jurisdiction are multiple and subject to their own debates. See MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 241–66 (1988).

⁸ Governments face factors from limited financial revenues for expenditures on regulatory programs to political realities shaping the allocation of regulatory resources. Therefore, a transparent analysis of possible shortcomings of traditional regulatory techniques, such as extraterritorial programs, as well as the introduction of alternatives, is critical.

U.S. regulation in this fashion. In Part IV, I offer alternative regulatory schemes that might incentivize CSR more effectively. Finally, in Part V, I conclude with a summary of my assessment.

II. U.S. FINANCIAL REGULATION AND CSR

At first glance, U.S. *financial regulation* might seem unrelated to *international CSR*, because, in name, its subject is finance and it references domestic law.⁹ However, students of U.S. financial regulation recognize the scope of its effects is much broader. Financial regulation, especially securities regulation, is interested in activities beyond stock market trading. For example, as I have explained in my prior capacity as U.S. Reporter on Company Law and the Law of Succession for the 2014 Congress of the International Academy of Comparative Law, federal securities regulation may affect corporate governance in significant ways.¹⁰ And, of course, how a company is managed may be closely linked to whether it engages in socially positive or negative activities. The wide presence of U.S. firms, operating in U.S. capital markets and subject to U.S. financial regulation, that also operate abroad, increases the chance that U.S. domestic law might appear in effect in other jurisdictions.

To illustrate this point, it is useful to provide some examples of U.S. financial regulation that might affect CSR as it relates to companies' operations in foreign jurisdictions. The first example is the payment provisions of the Foreign Corrupt Practices Act (FCPA).¹¹ As discussed below, the FCPA seeks to discourage bribery, including by certain companies, of foreign officials in other countries.¹² The payment provisions are especially interesting as they *directly* forbid certain activities abroad.¹³ The second example is the U.S. regulatory

⁹ Of course, this is not to say the activities described below do not take place in a broader tradition of international law in the United States. See generally MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW* (2004).

¹⁰ Kenneth M. Rosen, *Company Law and the Law of Succession*, 62 AM. J. COMP. L. 387, 400–01 (2014) (discussing proxy voting and federalization of certain legal issues).

¹¹ 15 U.S.C. §§ 78dd-1 to -3 (2012).

¹² *Id.*

¹³ *Id.*

framework for disclosure. Disclosure is of interest as it might expose the socially positive and negative operations of companies abroad. These effects may be more *indirect* through shaming bad behavior and highlighting good behavior, rather than mandating or prohibiting behavior directly.¹⁴

A. FOREIGN CORRUPT PRACTICES ACT

The FCPA is a statute that allows the United States Securities and Exchange Commission (SEC) or the United States Department of Justice (DOJ) to pursue violators of the statute.¹⁵ While some might not classify an anti-bribery statute as securities law or financial regulation, the FCPA's history and SEC's involvement should disavow this conclusion. Judge Stanley Sporkin, former Director of the SEC's Division of Enforcement, greatly enlightened the scheme's institution in a symposium related to the FCPA's twentieth anniversary.¹⁶

Judge Sporkin tells the fascinating tale of how the statutory scheme finds its origin in the Watergate hearings and the perhaps lesser-appreciated pursuit of claims of inappropriate corporate contributions to President Richard Nixon's re-election campaign.¹⁷ While at the SEC in the 1970s, given his interest in accounting, Judge Sporkin had a staffer conduct an informal inquiry into how

¹⁴ These certainly are not the only possible examples of extraterritorial financial regulation. Nor does what follows constitute a detailed discussion of the specific rules and regulations in these two areas. Rather, these two examples hopefully are useful as intuitively comprehensible by those attending this interdisciplinary Symposium, including individuals from outside law schools, such as the business scholars and firm leaders present, as an entry point to thinking about financial regulation and how extraterritorial financial regulation, in particular, might take different forms.

¹⁵ The SEC's jurisdiction relates to many of the most significant companies in the United States as it has jurisdiction over certain "issuers" of securities. 15 U.S.C. § 78dd-1(a) (2012). DOJ jurisdiction goes more broadly to "domestic concerns" which may include various entities and individual persons. *Id.* § 78dd-2(a).

¹⁶ Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & Bus. 269 (1998).

¹⁷ *Id.* at 271.

corporations might document these payments as part of their accounting activities.¹⁸ Upon learning how illicit payments could be concealed through mislabeling, the SEC discovered corporations could also use secret funds to bribe foreign government officials and eventually began a formal investigation.¹⁹ Ultimately, the SEC discovered large amounts of problematic payments, and SEC enforcement cases began.²⁰ Given the seemingly widespread nature of the problem, the SEC sought a new regulatory fix, resulting in a voluntary disclosure program for dubious payments.²¹ Hundreds of companies participated in the program.²²

Eventually, Senator William Proxmire queried whether legislation might help.²³ Judge Sporkin's advice preceded the first part of the FCPA, which requires internal control and books and records provisions.²⁴ Senator Proxmire also wanted to go further, and Congress added payment provisions to the FCPA which simply barred certain bribes.²⁵ Thus, in addition to requiring accounting of payments, the FCPA added payment provisions. Accordingly, a violation *could occur* if parties covered by the statute use "interstate commerce corruptly in furtherance of an offer . . . of anything of value to" certain foreign officials and others to influence or induce such persons "in order to assist . . . in obtaining or retaining business"²⁶

The above payment provisions can clearly be characterized as a CSR regulation with potential extraterritorial effects. By its terms, the statute does not limit itself to bribes on U.S. soil, thus making it noteworthy in banning actions that could include activities abroad.²⁷ Moreover, while a universal definition for CSR might not exist, it is fair to say the FCPA incentivizes CSR behavior. While some might view the FCPA's bribery ban as a mere prohibition of certain behavior,

¹⁸ *Id.* at 271–72.

¹⁹ *Id.* at 272.

²⁰ *Id.*

²¹ *Id.* at 272–73.

²² *Id.* at 273.

²³ *Id.* at 273–74.

²⁴ *Id.* at 275.

²⁵ *Id.*

²⁶ 15 U.S.C. § 78dd-1(a) (2012).

²⁷ *Id.* § 78dd-1.

an alternative characterization is that the FCPA seeks to encourage companies operating abroad to support upright, rather than corrupt, officials to improve the society in which they operate.

Certainly, this is not to discount the potential ability of the FCPA accounting provisions to affect CSR. U.S. officials may pursue FCPA violations for improper accounting, thus causing distress to the offender.²⁸ However, the accounting provisions aim to affect company behavior abroad may operate differently, including operating as a preemptive shaming mechanism,²⁹ as suggested below in the discussion of disclosure regulation.³⁰

B. DISCLOSURE REGULATION

Another example of U.S. financial regulation that might operate to promote good behavior and CSR by companies abroad is the U.S. securities law disclosure system.³¹ As illustrated by the early portion of the FCPA story above, financial regulators such as the SEC, are keenly interested in forcing companies to provide accurate, properly labelled information about their various activities.³² It is useful to see how the broader SEC disclosure program might be used as a regulatory vehicle to promote CSR abroad, even if it operates more indirectly than affirmative bans on activities.

Disclosure requirements for public companies under the federal securities laws³³ may be extensive³⁴ and can arise in a variety of

²⁸ *Id.* § 78m; see also *Foreign Corrupt Practices Act*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> (last visited Dec. 6, 2015).

²⁹ In other words, one may not want to engage in questionable activity at all if there is a likelihood it must be disclosed.

³⁰ See *infra* Section II.B.

³¹ Securities law disclosure is an important part of financial regulation. However, as noted above, it is not the only type of disclosure or regulation that might be employed to encourage CSR. See *supra* note 4. However, it is useful as an example for the discussion in this article.

³² See *supra* Section II.A.

³³ It is worth noting that while the article does not focus on it, additional state law disclosure requirements might exist as well.

³⁴ Indeed, U.S. lawyers have suggested at times that the extensive nature of U.S. disclosure requirements and their effects on securities offerings should likely be of interest to foreign entities that might trigger those requirements

contexts. For instance, such requirements may arise in the context of a particular event, such as a securities offering.³⁵ A company offering securities may be penalized for failing to make certain disclosures during the registration process.³⁶ Additionally, a company may be obliged to report on a periodic basis³⁷ not necessarily linked to an event like an offering.³⁸

Even those unfamiliar with the details of securities laws may be familiar with annual reports and other documentation many public U.S. companies are required to release.³⁹ When exploring the details of U.S. securities regulation, a variety of complex laws, forms, and rules reveal themselves in relation to such disclosures.⁴⁰ Some companies must make annual reports,⁴¹ quarterly reports,⁴² and reports in the interim of other significant occurrences.⁴³ The content of these

through contacts with the U.S. See, e.g., EDWARD F. GREENE, ET AL., I U.S. REGULATION OF INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS § 8.07 (4th ed. 1998).

³⁵ See THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 67 (5th ed. 2005).

³⁶ See Securities Act of 1933 § 5, 15 U.S.C. § 77e (2012).

³⁷ See Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78a et seq. (2012).

³⁸ Throughout the years, the existence of various disclosure obligations has caused the SEC to attempt to create a more integrated system. See, e.g., HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES LAW HANDBOOK, § 3:3 (2014).

³⁹ See generally, LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 471–75 (4th ed. 2001).

⁴⁰ See HAZEN, *supra* note 35, at 4–6.

⁴¹ Form 10-K, U.S. SEC. & EXCH. COMM'N (June 26, 2009), <https://www.sec.gov/about/forms/form10-k.pdf>.

⁴² Form 10-Q, U.S. SEC. & EXCH. COMM'N, (Sept. 2, 2011), <https://www.sec.gov/about/forms/form10-q.pdf>.

⁴³ Form 8-K, U.S. SEC. & EXCH. COMM'N (Aug. 10, 2012), <https://www.sec.gov/about/forms/form8-k.pdf>; see also Jennifer B. Lawrence & Jackson W. Prentice, *The SEC Form 8-K: Full Disclosure or Fully Diluted? The Quest for Improved Financial Market Transparency*, 41 WAKE FOREST L. REV. 913 (2006) (noting increase in 8-K filings).

reports is further defined through regulatory instructions on presenting financial⁴⁴ and other information.⁴⁵

The types of information that need to be disclosed can increase over time. For example, the Sarbanes-Oxley Act, enacted after the Enron scandal,⁴⁶ is noteworthy for Section 404, which requires corporate management discussion of internal controls.⁴⁷ It is important to note that disclosure is not necessarily limited to information about a company's activities within U.S. borders. Accordingly, a company engaged in CSR activities may, where appropriate, include descriptions of activities consistent with CSR it engages in abroad as part of its otherwise required disclosures. In this way, disclosure might be viewed as positive reinforcement of good behavior as it offers an opportunity to demonstrate that the company has a social conscience. Perhaps even more interesting, a company engaging in activities inconsistent with CSR would need to disclose such activities if the regulations otherwise require disclosing that type of activity. While this might not be the direct prohibition of negative activities listed in the FCPA's payment provisions, disclosing such activities may indirectly result in shaming the company, which might cause the company to reconsider continuing anti-CSR behavior that must be disclosed.⁴⁸

⁴⁴ See Regulation S-X, 17 C.F.R. § 210 (2015).

⁴⁵ See Regulation S-K, 17 C.F.R. § 229 (2015).

⁴⁶ See generally Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097-138 (2003) (discussing the Sarbanes-Oxley Act).

⁴⁷ Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7262 (2012); see also Peter Feltman, *SEC's Atkins Discusses Disclosure Issues*, CCH SEC FILINGS INSIGHT, Nov. 8, 2005.

⁴⁸ As Commentator, Joey Lee of Fordham Law School noted, disclosure rules, as they proliferate, can get to specific subjects such as the Dodd Frank Act's provisions focusing on disclosure related to conflict minerals. He further noted the possibility of activists utilizing such information made available under various disclosure regimes. See Joey Lee, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015). As I noted during the live Symposium, it is an interesting question how disclosure may have both positive and negative effects if only some are required to disclose but not others. This may happen if disclosure regimes are not close to equivalent in different jurisdictions. This partial disclosure may be misleading in some

Useful literature has been developing in a variety of subjects, including criminal law, about the powers and weaknesses of shaming as a legal device. The effectiveness of shaming may depend on the cultural setting of the exercise.⁴⁹ The subject is emerging as especially significant in the financial sector in the wake of the financial crisis as experts seek to struggle with how to fix the global economic system.⁵⁰ Regardless of one's position on the efficacy of shaming, it must be acknowledged at this point in the article that the U.S. regulatory scheme largely focuses on the power of disclosure and its behavioral effects. This is linked to the economic underpinnings of the securities laws positing that companies' market behavior, good and bad, will become known and reflected in their securities prices, hence incentivizing better behavior. Indeed, this is why the efficient market hypothesis positing efficient absorption of information is significant.⁵¹ Alternatively, to state things more dramatically, the belief that disclosure makes a difference by incentivizing better market behavior likely fuels continued citation of the view expressed by former Supreme Court Justice Louis Brandeis that "Sunlight is said to be the best of disinfectants"⁵²

Given the fact that U.S. financial regulation has been used in attempt to shape extraterritorial CSR activities, it next becomes necessary to evaluate the limits of U.S. home regulation as a CSR-motivating tool.

instances. Accordingly, norm migration, discussed later in this article, becomes more significant.

⁴⁹ See Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997).

⁵⁰ See Edward F. Greene & Joshua L. Boehm, *The Limits of "Name-and-Shame" in International Financial Regulation*, 97 CORNELL L. REV. 1083 (2012).

⁵¹ See generally JAMES D. COX, ET AL., SECURITIES REGULATION CASES AND MATERIALS 91-104 (7th ed. 2013) (discussing theory's use and its arguable strength and weaknesses).

⁵² See LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT (1913); see also, Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces "21st Century Disclosure" Initiative to Fundamentally Rethink the Way Companies Report and Investors Acquire Information (June 24, 2008), <http://www.sec.gov/news/press/2008/2008-119.htm> (quoting SEC Chairman Cox noting continued relevance of sunlight notion).

III. POTENTIAL LIMITS ON EXTRATERRITORIAL REGULATION'S EFFICACY

As a practical matter, U.S. financial regulation appears substantially engaged in CSR behavior abroad. That fact merits closer evaluation of the efficacy of U.S. financial regulation as an extraterritorial regulatory tool. Accordingly, this part of the article offers several potential limits of this regulatory scheme: legal limits, practical limits, political limits, and other efficacy limits. As mentioned in the introduction, it is not my aim to call for an end to all extraterritorial regulation. Rather, understanding possible limits on the efficacy of U.S. regulations in this area is required to engage in a more nuanced evaluation of U.S. financial regulation as a regulatory tool versus other tools.⁵³

A. LEGAL LIMITS

First, there are possible legal limits on the efficacy of extraterritorial U.S. regulation. Simply put, during the last several years, the United States Supreme Court has become increasingly skeptical of such extraterritorial efforts, including in financial regulation. Justice Scalia's opinion in *Morrison v. National Australia Bank Ltd.*⁵⁴ illustrates this increased skepticism. This case examined whether Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act)⁵⁵ was limited in its potential extraterritorial effect.

⁵³ Indeed, evaluation of possible limits of extraterritorial financial regulation may even provide a roadmap for advocates of such regulation moving forward. The aim of this article is to catalogue potential limits. An advocate could then utilize those limits to analyze different types of extraterritorial financial regulation and determine if the limits were more or less problematic for each different type. Thus, one might better compare relative regulatory efficacy even within the specific world of extraterritorial tools. As I discussed with other participants during the Symposium, in some instances, one regulation, such as disclosure, might ultimately be viewed as preferable to other more intrusive forms of extraterritorial activities. Kenneth Rosen, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015).

⁵⁴ 561 U.S. 247 (2010).

⁵⁵ Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2012).

Section 10(b), the general antifraud provision of the Exchange Act, is tremendously significant, especially because it allows for private rights of action.⁵⁶ In *Morrison*, foreign nationals from Australia brought a suit under Section 10(b) and other securities law provisions, claiming problematic behavior by a mortgage-servicing company, Homeside Lending.⁵⁷ Although Homeside Lending was headquartered in the U.S., a foreign company, National Australia Bank, owned Homeside Lending.⁵⁸ National Australia Bank, whose ordinary securities only trade abroad, previously touted Homeside and allegedly knew of problems with Homeside's financial models.⁵⁹ The Court held that foreign plaintiffs do not have a cause of action under Section 10(b) against the U.S. or foreign defendants arising out of problems in connection with securities traded on foreign exchanges.⁶⁰

In reaching this conclusion, Justice Scalia drew on his perception of an American legal tradition that absent clear Congressional intent otherwise, U.S. statutes do not apply beyond U.S. territory.⁶¹ Indeed, Justice Scalia appeared to chasten the Second Circuit for its seeming belief that, in the wake of silence on the matter of extraterritorial application, courts should determine whether Congress intended the statute to apply extraterritorially.⁶² Justice Scalia also discounted the petitioners' citation of Homeside's problematic activities occurring in the U.S. that might render the case not extraterritorial.⁶³ He instead concluded that under the Exchange Act, the relevant site of activity for territorial/extraterritorial analysis was the site where securities sales occurred, which presumably makes trading on foreign exchanges more relevant.⁶⁴

However, the entire Court did not fully embrace Justice Scalia's opinion. Justice Breyer concurred in part and in the judgment,

⁵⁶ *See id.*

⁵⁷ 561 U.S. at 250–53.

⁵⁸ *Id.*

⁵⁹ *Id.* Interestingly, it appears that American Depository Receipts representing such shares did trade in the United States. *See id.*

⁶⁰ *Id.* at 273.

⁶¹ *See id.* at 255.

⁶² *See id.* at 255–61.

⁶³ *See id.* at 266.

⁶⁴ *See id.* at 266–73.

focusing on the circumstances here involving registered securities on a foreign exchange.⁶⁵ Justice Stevens, joined by Justice Ginsburg, concurred in the judgment and seemingly preferred the more evaluative approach of the issue used by the Second Circuit.⁶⁶ For purposes however, of this article, which does not seek to state the doctrinally superior reasoning, the difference in reasoning seems less significant than the appearance of what might be a trend of skepticism on the extraterritoriality issue.⁶⁷

⁶⁵ See *id.* at 273–74.

⁶⁶ See *id.* at 273–86.

⁶⁷ Along similar lines, this article does not discount the possibility that future legal arguments might re-characterize some activities abroad as not actually problematic outside U.S. borders, and thus impermissibly extraterritorial as contemplated by the *Morrison* opinion by Justice Scalia. Indeed, Congress potentially possesses the ability to legislatively claw back jurisdiction when it chooses. Section 929P(b) of the Dodd-Frank Act adds some thoughts on extraterritorial jurisdiction. For instance, that provision amends Section 27 of the Securities Exchange Act of 1934, so that:

The district courts of the United States . . . shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving...conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or...conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010) (amending 15 U.S.C. § 78aa). How fully this claws back from Justice Scalia's opinion will only be seen over time as the statute is applied and further tested in courts. However, regardless of the statute's impact, the trend of skepticism by the Court remains, at least raising warning signs of what court imposed roadblocks other extraterritorial legislation might face. This is further discussed in the story of the *Arabian American Oil* case below. Moreover, Professor Virginia Harper Ho further reinforced this point during the Symposium, noting the Court's similar blow to trying to change corporate behavior regarding human rights using the Alien Tort Claims Act in the *Kiobel* case. Virginia Harper Ho, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015). In that case, the Court utilized the presumption against

The Court previously supported the view that without clear Congressional intent otherwise, a U.S. statute's reach should be limited to U.S. territory in *EEOC v. Arabian American Oil Co.*⁶⁸ In that case, the Court rejected the extraterritorial application of Title VII's anti-discrimination provisions abroad.⁶⁹ Justice Scalia began a section of his opinion in *Morrison* by citing *Arabian American Oil*, quoting an earlier case, *Foley Brothers v. Filardo*, stating:

[I]t is a "longstanding principle of American law 'that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"⁷⁰

As in *Morrison*, all members of the Court did not agree with the holding in *Arabian American Oil* because of questions about interpretations of the earlier case, *Foley Brothers*.⁷¹ Congress ultimately overruled *Arabian American Oil* by amending the statute to clarify its extraterritorial intent.⁷² However, in doing so, it can be argued that the statute now implicitly recognizes the need for clarity before extraterritorial application. Notwithstanding some dissent, the clarity point has now migrated through decades of jurisprudence.

At a minimum, this suggests that any extraterritorial efforts to regulate CSR behavior abroad might be subject to limits absent statutory clarity on the issue. Such legal uncertainty constitutes a possible limit on the efficacy of such efforts. Given the numerous risks associated with international business that might otherwise support the world economy, it is fair to question whether these legal limits on U.S. financial regulation should inspire thoughts on alternative techniques.

extraterritoriality to ATS claims. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

⁶⁸ 499 U.S. 244 (1991).

⁶⁹ See *id.*

⁷⁰ *Morrison*, 561 U.S. at 255 (quoting *Arabian American Oil*, 499 U.S. at 248).

⁷¹ See *Arabian Am. Oil Co.*, 499 U.S. at 260–78 (Marshall, J., dissenting) (rejecting the majority's recasting of the presumption against extraterritoriality as a "clear statement rule").

⁷² Civil Rights Act of 1991 § 109, Pub. L. No. 102-166 § 109, 105 Stat. 1071 (1991).

Moreover, regulations that have indeterminate ultimate legal effect may have less effect on behavior as well.

B. PRACTICAL LIMITS

In addition to legal limits on using U.S. financial regulation to inspire CSR, there may be practical limits. The behavioral impact of financial regulation might be tied to the ability and desire to enforce that regulation when rules are violated. U.S. financial regulation's efforts to encourage CSR abroad may face several potential practical speed bumps.

1. DEFINING VIOLATIONS

It is useful to return to the FCPA story to see the first practical difficulty: defining the violation. Punishing violations, and possibly deterring future violations, may be more difficult if it is unclear what constitutes a violation. Even a casual reading of the elements of an FCPA violation, noted above,⁷³ reveals the possible debates over whether those elements are present. For example, what does it mean to make a payment "corruptly?"⁷⁴

The practicality of establishing the elements of a successful case is illustrated by case law. For instance, the Eighth Circuit grappled with the statute in *United States v. Liebo*.⁷⁵ In that case, the defendant appealed his conviction for violating the FCPA's bribery provisions under factual circumstances the Court likened to a "modern fable."⁷⁶ Under the alleged facts, alongside the course of securing a contract for a foreign company, items appeared to change hands, including money and honeymoon airplane tickets.⁷⁷ Even after acknowledging the lower court's jury instruction adequately defined "corruptly" and that sufficient evidence existed for a jury to find some exchanges were done corruptly, the Eighth Circuit still held that "the district court clearly abused its discretion in denying Liebo's motion for a new

⁷³ See *supra* note 26 and accompanying text.

⁷⁴ See *id.*

⁷⁵ 923 F.2d 1308 (8th Cir. 1991).

⁷⁶ *Id.* at 1309.

⁷⁷ See *id.* at 1309–10.

trial.”⁷⁸ In light of what the Eighth Circuit felt was not necessarily overwhelming evidence on the “corruptly” issue, newly discovered evidence related to the affair still required a new trial.⁷⁹ The presence of evidentiary issues in FCPA cases raises other practical problems discussed below.⁸⁰

One might question if such a lack of clarity between permissible and impermissible behavior is an outlier. The outlier notion may be undermined somewhat by the need to provide guidance on how the FCPA applies decades after its promulgation. In 2012, the DOJ and SEC released *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.⁸¹ The DOJ explains:

It is the product of extensive efforts by experts at DOJ and SEC, and has benefited from valuable input from the Departments of Commerce and State. It endeavors to provide helpful information to enterprises of all shapes and sizes—from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world. The *Guide* addresses a wide variety of topics, including who and what is covered by the FCPA's anti-bribery and accounting provisions; the definition of a "foreign official"; what constitute proper and improper gifts, travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. On these and other topics, the *Guide* takes a multi-faceted approach, setting forth in detail the statutory requirements while also providing insight into DOJ

⁷⁸ See *id.* at 1310–14.

⁷⁹ *Id.*

⁸⁰ See *infra* Section III.B.2.

⁸¹ See *The FCPA Guide*, U.S. DEP'T OF JUSTICE, (Nov. 2, 2015), <http://www.justice.gov/criminal/fraud/fcpa/guidance/> (last visited Oct. 1, 2014).

and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases.⁸²

The guide is an admirable effort to help clarify what is permissible. However, the years it took before the DOJ and SEC felt comfortable issuing the guidance, as well as the volume of the report itself, at over 100 pages with indices,⁸³ also might indicate that perfect clarity does not exist. Beyond the FCPA, it is also worth noting that a remarkable amount of guidance exists for the SEC disclosure program. Further, it is presumably more challenging to issue guidance on what materials should be disclosed about the foreign activities of which the SEC is less aware.

Again, these practical problems do not justify ending any role of U.S. financial regulation; rather, these problems suggest that the ultimate efficacy of such efforts may be limited. Deterrence may be harmed when those subject to regulation have trouble seeing whether something constitutes wrongdoing. And, ultimately proving cases in courts when violations are unclear also may present difficulties.

2. OTHER PROSECUTORIAL ISSUES RELATED TO EXTRATERRITORIAL BEHAVIOR

The issue of defining violations is not the only possible practical problem of enforcing U.S. law extraterritorially. It is worth briefly mentioning some basic concerns encountered in transnational enforcement. First, enforcement generally requires discovering possible violations. While not impossible to discover illicit activity abroad, the monitoring and surveillance capabilities of the U.S. government of financial matters may be more limited outside of U.S. territory.⁸⁴

Second, even when possible violations are detected, it may be challenging to investigate and bring possible offenders and evidence related to those violations back to the United States. Bringing back

⁸² *Id.*

⁸³ See U.S. DEPT. OF JUST., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012).

⁸⁴ Ultimately, this may reinforce the benefits of more local involvement on CSR discussed in Part IV *infra*.

evidence may be challenging because it may include live witnesses and other documentation that are hard to secure.

Third, even when cases are successfully prosecuted, it may still be difficult to affect behavioral changes and to secure assets to pay fines in a foreign jurisdiction. Certainly, some modern international litigation tools exist that might help ameliorate these problems for international dispute resolution. Moreover, international agreements might help with service of process, securing evidence, or enforcing judgments. But even if these aids exist, government use, may be limited or controversial, as opposed to use by private parties.⁸⁵ A government wanting help may need to negotiate with other governments to get assistance. For example, they may be able to secure memoranda of understandings with other nations.⁸⁶ Of course, such processes may depend on the goodwill of other nations to cooperate and to subject themselves to U.S. extraterritorial reach, which may not be as likely given political realities explored below.⁸⁷

3. LOOPHOLES AS PRACTICAL LIMITS

A final possible practical limit might be described as the use of loopholes in efforts to affect activities abroad. If home country regulation is viewed as too invasive, the resulting behavioral modification may be that companies attempt to remove themselves from their home countries to avoid those countries' regulatory schemes. For instance, new business organization structures might be established to engage in activities abroad in entities unregistered in the United States.

The danger of businesses separating from home jurisdictions in order to avoid regulation recently drew attention in the tax context.⁸⁸ Concerns have been raised about schemes to avoid tax effects in the United States.⁸⁹ As a result, recent efforts have been made as well to

⁸⁵ See, e.g., MUCHLINSKI, *supra* note 5, at 160–74.

⁸⁶ See, e.g., *id.* at 170–71.

⁸⁷ See *infra* Part III.C.

⁸⁸ See John D. McKinnon & Damien Paletta, *Obama Administration Issues New Rules to Combat Tax Inversions*, WALL ST. J., Sept. 23, 2014, <http://www.wsj.com/articles/treasury-to-unveil-measures-to-combat-tax-inversions-1411421056>.

⁸⁹ See *id.*

close such loopholes, which is illustrated by efforts regarding tax inversions.⁹⁰ These solutions are yet to be fully tested;⁹¹ but at a minimum, the loophole problem, if capable of correction, certainly will take resources and time to do so.

C. POLITICAL LIMITS

Returning to the issue of politics, both foreign and domestic politics present potential limits on the efficacy of extraterritorial regulation.⁹² Accordingly, it is useful to briefly explore some of the political economy of such regulations.

1. FOREIGN POLITICS

As alluded to above, the ultimate success of home nation extraterritorial schemes to improve company behavior might be affected by the cooperation, or lack thereof, by officials of the host jurisdictions. One should not assume that the benefits of CSR induced

⁹⁰ See *id.* It is not the purpose of this article to instruct on how tax inversions worked in the past and availability may change in the future. Those who are not students of business organizations or tax law should at least have general familiarity with the use of business forms to accomplish different legal ends. For example a partnership may be treated differently for tax purposes than many corporations which may suffer the problem of being taxed at the entity and individual shareholder level for a sort of double taxation. Domestically, some sought new types of business organization forms to change legal, tax consequences. See Susan Pace Hamill, *The Story the Limited Liability Company: Combining the Best Features of a Flawed Business Structure*, in *BUSINESS TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING DEVELOPMENTS IN CORPORATE AND PARTNERSHIP TAXATION*, 295, 295–315 (Steven A. Bank & Kirk J. Stark eds., 2005). At the international level, it is not surprising that those dissatisfied with tax consequences associated with existing U.S. business entities might seek to form entities abroad under different legal regimes with more favorable tax consequences to shield income from taxation.

⁹¹ See Liz Moyer, *Pfizer Deal Strokes Washington Concern Over Tax Policy*, N.Y. TIMES, Nov. 23, 2015, <http://nyti.ms/1SfFiFX> (noting proposed rates might not cover all transactions).

⁹² Of separate note, it has been suggested that CSR is critically linked to political theory. See David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979).

by the home country will alleviate host countries of sovereignty concerns raised by extraterritorial regulation.⁹³

For instance, there is a strong history of these concerns in the so-called North/South context—especially when regulations are perceived as an imposition on developing nations by developed nations. Flashpoints for North/South political disputes can be found through the years. For example, in the wake of decolonization in the 1960s and 1970s, the developing world challenged laws favored by developed countries as part of the New International Economic Order.⁹⁴ While such efforts did not necessarily change established international norms,⁹⁵ an angry host nation's refusal to help a home nation may be more easily managed than a change in international law.⁹⁶

Ultimately, sovereignty concerns by nations are not an occurrence unique to the 1960s or 1970s. Long before that time, the idea of comity in international law perhaps reflected a nation's desire to self-limit its jurisdictional reach to discourage retaliatory extraterritorial maneuvering by other nations.⁹⁷ And since the 1970s, additional players have sought to exercise their sovereign muscles with China being an example.⁹⁸

⁹³ More generally, one should not assume that regulatory requirements opposed by a home nation will be attractive to the host nation, and conflicts might ensue. See JOHN DUNNING, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* 579–80 (1993).

⁹⁴ See *International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petrol. Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic*, 17 INT'L LEGAL MATERIALS 1 (1978) (demonstrating a pushback against companies from developed countries); see also G.A. Res. 3201 (S-VI), ¶ 1-2, U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

⁹⁵ See *International Arbitral Tribunal*, *supra* note 94.

⁹⁶ All of this is not to suggest that emerging economies lack their own CSR concerns; however, those may be uniquely shaped by their own experiences and situations. See THOMAS POLLAN, *LEGAL FRAMEWORK FOR THE ADMISSION OF FDI* 249–50 (2006).

⁹⁷ See generally Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV 11 (2010) (discussing comity).

⁹⁸ Interestingly, China appears to have its own conceptualization of CSR and techniques for encouraging it. See Jessica Marie Conrad, *The Business of*

Such political realities, at a minimum, should leave the United States without a full expectation of cooperation in all instances.⁹⁹ Also, some concern for retaliation against the interests of U.S. expats in foreign jurisdictions may be warranted.¹⁰⁰

2. DOMESTIC POLITICS

While foreign political entities might push back against extraterritorial regulation, other domestic officials might push back as well. These officials might include, but are not necessarily limited to, those generally skeptical of or opposed to foreign involvement. One of the most prevalent strains of U.S. foreign economic policy is export promotion.¹⁰¹ To the extent extraterritorial regulation creates a more difficult environment in host nations for U.S. exports, one might see pushback against the U.S. regulation at home. From a regulatory theory perspective, another interesting question is whether the moral authority of regulation, and resulting compliance, might be diminished by mixed messages from different parts of the regulatory community.

On a separate front, increased use of extraterritorial regulation may raise questions about government enforcement resource allocation in the United States. In an age of budget deficits, some might question expenditure of resources on enforcing extraterritorial

Business: Comparing Corporate Social Responsibility Initiatives in China and the United States, 41 GA. J. INT'L & COMP. L. 747 (2013).

⁹⁹ An example from the non-CSR setting of lack of cooperation, for example, is the difficulty of getting others to join sanction regimes. *See, e.g., China Rejects New EU Sanctions Against Russia as Counterproductive*, MOSCOW TIMES, Sept. 1, 2014, <https://themoscowtimes.com/articles/china-rejects-new-eu-sanctions-against-russia-as-counterproductive-38909>.

¹⁰⁰ *See, e.g., Laura Saunders, Expats Left Frustrated as Banks Cut Services Abroad*, WALL ST. J., Sept. 12, 2014, <http://www.wsj.com/articles/expats-left-frustrated-as-banks-cut-services-abroad-1410465182> (describing the problem of U.S. expats securing business services abroad after money laundering and tax regulations).

¹⁰¹ For example, the Department of Commerce has focused on such export promotion efforts. *E.g., U.S. DEP'T OF COMMERCE, A BASIC GUIDE TO EXPORTING*, available at http://export.gov/basicguide/?utm_source=hero&utm_medium=exportgov%20&utm_campaign=basicguide (last visited Nov. 24, 2015).

regulations while potentially neglecting more core regulatory missions of agencies at home.¹⁰²

D. OTHER EFFICACY LIMITS

Beyond politics, it is useful to separately identify another limit of extraterritorial regulation. The CSR movement is about changing norms for business operations. It seems that better behavioral norms and deeper cultural change in host countries are more likely to become socially-embedded if embraced at the host country level.¹⁰³

This is also important because poor behavior that flies in the face of CSR likely involves not only foreign companies, but suspect local participants, which may include officials receiving bribes or co-conspirators in bad behavior in the private sector. Thus, the likelihood of home countries solving all problems through initial jurisdiction over their companies that also operate abroad is questionable.

E. A NARRATIVE OF SECOND BEST SOLUTIONS?

In light of the above limitations, one must seriously consider whether a narrative exists about extraterritorial financial regulations to

¹⁰² Judge Sporkin himself noted the resource issue forced him to contemplate FCPA type programs as individual case enforcement became potentially overwhelming. See Sporkin, *supra* note 16, at 272.

¹⁰³ One very useful aspect of the Symposium was extended discussion about the need to move beyond CSR code words to institute changes that corporations adopt into their cultures rather than feeling satisfied to file reports to technically meet legal requirements. Professor Buhmann, for instance, usefully noted the need to let behavioral norms sit with firms for them to immerse themselves and more deeply adopt them. Karin Buhmann, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015). Professor Aparna Polavarapu further noted the diversity of different places where one might attempt to institute CSR norms haphazardly without accounting for different interests, sometimes conflicting, of different stakeholders. Aparna Polavarapu, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015). This further seems to counsel for longer term, considered change to promote CSR. In part, this is why I offer techniques below for norm migration and more universal acceptance of a new corporate citizenship.

improve CSR as suboptimal, second best solutions. I have utilized this vantage point,¹⁰⁴ as have others,¹⁰⁵ as a way to view and evaluate regulatory schemes more effectively. In other words, is this extraterritorial use of financial regulation—an indirect method with inherent limitations—the optimal method to improve CSR in foreign jurisdictions when more direct regulatory tools might better accomplish the task?

IV. ALTERNATIVE REGULATORY SOLUTIONS

In this part of the article, I explore alternative regulatory solutions to improving CSR beyond the extraterritorial application of home country financial regulation. In particular, I propose ideas about how CSR ideals might be harmonized more effectively at the multilateral level and how host countries might be incentivized to take up the CSR mantle.¹⁰⁶

A. MULTILATERAL HARMONIZATION OF IDEALS

Harmonization of CSR regulatory efforts at the multilateral level potentially offers a more direct means of achieving CSR. It is useful to divide the discussion of possible harmonization into two sections: the broader migration of CSR norms to multiple jurisdictions and the additional harmonization of assessment of what constitutes achievement of effective CSR.

1. NORM MIGRATION

Nations seeking to encourage certain CSR activities and norms in other jurisdictions would be well advised to consider potential means for adoption and enthusiastic enforcement of those norms by public

¹⁰⁴ See, e.g., Kenneth M. Rosen, “Who Killed Katie Couric?” and *Other Tales from the World of Executive Compensation Reform*, 76 *FORDHAM L. REV.* 2907 (2008); Fisch and Rosen, *supra* note 46 (discussing Sarbanes-Oxley).

¹⁰⁵ See, e.g., Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 *REV. ECON. STUD.* 11 (1956).

¹⁰⁶ While in the constraints of this Symposium this only is the beginning of a dialogue on these alternatives, hopefully future work on CSR will be able to contemplate them in more detail and policymakers, businesses, and other stakeholders will be able to use them as they evaluate CSR’s future.

authorities in those jurisdictions. Individual countries unilaterally seeking to export norms might be viewed as more provocative and with greater hostility by host jurisdictions. However, if perceived as part of a multilateral process of consensus building, those norms might be more palatable.

Moreover, one cannot underestimate difficulties with massive adoption of norms in a short period of time. As a result, creative regulatory policymakers might view norm migration as a more gradual process to spread among nations that takes place over a longer period of time. Gradual acceptance by additional nations of anti-corruption and anti-bribery norms reflected in the FCPA illustrates how norm migration might work.

As previously explained, the FCPA started as an outgrowth of a particular national experience, the Watergate scandal of the 1970s.¹⁰⁷ However, in the ensuing decades anti-bribery norms began to appear in additional multilateral fora. For example, negotiations at the Organisation for Economic Cooperation and Development (OECD) led in 1997 to over thirty nations signing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹⁰⁸ The initial signatories represented many of the most significant countries for world trade.¹⁰⁹ The following year, the U.S. Senate approved the Convention, and U.S. law was adjusted to reflect the broader regulatory consensus in the International Anti-Bribery and Fair Competition Act of 1998.¹¹⁰ Originating in the 1960s, the OECD started with a limited membership of some European countries, the United States, and Canada.¹¹¹ By 1997, when the OECD had twenty-eight members, all but Australia signed the Convention, along with some nations that were not OECD members, such as Brazil.¹¹²

¹⁰⁷ See *supra* note 17 and accompanying text.

¹⁰⁸ See RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 912 (2000).

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners> (last visited Oct. 1, 2014).

¹¹² See BRAND, *supra* note 108, at 938.

By 2014, there were still only thirty-four OECD members.¹¹³ Similarities among members in a multilateral organization with a relatively small group of members may have allowed a starting point for negotiations of more shared norms and facilitated agreement. Over time, the OECD membership group grew geographically; and while including most advanced economies today, the OECD also includes some emerging countries, like Chile, Mexico, and Turkey.¹¹⁴ In addition, the OECD currently emphasizes working with nations with emerging economies, such as India, China, and Brazil.¹¹⁵ The OECD thus may serve a useful norm migration facilitating function: establishing agreement on issues such as CSR norms among a smaller group of important economies and moving forward together to reach out to other significant economies.¹¹⁶

For anti-corruption agreements, the consensus on norms appears to be growing. In late 2005, the United Nations Convention against Corruption (UN Convention) entered into force.¹¹⁷ As of April 2015, the UN Convention includes 140 signatories.¹¹⁸ Of course, multilateral statements against corruption do not constitute the end of corrupt behavior. However, getting more nations to affirmatively endorse anti-corruption norms is a good start. This raises an interesting issue about the FCPA as well. Perhaps its greatest achievement is not prosecutions under the statute, but its help in creating a dialogue on the fight against corruption. In any event, the corruption regulation story raises interesting questions for policymakers about regulatory sequencing and the most effective way

¹¹³ *Members and Partners*, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ The United States may be becoming more strategic about this. For example, on the sensitive issue of tax avoidance by multinationals, the OECD has released recommendations fighting such tax avoidance. *OECD Releases First BEPS Recommendations to G20 for International Approach to Combat Tax Avoidance By Multinationals*, OECD, (Sept. 16, 2014) <http://www.oecd.org/tax/oecd-releases-first-beps-recommendations-to-g20-for-international-approach-to-combat-tax-avoidance-by-multinationals.htm>.

¹¹⁷ *United Nations Convention Against Corruption Signature and Ratification Status as of 1 April 2015*, U.N. OFFICE ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Oct. 1, 2014).

¹¹⁸ *Id.*

to introduce regulations in stages.¹¹⁹ The latter point suggests another project that might be undertaken in a multilateral fashion: establishing consensus on regulatory assessment of pro-CSR regulatory efforts.

2. HARMONIZING STANDARDS FOR REGULATORY ASSESSMENT

Reaching greater multilateral consensus on standards of what constitutes effective encouragement of CSR would be valuable, so that policymakers could assess whether various regulatory efforts are successful, unsuccessful, or mixed bags. Of course, more universal notions of CSR's basic definition might facilitate the creation of assessment standards.¹²⁰ Indeed, one of the challenges to augmenting

¹¹⁹ It should be noted that anti-corruption is only one example of possible norm migration as additional CSR goals may migrate. Of note, the U.N. has been engaging in extensive efforts on a variety of issues beyond corruption related to corporate behavior and investment. For example, the U.N.'s Human Rights Council unanimously affirmed principles related to corporations' relationship to human rights. Special Representative of the Secretary-General for Business and Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie); U.S. DEP'T OF ST. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 3-4 (2013), available at <http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf>. The United States has identified one of the benefits of such principles, noting that they may serve "as a 'floor' rather than a 'ceiling'" for a firm's support of human rights. See *id.* at 4. Here the norm migration actually also moved in the other direction with the OECD updating its guidelines in reflection of the principles. See *id.* at 5; OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 13-15 (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

Other projects are ongoing. For instance, the United Nations has made substantial progress on a multi-decade agenda for sustainable development, another area where corporate social responsibility might be critical. See Richard L. Field & Ira R. Feldman, *The United Nations Post-2015 Development Agenda*, INT'L L. NEWS, Winter 2015, at 1.

¹²⁰ Of course, scholars have attempted to describe a range of competing views of CSR. See, e.g., Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002).

CSR is a lack of agreement on what CSR specifically is.¹²¹ A clear definition of CSR not only appears to be lacking for scholars, but also for policymakers seeking to encourage CSR.

However, universal agreement on a CSR definition should not stop the commencement of dialogue on methodologies for assessing activities many would consider to bolster CSR efforts.¹²² In this paper, I have functionally explained what CSR includes through reference to specific pro-CSR policies. The assessment of such policies, including extraterritorial domestic regulation, can certainly begin with dialogues, even informal ones related to what regulations work well or are more limited as parties seek to develop consensus on more formal measures of regulatory outcomes.

Possible fora exist for such dialogues. For instance, the United Nations Conference on Trade and Development (UNCTAD) regularly hosts the World Investment Forum, which brings together government leaders, business leaders, and scholars to talk about investing in sustainable development.¹²³ The 2014 forum featured a special multidisciplinary academic conference where scholars sought to create a research agenda on investment for development.¹²⁴ Such events might house efforts to begin to further define possible aspects of CSR and to assess efforts to achieve CSR. Indeed, after the World Investment Forum, UNCTAD moved forward with an Investment Policy Framework for Sustainable Development as a way to help actual policymaking to proceed that includes a possible corporate

¹²¹ See, e.g., Chris MacDonald, *Two Problems With CSR*, BUS. ETHICS BLOG (Aug. 8, 2011), <http://businessethicsblog.com/2011/08/08/two-problems-with-csr/> (noting shortcomings of CSR definitions).

¹²² Indeed, even if notions of the contents of CSR change, evolving perceptions are still part of a long-term recognition of the need for international businesses to accept social norms. See POLLAN, *supra* note 96, at 248.

¹²³ See U.N. Conference on Trade & Dev., *World Investment Forum*, WORLD INVESTMENT F., <http://unctad-worldinvestmentforum.org/about> (last visited Dec. 6, 2015).

¹²⁴ See U.N. Conference on Trade & Dev., *Programme*, WORLD INVESTMENT F., <http://unctad-worldinvestmentforum.org/switzerland2014/programme/> (last visited Dec. 6, 2015).

role.¹²⁵ Such framework documents might provide a standard against which government policies ultimately might be measured.

Of course, the challenges of achieving broad, multilateral consensus on assessment and other matters begs the question of what other regulatory steps might be taken to augment CSR, including host country regulation.

B. INCENTIVIZE HOST REGULATION

To encourage companies to behave better and to contribute to communities, interested nations should explore ways to encourage and incentivize host countries themselves to take up the challenge of encouraging CSR. Possible methods for accomplishing this goal include sharing resources and using transparency to align public and private sector norms for CSR behavior.

1. SHARED RESOURCES

Encouraging host country efforts to improve CSR might start with home countries sharing regulatory resources. Initially, this could include technical assistance regarding effective regulatory design. Regulatory design in this area is a challenge, and nations might benefit from sharing experiences of what they have found to be effective and ineffective.

The SEC provides a possible model for such assistance with its International Technical Assistance Program.¹²⁶ Through this program, the SEC hosts market development and enforcement training institutes in Washington, D.C. each year.¹²⁷ The SEC also plans regional and bilateral training abroad as well.¹²⁸ In addition to training, the SEC

¹²⁵ See U.N. Conference on Trade & Dev., *Investment Policy Framework for Sustainable Development*, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (Dec. 23, 2015), http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

¹²⁶ See *Securities and Exchange Commission's International Technical Assistance Program*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/about/offices/oia/oia_emergtech.shtml.

¹²⁷ *Id.*

¹²⁸ *Id.*

provides confidential assessments to its global counterparts' regulatory efforts.¹²⁹

Of course, one of the keys to effective technical assistance is recognition that the effectiveness of particular regulatory programs may hinge on the specific needs and natures of different jurisdictions. Thus, for assistance providers, humility is critical. Accordingly, the technical assistance provider must recognize that her jurisdiction's regulatory fix is not always best for all jurisdictions.

In addition to sharing knowledge resources, financial resources also can be important in supporting foreign programs to encourage CSR. In tough financial times, some reluctance might accompany requests to share such resources. However, in some instances, home country regulators may want to assess if financial assistance to foreign regulatory programs may be less costly and more effective than funding home country efforts through extraterritorial regulations. An excellent example of this is monitoring corporate activities abroad for illicit behavior inconsistent with CSR.¹³⁰ Eyes on the ground in host country jurisdictions might sight problems more easily than home countries.

2. TRANSPARENCY AND ALIGNMENT OF PRIVATE SECTOR NORMS

The CSR experience to date raises another possible way to help host jurisdictions support CSR. Corporations increasingly see CSR as a way to market themselves to others. Thus, one would expect a jurisdiction's creation of an environment that facilitates positive CSR and that can easily be explained to others to attract private sector investment.¹³¹ Host jurisdictions should be encouraged to show their efforts to promote an environment of CSR as a way to attract investment from foreign corporations.¹³²

¹²⁹ *Id.*

¹³⁰ *See supra* Part III.

¹³¹ More generally, government environments for doing international business, especially given risks involved, are recognized. *See* WITOLD JERZY HENISZ, *POLITICS AND INTERNATIONAL INVESTMENT* (2002).

¹³² One of the Symposium's greatest revelations was a firm's desire to be better corporate citizens backed up by the institution of actual internal policies to encourage such a role. For instance, Peter Selleck of Michelin's keynote address aptly illustrated this point. Peter Selleck, Keynote Address at

Outsiders may incentivize and augment a host jurisdiction's explanation of its CSR environment. It is no surprise that one of the World Bank's significant annual projects is its *Doing Business Report*, in which experts from around the world help the World Bank Group assess and communicate the regulatory environment for businesses in different nations.¹³³ In these evaluations, future reports might include references to national comfort with and regulatory encouragement of CSR. This might be a vehicle for countries to attract corporations through positive assessment of their behavioral environments. When government and firm cultures indicate to each other shared goals and efforts to attain them, perhaps the world will be on the path to more sustainable, long-term cultures in both the private and public sectors supporting CSR.

V. CONCLUSION

As explained above, the United States historically has applied financial regulation as a home country to activities of its companies operating abroad and in a way the U.S. hopes will encourage positive behavior by those companies. Without immediately rejecting all such extraterritorial regulatory efforts, it is important to recognize that such efforts' efficacy ultimately might be limited.

Accordingly, I have suggested some possible limitations and additional regulatory efforts that might more directly address the desire to enhance the CSR efforts of businesses around the world. Hopefully, future CSR discussions will utilize this model for a more thorough relative assessment of CSR-enhancing efforts.

the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 5, 2015).

In addition, more study is needed on how firms might use private mechanisms to more directly attain needed CSR program inputs in a world of multiple players engaging in more complex production activities without a global regulatory policy. This was explained well by Professor Kish Parella's contribution to the Symposium. Kish Parella, Remarks at the South Carolina Journal of International Law and Business Symposium: Corporate Social Responsibility in Emerging Markets (Feb. 6, 2015).

¹³³ See *Doing Business*, WORLD BANK GROUP, <http://www.doingbusiness.org> (last visited Oct. 1, 2014).