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THE LONG-ARM OF U.S. JUSTICE: SCOVILLE'S RESTORATION OF "CONDUCT AND EFFECTS" IN SECURITIES ENFORCEMENT AND IMPLICATIONS FOR CHINESE CORPORATIONS

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Abstract

Commencing with the U.S. Supreme Court's ruling in Morrison v. National Australia Bank Ltd., a shift away from the "conduct and effects" test and the prior expansion of extraterritorial jurisdiction in U.S. courts seemed inevitable. However, Morrison and other Court rulings held that the presumption against territoriality was rebuttable by showing the U.S. Congress had intended that the statute applied to overseas misconduct via either language, structure or context. In a decision of first impression, the Tenth Circuit in Scoville v. SEC held that the Dodd-Frank law had indeed demonstrated Congressional intent with respect to extraterritorial governmental enforcement of U.S. securities laws thus overriding the presumption. The court therefore reverted to the decades-long "conduct and effects" test in evaluating whether overseas violations of securities laws would come within the purview of extraterritorial jurisdiction. The ruling has potentially significant implications for Chinese corporations that violate Federal laws outside the United States in non-securities contexts as well. Chinese corporations conduct business globally and might violate the anti-bribery provisions of the United States Foreign Corrupt Practices Act ("FCPA"). This article examines the implications for Chinese corporations in light of the Scoville ruling through the lens of the FCPA opining that the context and construct of the FCPA militate strongly in finding Congressional intent to have the FCPA applicable extraterritorially. Moreover, in an age of geo-strategic hegemonic rivalry, U.S. courts may — depending upon the specific facts — find the violation as having "effects on the United States" — thus falling within the governmental enforcement powers of the U.S. Securities and Exchange Commission and Department of Justice.

I. INTRODUCTION

The question of extraterritorial jurisdiction in U.S. federal courts involves determining "the application of U.S. law to conduct that takes place at least

partially outside the territory of the United States . . . "[1] While a long-standing "presumption against extraterritorial jurisdiction" exists, the judicial interpretation and application of the "presumption" has shifted over time. Yet the "constant" is the judicial inquiry with respect to whether Congress intended the statute to be relegated solely to domestic concerns.[2] During the latter part of the 20th century, federal courts increasingly utilized the "conduct and effects" standard finding that Congressional intent to exercise extraterritorial jurisdiction existed either if the conduct took place in the U.S. or if overseas conduct created effects that were manifested in the U.S.

In 2010, the Supreme Court modified the conceptualization of the presumption holding that unless the statute stated to the contrary, federal laws were automatically presumptively not extraterritorially applicable. *Morrison v. National Australia Bank Ltd.* "re-energized" the presumption ruling that the decades-long "conduct and effects" standard previously extensively used by courts was "unpredictable and inconsistent." However, *Morrison* conceded that federal laws could indeed be applied extraterritorially if Congressional intent in favor of the extraterritorial application of the statute was established. Significantly, the Court held that specific language of Congressional intent in the statute was not required and that "context can be consulted" in determining whether Congressional intent existed regarding the extraterritorial effect of a statute.[3]

Immediately after *Morrison*, the U.S. Congress passed the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). [4] Specifically, Section 929P(b) of Dodd-Frank amended the extraterritorial power of the Securities Act and the Exchange Act. Pursuant to Dodd-Frank, U.S. courts were explicitly empowered to allow government enforcement action in securities laws cases.[5] However, courts struggled to determine whether the presumption was indeed overridden in securities enforcement actions; courts continued applying *Morrison's* automatic

[1] *See* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1348–49 (2014) (jurisdiction "comprises at least three different aspects, ordinarily referred to as prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction").

[2] Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (the presumption is a rule of construction which declares that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States" and "is based on the assumption that Congress is primarily concerned with domestic conditions").

[3] Morrison v. Nat'l Austl. Bank Ltd, 561 U.S. 247, at 265 (2010). *See also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2102 (2016).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, 111 P.L. 203, 124 Stat. 1376 (2010).

[5] Dodd-Frank Act § 929P(b), 124 Stat. 1864–65; *see* 15 U.S.C. 78aa(b) ("The district courts of the United States and the United States courts of any Territory 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 chapter involving — (1) 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 (2) *conduct occurring outside the United States that has a foreseeable substantial effect within the United States.*") (emphasis added).

presumption while noting their hesitancy and raising the possibility that Dodd-Frank's amendments did, in fact, override *Morrison*.[6]

In *Scoville v. SEC*, the District Court found that *Morrison* was no longer valid in the context of *government enforcement* of Federal securities laws violations and certified the issue for interlocutory appeal to the Court of Appeals.[7] The Tenth Circuit Court of Appeals affirmed and stated the context of Dodd-Frank evinced Congressional intent that the Federal securities laws should be applied extraterritorially in the context of government enforcement thus re-introducing the traditional "conduct and effects" test.[8]

Pursuant to *Scoville*, once the presumption is overcome, extraterritoriality in the context of government enforcement suits depends on the "conduct and effects" test. The ruling has potentially important implications with respect to enforcement actions in non-securities contexts if the government can establish Congressional intent and the "conduct and effects" standard is satisfied. This article will discuss the implications through the lens of the United States Foreign Corrupt Practices Act.

The context and structure of the FCPA and the FCPA amendments all strongly militate towards finding Congressional intent for extraterritorial application of the FCPA — a statute designed to deter and punish bribery of foreign officials.[9] The FCPA is divided into two parts: the anti-bribery and accounting provisions.[10] This article only discusses the anti-bribery provisions as the accounting provisions are essentially limited to "issuers".[11] The FCPA anti-bribery section prohibits improper payments to foreign governmental officials for the purpose of obtaining a business advantage.[12]

[6] *See* U.S. SEC v. Battoo, 158 F. Supp. 3d 676, 692 n.12 (N.D. Ill. Jan. 25, 2016) ("There is no binding case law that decides whether the Dodd-Frank Act reinstated the conduct-and-effects test for actions brought by the SEC."); *see also* SEC v. Gruss, 859 F. Supp. 2d 653, 664 n.4 (S.D.N.Y. 2012) ("In essence, Section 929P(b) may have restored the Second Circuit's "conduct and effects" test for actions brought by the SEC or the Department of Justice."); *see also* SEC. v. Compania Internacional Financiera S.A., 2011 WL 3251813, at 17 n.2 (S.D.N.Y. July 29, 2011) (Section 929P(b) "may demonstrate the Congressional intent for the extraterritorial application of certain provisions of the federal securities laws that the Morrison court found lacking" and "[i]t may be that the Dodd-Frank Act was specifically designed to reinstate the Second Circuit's 'conduct and effects' test.")

[7] *See* SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275 (D. Utah 2017).

[8] *See* SEC v. Scoville, 913 F.3d 1204 (10th Cir. 2019), *cert. denied* (2019).

[9] The FCPA has a second component known as the "Accounting Provisions" relevant to issuers that provides for maintaining accurate records as well as instituting an internal mechanism to ensure proper record-keeping. The accounting provisions obligate issuers to create and retain both accurate books and records as well as to create and keep internal accounting controls. Falsifying books and records or knowingly circumventing or failing to implement a system of internal controls are also violations of the FCPA. *See* 15 U.S.C. § 78m(b)(2) (2015).

[10] *See* U.S. DEP'T OF JUSTICE & U.S. SEC. EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, at 2, 10 (2012) [hereinafter FCPA GUIDE].

[11] *See* 15 U.S.C. § 78m(b)(2) (2015).

[12] The interpretation of government official is broad and includes employees of private businesses controlled by foreign governments such as state-owned enterprises. *See* FCPA GUIDE, *supra* note 10, at 10, 12-13 (2012). *See also* United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014) (factors to evaluate in ascertain whether the entity is a government instrumentality).

The jurisdictional basis of the anti-bribery provisions contains three primary jurisdictional hooks: "domestic concerns", "issuers" and "territorial" — acting within the territory of the U.S. In evaluating the question of extraterritorial jurisdiction over foreign defendants (defendants that are neither domestic concerns nor issuers), a court will first need to determine whether the presumption against extraterritoriality is overcome. If the presumption is rebutted, the issue is whether the overseas conduct had effects in the United States.

The question this article raises is whether a Chinese corporation that is neither a "domestic concern" nor an "issuer" but allegedly violates the FCPA overseas, can fall within the territorial prong of the FCPA's jurisdiction for purposes of a government enforcement proceeding. Presuming the presumption is overcome, there are two factors militating towards potentially finding "effects" in the United States thus complying with the "territorial jurisdictional hook" of the FCPA itself. One, in light of the U.S.-China hegemonic rivalry, a U.S. court might conclude the specific Chinese entity's activities and/or the specific conduct might constitute effects having adverse national security implications in the United States.[13] Geo-economic rivalry was an important factor in the enactment of the FCPA — the legislative intent of the FCPA was driven to a substantial extent by the former U.S.-Soviet rivalry.

> [T]he major motivation for the FCPA was a perception of the national security risks that foreign payments posed. Congressional hearings highlighted the legislators' very strong concern *that foreign corrupt payments were harming the United States' ability to win the Cold War*.[14]

U.S. national security concerns may become an important factor in court rulings on extraterritorial jurisdiction against Chinese entities in FCPA enforcement proceedings.[15]

Two, if the conduct involves the United States banking system, a court may also rule this directly affects the United States. Indeed, while not yet scrutinized by a judicial authority, this second factor has been successfully used by the U.S. government to obtain resolutions in prior FCPA enforcement actions.[16] Significantly, for foreign defendants, the U.S. enforcement agencies' Guidelines state that "territorial jurisdiction" encompasses

[13] *See infra*. Specifically, the Justice Department is looking to prosecute cases of Chinese entities violating the FCPA. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL JEFF SESSION'S CHINA INITIATIVE FACT SHEET (2018), https://www.justice.gov/opa/speech/file/1107256/download (last visited June 4, 2020) ("Identify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses.").

[14] *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1623 (2017) (emphasis added).

[15] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL JEFF SESSION'S CHINA INITIATIVE FACT SHEET (2018), https://www.justice.gov/opa/speech/file/1107256/download (last visited June 4, 2020) ("China Initiative" noting that U.S. enforcement will target Chinese violations of the FCPA).

[16] *But see* United States v. Hoskins, 902 F.3d 69 (2d Cir. 2018).

defendants' acts in furtherance of the bribery should they avail themselves of various acts such as monetary wires or utilizing the U.S. banking system to further the violation.[17] In recent enforcement cases, the use of the U.S. banking system has been interpreted broadly to include foreign defendants' usage of U.S. banks even if done remotely from outside the U.S.[18] Cutting against this view is a ruling made by the Second Circuit that found the territorial nexus hook of the FCPA requires actual physical presence in the United States.[19]

This paper contributes to the literature by highlighting how *Scoville*'s reasoning is applicable in contexts other than securities enforcement as well as analyzing "conduct and effects" in an era of geo-economic competition. The article proceeds as follows: Section II provides an overview of the issue of extraterritorial jurisdiction in U.S. courts by presenting an historical perspective, a review of recent Supreme Court "rebuttable presumption" rulings and *Scoville*'s return to the "conduct and effects" test. Section III provides a background to the FCPA and the FCPA Amendments which indicate Congressional intent for the extraterritorial application of the FCPA. Section IV analyzes the "conduct and effects" test with respect to Chinese entities and discusses the implications of the era of hegemonic competition with respect to a court's evaluation of "conduct and effects."

II. U.S. JUDICIAL VIEWS ON EXTRATERRITORIALITY

This Section reviews U.S. federal court perspectives on the issue of extraterritoriality which is important in viewing the question of FCPA enforcement against Chinese entities into the historical context. The Section starts with a brief review of extraterritorial jurisdiction, then focuses on recent Supreme Court developments and concludes with the Scoville ruling.

[17] Such acts include: "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States" or "*sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system*." *See* FCPA GUIDE, *supra* note 10, at 11 (emphasis added). *But See United States v. Hoskins,* 902 F.3d 69, 84 (2d Cir. 2018) ("[I]t is undisputed that Mr. Hoskins never entered the territory of the United States and thus could not be prosecuted directly under [15 U.S.C. § 78dd-3].")

[18] The issue of whether utilizing U.S. banking or correspondent banks located in the U.S. is sufficient has not been addressed by the courts. Thus there is a lack of appellate decisions as numerous defendants have paid fines and entered into agreements based upon this connection. No foreign defendant has disputed jurisdiction but the issue may increasingly be raised since there is an absence of rulings on the issue. However, as discussed infra, the view of the U.S. enforcement agencies is sensible in a technologically-driven world where global transactions are initiated without the need for physical presence.

[19] *See Hoskins*, 902 F.3d 69.

A. Historical Perspective

Extraterritorial jurisdiction has been discussed by the U.S. Supreme Court for a long time.[20] The intellectual foundation of a presumption against applying U.S. laws to overseas conduct is "the assumption that Congress is primarily concerned with domestic conditions."[21] Federal statutes that do not have a specific geographic focus within the United States are less apt to be found within the presumption's contours. Chief Justice Taft stated in the *Bowman* opinion that any presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated."[22] Therefore, if the failure to use extraterritorial jurisdiction would:

> Greatly . . . curtail the scope and usefulness of the statute . . . [the Court would not require a] specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.[23]

The *Bowman* Court proceeded to hold that the statute criminalizing fraud committed against the Government of the United States was to be applied extraterritorially even though there was no express Congressional intent expressed in the statute itself.[24] Thus, the Supreme Court held that federal statutes should be applied to overseas conduct if doing so advances the U.S. interest against obstruction of U.S. law even without any specific language stating the geographic focus of the law is overseas.[25]

In the 1960s and 1970s, the federal circuit courts of appeal began to expansively hold that violations of U.S. federal securities laws were applicable to overseas conduct — even in private civil litigation. The Second Circuit pioneered this conceptualization of extraterritoriality and applied the "conduct and effects" test to determine whether the securities laws applied to overseas conduct.[26] *Schoenbaum*,[27] *Leasco*,[28] *Bersch*[29] and *Vencap*[30] held that extraterritorial application of U.S. securities law was proper if the

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[20] For an excellent and comprehensive review of the issue in the context of Supreme Court precedent, *see* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L REV. 1583, 1592–96 (2020).

[21] Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).

[22] United States v. Bowman, 260 U.S. 94, 98 (1922).

[23] *Id.* (emphasis added).

[24] *Id.* at 100.

[25] Dodge, *supra* note 20, at 1607. ("The possibility of nongeographic provisions was noted as early as Bowman, where the Court recognized a class of statutes that are 'not logically dependent on their locality for the Government's jurisdiction.'") (citation omitted).

[26] *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (conduct test); Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968) (effects test).

[27] *See Schoenbaum*, 405 F.2d at 206.

[28] *See RJR Leasco*, 468 F.2d at 1336.

[29] Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 992 (2d Cir. N.Y. 1975).

[30] *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1018 (2d Cir. N.Y. 1975).

"conduct and effects" test was satisfied. Pursuant to this standard, U.S. courts had jurisdiction:

> if "wrongful conduct [abroad] had a substantial effect in the United States or upon United States citizens," or if "wrongful conduct . . . in the United States" affected investors abroad.[31]

Courts in other circuits also commenced applying federal securities law extraterritorially, [32] as well as in antitrust litigation incorporating "jurisdictional rule of reason" to ascertain whether extraterritorial conduct could be subject to suit. [33] Cumulatively, these cases broadly expanded notions of extraterritoriality and perhaps precipitated the Supreme Court to re-assess the expansion of extraterritorial jurisdiction by establishing firmer parameters. Commencing with *Morrison*, the Supreme Court endeavored to cutback against an overly-broad interpretation of extraterritorial applicability of U.S. law [34] by insisting that a statute must either expressly state Congressional intent for extraterritorial jurisdiction or confer Congressional intent by reference to the statute's context and structure.

B. Morrison and RJR Nabisco

Shifting from decades of accepted practice and potentially unfettered expansion of extraterritoriality, *Morrison* re-focused attention on the presumption.[35] *Morrison* involved a "foreign-cubed" litigation; a litigation involving foreign plaintiffs, a foreign defendant, and a foreign securities transaction; the foreign plaintiffs alleged that the National Australia Bank violated Section 10(b) by improperly incorporating a United States subsidiary's allegedly falsified valuations into the defendant's public filings.

The Supreme Court held that there was no basis for an action under Federal securities laws because the securities at issue were not listed on domestic U.S. exchanges or purchased in the United States. *Morrison* held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[36] As the Supreme Court explained, "[t]he criticisms

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[31] *Morrison*, 561 U.S. at 257 (quoting SEC v. Berger, 322 F.3d 187, 192 (2d Cir. 2003)).

[32] In re CP Ships Ltd. Sec. Litig., 578 F.3d 1306, 1313-14 (11th Cir. 2009); Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 664–67 (7th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999); Grunenthal GmbH v. Hotz, 712 F.2d 421, 424–25 (9th Cir. 1983); Continental Grain (Austl.) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421–22 (8th Cir. 1979); SEC v. Kasser, 548 F.2d 109, 112-15 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

[33] Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1301 (3d Cir. 1979) (Adams, J., concurring) (quotation omitted); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976) (same).

[34] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 254–55 (2010) ("[D]isregard of the presumption against extraterritoriality . . . has been repeated over many decades by various courts of appeals in determining the application of the Exchange Act . . . ").

[35] *Morrison* did not create the presumption against extraterritoriality but strongly upheld its importance. *See, e.g.*, EEOC v. Arabian American Oil (Aramco) 499 U.S. 244, 246 (1990) (presumption of extraterritoriality applicable to Title VII of the Civil Rights Act of 1964).

[36] *See Morrison*, at 254–55.

[of the conduct-and-effects test] seem to us justified . . . [and] demonstrate the wisdom of the presumption against extraterritoriality . . . In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."[37] Therefore, the Exchange Act applies only to "securities listed on domestic exchanges, and domestic transactions in other securities . . . "[38]

However, *Morrison* held that the presumption could be rebutted — a court could override the presumption - by a "clear indication of extraterritoriality."[39] Significantly, Morrison held that the presumption was not a "clear rule" and in ascertaining whether the presumption had been rebutted by a "clear indication of extraterritoriality"[40], the statute's context could be utilized. Morrison stated that the presumption was not a "clear statement rule," if by that is meant a requirement that a statute says "this law applies abroad." Assuredly context can be consulted as well.[41]

Morrison thus provided an extensive ability for courts to find a "clear indication" of extraterritoriality by permitting the court to take into account not just the language but also the statute's context.

In *RJR Nabisco, Inc. v. European Community*,[42] the Supreme Court discussed the presumption in the context of a RICO suit examining whether RICO's predicate acts alleged (such as violating the Federal money-laundering statute) applied to acts committed "outside the United States" if "the defendant is a United States person."[43] Bolstering *Morrison*'s emphasis on the statute's context, *RJR Nabisco* provided an additional pathway of finding a "clear indication" of Congressional intent aside specific language and/or context of the statute. The Court stated such intent can be found in examining the "structure" of the statute and found the required "clear indication" of extraterritoriality in the "structure" of the RICO statute.[44]

The *RJR Nabisco* opinion referenced the fact that at least some of RICO's predicate acts expressly applied abroad. For example, the federal money-laundering statute: one of the predicate acts alleged applies to offenses

[37] *Id.* at 261–66.

[38] *Id.* at 266–67.

[39] *Id.* at 265.

[40] *Id.*

[41] *Id.*, *see also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 119 (2013) (looking to the "historical background" of a statute to determine whether the presumption had been overcome); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177 (1993) (courts should look at "all available evidence about the meaning" of a provision); Foley Bros. v. Filardo, 336 U.S. 281, 285–88 (1949) (looking to "legislative history" to determine whether the presumption had been overcome); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (AM. LAW INST.2018) ("The presumption is not a clear-statement rule, and a court will examine all evidence of congressional intent to determine if the presumption has been overcome.").

[42] RJR Nabisco Inc. v. European Cmty., 136 S. Ct. 2090, 2102 (2016).

[43] *RJR Nabisco*, at 2101 ("RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct.").

[44] *Id.* at 2103.

"outside the United States" if "the defendant is a United States person."[45] The Court found this structure sufficient to rebut the presumption under Sections 1962(b) and (c) of RICO, which it held to apply extraterritorially "to the extent that the predicates alleged in a particular case themselves apply extraterritorially."[46] Thus, the Court found the presumption rebutted "to the extent that the predicates alleged in a particular case themselves apply extraterritorially."[47]

Corroborating *Morrison*'s holding that specific language was not a requirement to overriding the presumption, the Court held that the absence in the RICO statute itself of language defining its geographic scope did not trouble the Court: "While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential."[48]

RJR Nabisco constituted a significant development holding specific language expressing Congressional intent was not required to find Congressional intent.[49] *RJR Nabisco* further corroborates that while a "clear indication" is required, the pathway to finding the indication is not particularly strict and is in fact quite broad.[50] After *RJR Nabisco*, not only can context be instructive but the structure of the statute can also "clearly indicate" Congressional intent.

The following section discusses how the U.S. Congress amended a statute which was ultimately held in *Scoville* to overcome the presumption in securities law enforcement cases. As will be explained in the following section, once Congressional intent is established, a court will decide whether the conduct meets the "conduct and effects" test. The same analysis is relevant to FCPA enforcement actions.

C. Scoville and the Return to "Conduct and Effects"

Following the Supreme Court's opinion in *Morrison*, Congress amended the securities laws and specifically authorized jurisdiction based on the conduct and effects test in enforcement suits brought by the U.S. government. [51] However, Congress amended the Exchange Act's jurisdictional provision — not section 10(b) itself — and the Federal district

[45] *Id.* at 2101.

[46] *Id.* at 2102.

[47] *Id.*

[48] *Id.*

[49] *Id.* ("While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential.").

[50] The presumption was often applied in a practical way. *See Dodge*, *supra* note 21, at 1615 ("Historically, we have seen that the Supreme Court applied the traditional presumption against extraterritoriality inconsistently, ignoring the presumption when limiting a provision to conduct within the United States would have defeated the apparent purpose of the statute.") (emphasis added).

[51] *See* 15 U.S.C. § 78aa(b) (2018).

courts grappled with the question whether the amendment indeed reversed *Morrison* in government enforcement actions.[52]

The key relevant provision in Dodd-Frank is Section 929P(b) which unambiguously relates to the extraterritoriality enforcement of the Securities Act and the Exchange Act.[53] Pursuant to 929P(b), enforcement actions by government agencies could be based upon extraterritorial conduct if the "conduct and effects" standard was satisfied.[54]

The provision states as follows:

> Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws . . . .
>
> (b) Extraterritorial Jurisdiction. - The district courts of the United States and the United States courts of any Territory 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 . . . involving — (1) 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 (2) *conduct occurring outside the United States that has a foreseeable substantial effect within the United States*.[55]

Further corroboration of the Congressional intent to override *Morrison* were the comments of Representative Paul Kanjorski who introduced Section 929P(b),[56] as well as Senator Jack Reed's comment that Section 929P(b) was drafted with "extraterritoriality language that clarifies that in actions brought by the SEC or the Department of Justice . . . . the securities laws "apply if the conduct within the United States is significant, *or the external U.S. conduct has a foreseeable substantial effect within our country*."[57] The amendment is applicable to enforcement cases brought by the SEC or DOJ but not private suits which remained unaddressed by Dodd-Frank.[58]

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[52] Compare SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 909–17 (N.D. Ill. 2013) (Congress did not amend the Exchange Act), with SEC v. Scoville, 913 F.3d 1204, 1215–18 (10th Cir. 2019) (Congress specifically amended the Exchange Act).

[53] The issue the Second Circuit noted required Congress to address and resolve. *See* Morrison v. Nat'l Austl. Bank Ltd, 547 F.3d 167, 170 n. 4.

[54] *See* H.R. REP. No. 687, 111th Cong., 2d Sess. Pt. 1, 80 (2010) ("This section addresses the authority of the SEC and the United States to bring civil and criminal law enforcement proceedings involving transnational securities frauds" by "codify [ing] . . . both the conduct and the effects tests.").

[55] Dodd-Frank Act § 929P(b), 124 Stat. 1864-1865 (2010) (codified at 15 U.S.C. § 78aa(b) (2012).

[56] 156 CONG. REC. at 12,432 (2010) (The Morrison decision "had 'appl[ied] a presumption against extraterritoriality,' and that Section 929P(b) was intended to 'rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department' . . . [T]he purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States.").

[57] 156 CONG. REC. at 13, 182 (2010) (emphasis added).

[58] *See* Dodd-Frank Act, § 929Y, Pub. L. No. 111-203, 124 Stat. 1376, 1871 (2010) (Section 929Y directed the Commission to conduct a study on the private right of action and solicit public comment as to whether it should be extended to private claimants. The results are available at http://www.sec.gov/news/stu-

In the *Scoville* litigation, the court contended with the question "whether Section 929P(b) of Dodd-Frank reinstated the 'conduct and effects' test that had just been repudiated in *Morrison*, or whether Section 929P(b) left the *Morrison* transactional test in place."[59] The district court examined Section 929P(b) and found Congressional intent to override *Morrison* in government enforcement suits.[60] The court held that both the language and legislative history of Section 929P(b) demonstrated that in securities law enforcement cases the "conduct and effects" test was appropriate.[61]

> Looking at context, *the 2010 amendment provides the clear indication of extraterritoriality necessary to rebut the presumption with respect to government enforcement of section 10(b) irrespective of which provision was amended*. (emphasis added).[62]

The Tenth Circuit Court of Appeals concurred,[63] holding that with respect to government enforcement of securities laws:

> Congress has provided that the antifraud provisions apply extraterritorially when significant steps are taken in the United States to further a violation or conduct occurring outside the United States has a foreseeable substantial effect within the United States.[64]

The Tenth Circuit noted that for decades, Federal courts had utilized the "conduct and effects" standard to apply U.S. securities laws extraterritorially[65] and cited the legislative context:

> Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied.[66]

In sum, *Scoville* held that Dodd-Frank had in fact overturned *Morrison* in government enforcement actions and therefore, courts should apply U.S. securities law extraterritorially in enforcement actions subject to the "conduct and effects" test being satisfied.[67] The U.S. Supreme Court rejected a petition for certiorari[68] leaving *Scoville* as potentially persuasive authority. *Scoville*'s reasoning has implications in other contexts besides securities laws. The next Section examines the potential impact with respect to the anti-bribery provisions of the FCPA.

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dies/2012/929y-study-cross-border-private-rights.pdf). The question of private suits is beyond the scope of this paper.

[59] *See Traffic Monsoon*, at 1289.

[60] *Id.* at 1290.

[61] *Id.* at 1292.

[62] *Dodge*, *supra* note 20, at 1616 n 284 (emphasis added).

[63] *See* SEC v. Scoville, 913 F.3d 1204, 1213 (10th Cir. 2019).

[64] *Id.* at 1215.

[65] *Id.* at 1216.

[66] *Id.* at 1218.

[67] *Id.* at 1225.

[68] Scoville v. SEC, 140 S.Ct. 483 (2019).

III. EXTRATERRITORIALITY IN THE FCPA CONTEXT

Section III focuses on the extraterritorial application of the FCPA in light of developments discussed above in the enforcement of securities laws. While the two areas are different, the same legal analysis would control whether overseas violations of the FCPA are subject to government enforcement actions. The focus of this Section is whether the government agency could establish a "clear indication" of Congressional intent with respect to the anti-bribery provisions of the FCPA. If Congressional intent is in fact established, the overseas conduct would need to satisfy the "conduct and effects" test — an analysis conducted in Section IV — to fall within the ambit of U.S. extraterritorial jurisdiction.

A. The FCPA and FCPA Amendments

Enacted in 1977, the FCPA was intended to deter U.S. businesses from paying bribes to *foreign officials* and the falsification of corporate books and records to hide the corrupt payments.[69] Managements which resort to corporate bribery and the falsification of records to enhance their business reveal a lack of confidence about themselves: "paying bribes — apart from being morally repugnant and illegal in most countries — is simply not necessary for the successful conduct of business here or overseas."[70]

The FCPA was amended in 1988 by adding two affirmative defenses[71] and significantly for purposes of our discussion, Congress also sought an international agreement with Organization of Economic Cooperation and Development ("OECD") members to prohibit bribery in international business transactions by many of the United States' major trading partners.[72]

> It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such

[69] U.S. SEC. AND EXCHANGE COMM., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2–3 (1976) (FCPA contains both anti-bribery and accounting sections); *See also* S. REP. No. 95-114, at 7 (FCPA addresses the concealment of bribes via the "books and records" provision to "strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure.")

[70] H.R. REP. No. 95-640, at 4–5; S. REP. No. 95-114, at 4 (emphasis added).

[71] Omnibus Trade and Competitiveness Act of 1988 § 2901, 102 Stat. 1107 § 5003 (1988); *See also* H.R. REP. No. 100-576, at 916-24 (1988) (discussing FCPA amendments, including changes to standard of liability for acts of third parties) [hereinafter H.R. Rep. No. 100-576].

[72] Omnibus Trade and Competitiveness Act of 1988 § 2901, 102 Stat. 1107 § 5003(d) (1988).

international agreement should include a process by which problems and conflicts associated with such acts could be resolved.[73]

These efforts were successful and the Convention on Combating Bribery of Foreign Officials in International Business Transactions ("Anti-Bribery Convention") was signed, obligating member states to outlaw the bribery of foreign officials.[74] The treaty calls on parties to apply territorial jurisdiction "*broadly so that an extensive physical connection to the bribery act is not required*".[75]

Further establishing Congressional intent to "apply territorial jurisdiction broadly", the FCPA was further amended in 1998 to adhere to the Convention.[76] The 1998 amendments and the significance of conforming with the Anti-Bribery Convention[77] substantially increased the jurisdictional hook to foreign persons committing any act in furtherance of the bribery while in the United States.[78] The amendments also provided criminal sanctions for FCPA violations by foreign nationals employed by, or acting as agents of, U.S. businesses.[79]

B. Congressional Intent and Extraterritorial FCPA Jurisdiction

The presumption against extraterritoriality is rebuttable when Congressional intent for the extraterritorial application of the statute is clearly indicated. The FCPA's anti-bribery provisions provide three bases for jurisdiction: "U.S. issuers" (U.S. and foreign entities which trade on U.S. capital markets or entities obligated to file periodic reports with the U.S. SEC);[80] "domestic concerns" (U.S. persons (including U.S. Green Card holders and U.S. businesses))[81] and "territorial jurisdiction" applicable to

[73] Omnibus Trade and Competitiveness Act of 1988 § 2901, 102 Stat. 1107 § 5003(d) (1988); *See also* S. REP. No. 105-277, at 2 (1998) (describing efforts by Executive Branch to encourage U.S. trading partners to enact legislation similar to FCPA following 1988 amendments) [hereinafter "S. REP. No. 105-277"].

[74] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1.1, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter "Anti-Bribery Convention"].

[75] *Id.* at art. 1.2, cmts. 25, 26 (emphasis added).

[76] *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); *see also* S. REP. No. 105-277, at 2–3 (describing amendments to "the FCPA to conform it to the requirements of and to implement the OECD Convention").

[77] Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1.2 (1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (requiring OECD member countries to make it a criminal offense "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.").

[78] *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998).

[79] *Id.*

[80] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 (2012)).

[81] *See* 15 U.S.C. § 78dd-2.

foreign entities which commit acts within the U.S. to promote or advance the violation.[82]

Initially, it is noted that the FCPA aimed to prevent bribery of foreign officials and has no geographic limitation — it would be inherently illogical to presume such conduct would not encompass overseas bribery. To the contrary, most bribery would presumably take place outside the United States which militates in favor of finding intent to apply the FCPA to extraterritorial conduct. While the Amendments made it applicable also to conduct within the U.S., it is obvious that Congress envisioned and fully understood that such conduct would at times (or mostly) be based in foreign countries. Since the FCPA is a manifestation of Congressional intent to deter overseas bribery, the extraterritorial application of the FCPA cannot be seriously questioned.

Furthermore, and comporting with the prevailing conceptualization of extraterritoriality within the context of "the conduct and effects test", Congress specifically understood that "[although] the payments which [the Act] would prohibit are made to foreign officials, in many cases the *resulting adverse competitive affects* [sic] *are entirely domestic*."[83] This appears to be an exact codification of the "conduct and effects" test.

Indeed, the impetus for enacting the FCPA was to focus on the effects of global bribery on the U.S. economy.[84] Significantly, national security interests within the context of the geo-political U.S.-Soviet competition formed an important motivation behind the FCPA's enactment:

> [T]he major motivation for the FCPA was a perception of the national security risks that foreign payments posed. Congressional hearings highlighted the legislators' very strong concern *that foreign corrupt payments were harming the United States' ability to win the Cold War*.[85]

Thus the motivation driving the FCPA was related to national security in the context of the U.S.-Soviet competition and was a manifestation of concern that bribery of foreign officials would undermine the U.S. ability to triumph in its conflict with the Soviet Union.

Together, the national security concerns [] posed by illicit corporate payments abroad were sufficient to achieve legislative passage of the FCPA.[86]

Similarly today, the U.S. views China as seeking to undermine U.S. economic superiority. The analogy between the U.S.-Soviet contest and the U.S.-China geo-economic contest is striking and may play a decisive role in a U.S. court's determination with respect to Congressional intent and the FCPA's anti-bribery provisions.

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[82] *See* 15 U.S.C. § 78dd-3 (This provision was added in the 1998 Amendments.)

[83] H.R. REP. No. 95-640, at 4 (1977) (emphasis added).

[84] *See* S. REP No. 100-85, at 46 (1987) (recounting FCPA's historical background and explaining that "a strong antibribery statute could help U.S. corporations resist corrupt demands . . . ") [hereinafter "S. REP. No. 100-85"].

[85] *See* Brewster, *supra* note 14, at 1623 (emphasis added).

[86] *Id.*

In addition to the FCPA's context, structure and Congressional motivation to protect U.S. security interests, the FCPA Amendments corroborate the Congressional intent for enforcement agencies to exercise extraterritorial jurisdiction. In 1988, Congress commanded the Executive Branch to negotiate with the United States' prominent trading partners in the OECD to pass legislation similar to the FCPA.[87] In 1997, the United States and other sovereigns signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) requiring the signatories to criminalize the bribery of foreign public officials by "any person" and "to establish . . . jurisdiction . . . when the offence is committed in whole or in part in its territory."[88] Significantly, the OECD Convention obligates member states to ensure that jurisdiction is wide and broad when criminalizing foreign bribery: "the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[89]

The Convention thus intentionally embraced an exceedingly expansive approach to jurisdiction.[90] "To address claims that the FCPA would be jurisdictionally overreaching by pursuing foreign persons or corporations with limited territorial ties to the United States, American negotiators included very broad bases for jurisdiction into the OECD Convention."[91] Article 4 empowers sovereigns to enact legislation that would take a broad view of jurisdiction and find "jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory."[92] The official commentary states that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."[93] Accessing U.S. banking would arguably come within the ambit of this broad understanding of jurisdiction.[94]

Accordingly, in 1998, the FCPA was further amended to encompass the territorial jurisdictional hook:

[87] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

[88] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 1, 4, Nov. 21, 1997, 37 I.L.M. 1.

[89] OECD, The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents 16 (2011) at art. 1.2, cmts. 25, 26 (emphasis added).

[90] *See* Brewster, *supra* note 14, at 1665, citing Mark Pieth, *Article 4: Jurisdiction*, *in* THE OECD CONVENTION ON BRIBERY: A COMMENTARY 267, 277 (2007) ("The Convention interpretation is clear: even the slightest of connections is sufficient.").

[91] *See Id*, at 1664 (2017).

[92] OECD Anti-Bribery Convention, Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1(1), Nov. 21, 1997 [hereinafter OECD Anti-Bribery Convention], art. 4(1).

[93] OECD Anti-Bribery Convention, cmt. 25.

[94] *See* Brewster, *supra* note 14, at 1664 ("This explicit multilateral endorsement of broad jurisdictional rules provided for American FCPA enforcement when any act in furtherance of a foreign bribe touched on American territory, *including uses of the American banking system*.").

> [A]ny person other than an issuer . . . or a domestic concern . . . or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, *corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance* of [a corrupt payment.][95]

This provision is particularly relevant to foreign entities as the jurisdictional hook of § 78dd-3 extends potentially to corrupt usage of "any means" or instrumentality of interstate commerce in order to further any act of bribing a foreign official. For example, a corrupt payment made entirely overseas between non U.S.-connected entities will still fall within the ambit of U.S. enforcement if the transaction involved: "sending a wire transfer from or to a U.S. bank *or otherwise using the U.S. banking system*, or traveling across state borders or internationally to or from the United States".[96]

The explicit multilateral endorsement of broadly interpreting jurisdiction "*so that an extensive physical connection to the bribery act is not required*" comports with the enforcement policy of U.S. Government agencies. Any act in furtherance of a foreign bribe which "touches" or involves U.S. territory, *including uses of the American banking system* conforms with a broad understanding of extraterritoriality for the FCPA.[97] As the following sub-section discusses, U.S. enforcement agencies have incorporated the Convention's (and thus arguably the U.S. Congress's intent) broad understanding of jurisdiction and have relied upon foreign defendants' usage of U.S. banks to find enforcement jurisdiction.

Finally, while the presumption "did apply to *ordinary criminal offenses*, like assault, murder, robbery, and fraud,"[98] important Federal laws, such as the statute criminalizing false claims against the U.S. government, do not have such a presumption[99] because such offenses "affect the peace and good order of the community."[100] Clearly the FCPA is not a "run of the mill" penal statute and there is no domestic U.S. geographic focus. Furthermore, government FCPA enforcement actions presumably align with promoting the U.S. national interest.[101] U.S. government enforcement agencies could also argue that enforcement of the FCPA in the context of the U.S.-China hegemonic rivalry[102] constitutes the "right of the Government to defend itself against obstruction, or fraud wherever perpetrated."[103] Courts may view the

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[95] 15 U.S.C. § 78dd–3(a) (2012) (amended 1998) (emphasis added).

[96] FCPA GUIDE, *supra* note 10, at 11 (emphasis added).

[97] *See* Brewster, *supra* note 14, at 1664.

[98] *Dodge*, *supra* note 20, at 1615 (emphasis added).

[99] United States v. Bowman, 260 U.S. 94, 98–101 (1922).

[100] *Id.* at 98.

[101] Kiobel for example involved plaintiffs seeking damages from a foreign corporation. There may be more inclination to find the presumption when civil parties are litigating for compensatory and/or punitive damages.

[102] *See infra*.

[103] United States v. Bowman, 260 U.S. 94, 98 (1922).

U.S. government agency position as a reasonable interpretation of Congressional intent that should be deferred to.[104]

In sum, there is substantial evidence that Congress intended for the FCPA to be relevant to overseas bribery. The FCPA's purpose in thwarting overseas bribery demonstrates an "'affirmative intention [that] the Congress clearly expressed' to give [the] statute extraterritorial effect."[105] Congressional focus on the domestic effects of overseas conduct corroborates the intent for extraterritorial jurisdiction — "[although] the payments which [the Act] would prohibit *are made to foreign officials*, *in many cases the resulting adverse competitive affects [sic] are entirely domestic*."[106] In addition, the Amendments as well as the push to internationalize bribery laws and broadly construe jurisdiction all militate strongly in finding the structure and context indicative of Congressional intent to employ enforcement actions for overseas FCPA violations particularly in the context of prevailing against a geo-economic strategic competitor.

C. Enforcement for Extraterritorial FCPA Violations: Recent Perspectives

With respect to Chinese corporations that are neither "issuers" nor "domestic concerns", the third prong of "territorial jurisdiction" is relevant. While Section 78dd-3, (unlike in §§ 78dd-1 and 78dd-2), necessitates a link between the corrupt payment and "interstate commerce",[107] this required link is flexible and arguably encompasses utilizing the U.S. banking system. Indeed, it is the position of U.S. enforcement agencies that a corrupt payment made entirely overseas between non U.S.-connected entities, in other words, the entire conduct is perpetrated extraterritorially, will still be within the long-arm of U.S. justice if the conduct touches and concerns the United States.

Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce — as does sending a wire transfer from or to a U.S. bank *or otherwise using the U.S. banking system*, or traveling across state borders or internationally to or from the United States.[108]

Unsurprisingly, even prior to *Scoville*, government enforcement agencies interpreted the Congressional intent of the FCPA as being applicable to foreign entities overseas misconduct based upon utilization of the U.S. Dollar

[104] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[105] Morrison v. Nat'l Austl. Bank Ltd, 561 U.S. 247, 265 (2010). (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (2006)).

[106] H.R. REP. No. 95-640, at 4 (1977) (emphasis added).

[107] 15 U.S.C. §78dd-3 ("It shall be unlawful . . . while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of" bribing a foreign official.")

[108] FCPA GUIDE, *supra* note 10, at 11 (emphasis added).

financial system.[109] FCPA enforcement actions have alleged jurisdiction because the transactions were denominated in U.S. Dollars and used correspondent banks located in the U.S. to further the bribery.[110] The U.S. government agency position that the "territorial jurisdiction" prong of the statute is satisfied by establishing usage of U.S. banks is sufficient has not been challenged.

Illustrative is *U.S. v JGC Corp.*[111], wherein the defendant was neither a "domestic concern" nor an "issuer."[112] The defendant, a foreign entity, was accused of violating the FCPA by bribing Nigerian officials and faced DOJ allegations of FCPA violations to obtain government contracts. The sole connection to the U.S. was that the defendant had a U.S. JV partner and — significantly — the corrupt payments were U.S. Dollar wires transferred through U.S. bank accounts. The corrupt conduct occurred exclusively outside the territory of the United States in European nations and Nigeria. The DOJ claimed jurisdiction in part based on the defendant's wiring of funds that were routed through correspondent banks in the U.S. [113] Essentially, the government enforcement was predicated on the fact that funds were routed through the United States banking system which thus *established a territorial act in furtherance of the FCPA violation.*[114] The defendant did not litigate the issue and resolved the enforcement via a deferred prosecution agreement (DPA).[115]

The U.S. government agency position that physical presence of a defendant within the territory of the United States is not required was not accepted in the Second Circuit's opinion in *Hoskins* which refused to embrace a broad interpretation of extraterritorial enforcement.[116] The Second Circuit

[109] *Id.*

[110] *See e.g.*, United States v. Snamprogetti Netherland BV, No. 10-CR-460 (S.D. Tex. Jul.07, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-07-10snamprogetti-info.pdf ("corrupt u.s. dollar payments to be wire transferred from Madeira Company 3' s bank account in Amsterdam, The Netherlands, via correspondent bank accounts in New York, New York, to bank accounts of Tri-Star in Switzerland for use in part to bribe Nigerian government officials."); *See also* United States v. Unitell, LLC, No. 16-CR-137 (ER) ¶¶ 66–71 (S.D.N.Y. Feb 18, 2016), https://www.justice.gov/criminal-fraud/file/827496/
download (Noting defendants transferred money into and out of correspondent banks located in New York).

[111] United States v. JGC Corp., No. 11-CR-260, ¶¶ 19.e. and 22 (S.D. Tex. Apr. 6, 2011).

[112] Information at 2, United States v. JGC Corp., No. 11-CR-260 (S.D. Tex. Apr. 6, 2011), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-dpa.pdf.

[113] *Id.* at 13.

[114] Lauren Ann Ross, *Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act*, 62 DUKE L.J. 445, 453–54 (2012) (discussing 15 U.S.C. §§ 78l, 78m(b)(2), 78o(d), 78dd-1 (2006)), at 447.

[115] *See* Deferred Prosecution Agreement, United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr, 6, 2011). *See also* Magyar Telekom, Plc., (Hungarian subsidiary of Deutsche Telekom in which the basis of jurisdiction was sending and storage of e-mails on U.S. servers.) *See* U.S. v. Magyar Telekom, Plc., No. 1:11CR00597, Information ¶¶ 2, 24, 26(c), 47 (E.D. Va. Dec. 29, 2011). *But see* U.S. v Hoskins, 902 F.3d 69, 72 (2d Cir. 2018) (Emailing others who were in the U.S. was of no import since the defendant himself was not physically within the U.S.).

[116] *Hoskins*, 902 F.3d 69 (2d Cir. 2018).

examined the territorial jurisdictional hook of the FCPA which refers to foreign persons acting "while in the territory of the United States." Reviewing the legislative history of the FCPA, the court stated:

> In adopting the FCPA, Congress sought to criminalize wrongful conduct by Americans and those who in various ways work with Americans, while avoiding unnecessary imposition on the sovereignty of other countries whose traditions and laws may differ from our own. The legislative history described in the Court's opinion demonstrates that, in confronting the delicate line-drawing exercises involved in balancing these concerns, *Congress intended to limit the overseas applications of the statute to those that it explicitly defined.*[117]

The court held that there was no evidence of Congressional intent to apply the FCPA if the defendant acted "outside American territory."[118] Thus, according to the Second Circuit, the FCPA's territorial jurisdiction hook is applicable only when the defendant is in fact physically within the territory of the United States.

However, the opinion in *Hoskins* is not determinative for evaluating whether enforcement actions against Chinese corporations for overseas FCPA violations can be pursued for several reasons. First, there was no indication that *Hoskins* used U.S. banks which is the basis enforcement agencies have invoked for satisfying the territorial prong. It is entirely possible that using U.S. banks might be considered by the Second Circuit as a sufficient nexus to the territory of the United States to satisfy the FCPA's territorial jurisdictional prong. Second, the decision is binding only in the Second Circuit and government agencies can pursue claims in other jurisdictions. Third, it was decided "pre-*Scoville*" and the court was clearly influenced by *Morrison* and *RJR Nabisco*.[119] Fourth, the ruling did not consider whether adverse national security affects in the context of a hegemonic competition constitute sufficient conduct to satisfy the territorial prong. *Hoskins* incentivizes challenging the assertion of enforcement jurisdiction based upon accessing U.S. banking from overseas. Until the issue is litigated and there is authority (preferably appellate), we do not know whether accessing U.S. banks is sufficient to bring the conduct within the ambit of "territorial jurisdiction." With respect to Chinese corporate defendants, this issue will be significant should the China Initiative lead to heightened enforcement proceedings.

If the presumption is lifted, the remaining question is whether the conduct has effects in the U.S. As the next Section discusses, there are two potential paths to find that overseas bribery has effects in the U.S. First, the national interest is now inextricably linked to the U.S.-China hegemonic rivalry. Government agencies can argue that — depending on the Chinese entity —

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[117] *Id.* at 102. (Lynch, J., concurring) (emphasis added).

[118] *Id.* at 84, 97.

[119] *Id.* at 96. ("Because some provisions of the FCPA have extraterritorial application, " 'the presumption against extraterritoriality operates to limit th[ose] provision[s] to [their] terms,'"citing *RJR Nabisco*, 136 S.Ct. at 2102 (quoting *Morrison*, 561 U.S. at 265, 130 S.Ct. 2869.").

the conduct has substantial effects on U.S. national interests both economically and possibly linked to national security.[120] Second, the usage of U.S. banking or correspondent banks may continue to serve as a basis for enforcement actions. No defendant has challenged the claim that resort to U.S. banks to further a corrupt payment serves as a legitimate jurisdictional basis although an eventual challenge is enhanced in light of *Hoskins*.

IV. POST-*SCOVILLE*: "CONDUCT AND EFFECTS" IN AN AGE OF HEGEMONIC RIVALRY

The United States is the current Chief Architect[121] of the global governance architecture; wielding dominant positions in the triad of hegemonic power levers — military, economic and technological.[122] However, an ambitious China seeks to restore itself and replace the U.S.[123] as the world's major economic, political and military power.[124] President Xi acknowledges China has global ambitions of leadership in the geo-strategic context, conceding that China's rise has immense global implications,[125]

[120] The distinction between national "security", national "interests" and economic "interests" in the context of geo-strategic rivalry is likely not significant and are in fact all inter-related.

[121] *See* Joel Slawotsky, *The Clash of Architects: Impending Developments and Transformations in International Law*, 3(2) CHINESE J. GLOBAL GOV. 83 (2017), https://doi.org/10.1163/23525207-12340025) (discussing the effects of China's ascendancy and how this will affect international law and global governance as well as potentially impacting domestic governance of sovereigns militating towards a Chinese governance model).

[122] Joel Slawotsky, *The National Security Exception in US-China FDI and Trade: Lessons from Delaware Corporate Law*, 6 CHINESE J. COMP. L. *228,* 241–45 (2018), https://doi.org/10.1093/cjcl/cxy012 (noting economic, technological and military power as the triad of hegemonic status).

[123] The prospect of hegemonic defeat was considered by U.S. elites unthinkable just a few years ago. Barack Obama, *Remarks by the President at the United States Military Academy Commencement Ceremony* (May 28, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony ("In fact, by most measures, America has rarely been stronger relative to the rest of the world . . . . Our military has no peer . . . . Meanwhile, our economy remains the most dynamic on Earth; our businesses the most innovative…From Europe to Asia, we are the hub of alliances unrivaled in the history of nations. America continues to attract striving immigrants . . . . So[,] *the United States is and remains the one indispensable nation. That has been true for the century passed and it will be and true for the century to come*.") (emphasis added).

[124] Daniel Blumenthal, *The Unpredictable Rise of China* (Feb. 3, 2019), https://www.theatlantic.com/ideas/archive/2019/02/how-americans-misunderstand-chinas-ambitions/581869/("In 2012, soon after he became secretary general of the CCP and president of the People's Republic of China, he delivered the rejuvenation speech at a historical exhibition within China's National Museum, in Beijing….Xi reminded his audience that the CCP had long struggled to restore China to its historic centrality in international affairs. 'Ours is a great nation,' he said, that has 'endured untold hardships and sufferings.' But the Communist Party, he said, had forged ahead, 'thus opening a completely new horizon for the great renewal of the Chinese nation.'"). Robert Lawrence Kuhn, *Xi Jinping's Chinese Dream*, N.Y. TIMES (June 4, 2013), https://www.nytimes.com/2013/06/05/opinion/global/xi-jinpings-chinese-dream.html (China seeks to restore its former status as global economic leader).

[125] Huang Zheping, *Chinese President Xi Jinping Has Vowed to Lead the "New World Order"* (Feb. 22, 2017), http://finance.yahoo.com/news/chinese-president-xi-jinping-vowed-084654413.html ("China should take the lead in shaping the 'new world order' and safeguarding international security").

"[b]eing a big country means shouldering greater responsibilities for regional and world peace and development."[126] China — recognizing the importance of alliances — has endeavored to engage U.S. allies, bringing them within China's orbit of influence.[127]

The radical transformation in the United States' perceptions of China is illustrated in the vast differences between contemporary United States National Security Strategy documents.[128] In a relatively expedited time frame, the U.S. has moved from optimistically expecting China to embrace the U.S.-led Western liberal order to perceiving China as a strategic adversary.[129] China also views the U.S. with an understanding that each side is locked in a geo-economic battle focused on economic and financial power.[130]

> In this sense, we should attach importance to the mutual influence of trade disputes and financial markets so as to achieve the following targets: *to minimize the impact of trade disputes on China's financial market, to contain any harm to*

[126] Michael Schuman, *U.S.-China Rivalry: Whose Money Will the World Follow. . .* , BLOOMBERG (May 14, 2015), https://www.bloomberg.com/news/articles/2015-05-14/u-s-china-rivalry-whose-money-will-the-worl
d-follow-. Unsurprisingly, China envisages an increasing military role to protect Chinese national interests overseas and is rapidly developing a powerful military. *See* Anthony H. Cordesman, *China's New 2019 Defense White Paper*, CSIS (July 24, 2019), https://www.csis.org/analysis/chinas-new-2019-defense-white-paper ("The PLA actively promotes international security and military cooperation and refines relevant mechanisms for protecting China's overseas interests. To address deficiencies in overseas operations and support, it builds far seas forces, develops overseas logistical facilities, and enhances capabilities in accomplishing diversified military tasks").

[127] *See China, Israel to Continue Win-Win Cooperation: Chinese Envoy,* XINHUA NET (Dec. 10, 2019), http://www.xinhuanet.com/english/2019-12/10/c_138620210.htm (noting increasing China-Israel economic integration); *See also* BRI, Michael Schuman, *The U.S. Can't Make Allies Take Sides over China*, THE ATLANTIC (Apr. 25, 2019), https://www.theatlantic.com/ international/archive/2019/04/us-allies-washington-china-belt-road/587902/ ("Washington pressured Rome . . . to steer clear of Beijing's global infrastructure-building program, warning that Italy's participation 'lends legitimacy to China's predatory approach to investment and will bring no benefits to the Italian people.' The plea fell on deaf ears."). The United States in response endeavors to convince allies to reduce economic integration with China. *See* Ivan Levingston, *Caught in Trump's Trade Crossfire, Israel Chases China Deal*, BLOOMBERG (Dec. 23, 2019), https://www.bloom
berg.com/news/articles/2019-12-23/caught-in-trump-s-trade-crossfire-israel-chases-deal-with-china (U.S. pressuring Israel to reduce economic cooperation with China).

[128] *See* KEVIN D SCOTT, JOINT OPERATING ENVIRONMENT 2035: THE JOINT FORCE IN A CONTESTED AND DISORDERED WORLD (2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/concepts/joe_2035_july16.pdf. ("Russia, China, and other revisionist states may also increasingly partner and coordinate with each other or with smaller, but militarily-active partners such as Pakistan or North Korea").

[129] Joel Slawotsky, *Law at the End of the Day Principled Realism: Thoughts on the New U.S. National Security Strategy,* http://lcbackerblog.blogspot.com/2018/01/joel-slawotsky-principled-realism.html (comparing differences between recent National Security Strategy documents reflecting a transformational U.S. perception of China).

[130] *See* Kevin Rudd, *Kevin Rudd on US-China Relations: This is a New and Dangerous Phase*, AUSTRALIAN FIN. REV. (Jan. 23, 2019), https://www.afr.com/policy/kevin-rudd-on-uschina-relations-this-is-a-new-and-dangerous-phase-20190122-h1acu6 ("Last year [2018] represented a fundamental strategic turning point in the 40-year history of US-China relations. This is not just an American view; it is also the Chinese view").

> *the rival's side in the trade war, and to prevent the opponent from using the trade war to manipulate and attack the domestic financial market.*[131]

The new contentious relationship[132] has generating a more confrontational and acrimonious tone in various contexts.[133]

In light of the rivalry, the United States Department of Justice's "China Initiative" is an important development which may have consequences for the FCPA extraterritorial jurisdiction question. The China Initiative "reflects the [Justice] Department's strategic priority of countering Chinese national security threats and reinforces the President's overall national security strategy."[134]

> China wants the fruits of America's brainpower to *harvest the seeds of its planned economic dominance*. Preventing this from happening will take all of us, here at the Justice Department, across the U.S. government, and within the private sector. With the Attorney General's initiative, *we will confront China's malign behaviors and encourage them to conduct themselves as they aspire to be one of the world's leading nations.*[135]

Not surprisingly, one of the China Initiative's goals is to "[i]dentify Foreign Corrupt Practices Act (FCPA) cases involving Chinese companies that compete with American businesses."[136]

The China Initiative's emphasis on enforcement of the FCPA is understandable from the vantage point of the United States; Chinese entities compete with U.S. entities for business globally and therefore are perceived as potentially causing deleterious effects on United States economic interests and possible national security threats.

The China Initiative's focus on the FCPA is unsurprising given the U.S. perception that China is a strategic economic competitor seeking to undercut the hegemonic status of the U.S. Focusing on Chinese entities and FCPA

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[131] Mei Xinyu, *Financial Defense Important in US-China Trade War* (Aug. 12, 2019), http://www.globaltimes.cn/content/1161201.shtml.

[132] *See* Remarks by Vice President Pence on the Administration's Policy Toward China, WHITE HOUSE (Oct. 4, 2018), https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/ ("[T]he United States Navy will continue to fly, sail, and operate wherever international law allows and our national interests demand. We will not be intimidated and we will not stand down….[O]ur message to China's rulers is this: This President will not back down."); Alexandra Alper & David Lawder, *Trump Considers Delisting Chinese Firms From U.S. Markets*, REUTERS (Sept. 27, 2019), https://www.reuters.com/article/us-usa-trade-china-limits/trump-considers-delisting-chinese-firms-from-u-s-markets-sources-idUSKBN1WC1VP (U.S. considering measures including de-listing Chinese shares).

[133] Paul D. Shinkman, *China Threatens Trump Over F-16 Sale to Taiwan*, U.S. NEWS (Aug. 16, 2019), https://www.usnews.com/news/world-report/articles/2019-08-16/china-threatens-trump-over-f-16-sale-to-taiwan (China threatens serious retaliation if the U.S. sells F-16s to Taiwan); https://www.cotton.senate.gov/files/documents/Cotton-Crenshaw%20Bill%20to%20Hold%20China%20Accountable%20(FINAL).pdf (proposed bill to allow suits against China and Chinese entities for damages arising out of gross negligence in handling the 2019-2020 Corona virus pandemic).

[134] U.S. DEP'T OF JUSTICE, *supra* note 15.

[135] U.S. DEP'T OF JUSTICE, *supra* note 15.

[136] U.S. DEP'T OF JUSTICE, *supra* note 15.

violations may be viewed as comporting with the Congressional intent in enacting the FCPA to protect U.S. national interests.[137]

Moreover, China's economic model is state-capitalism and numerous important and strategic corporations are controlled or owned by the Chinese government, which heightens national security concerns.[138] Chinese SOEs are important actors in international economic law[139] and are likely to increase in importance in the years ahead.[140] "The role of SOEs has become all the more important . . . China is home to 109 corporations listed on the Fortune Global 500 — but only 15% of those are privately owned".[141]

Furthermore, important global corporations based in China that are not formally SOEs have been identified by the U.S. as being owned or controlled by the Chinese military.[142] Thus, from an American perspective, the China Initiative's FCPA focus is sensible for two reasons. One, SOEs are known to be inefficient and are plagued with corruption;[143] even SOEs in the EU are

[137] *See* Brewster, *supra* note 14, at 1623 ("[T]he 'major motivation for the FCPA was a perception of the national security risks that foreign payments posed. Congressional hearings highlighted the legislators' very strong concern *that foreign corrupt payments were harming the United States' ability to win the Cold War*.") (emphasis added).

[138] *See* Joel Slawotsky, *The National Security Exception in US-China FDI and Trade*, 6 *CHINESE J. COMP. L.* 228, 233 (2018) ("Specifically, but not exclusively, Chinese State-owned enterprises (SOEs) are also perceived as inherently more threatening to national security due to their governmental links."); *See also* Qingjiang Kong, *Emerging Rules in International Investment Instruments and China's Reform of State-owned Enterprises*, 3 CHINESE J. GLOBAL GOVERNANCE 73 (2017) ("SOEs are exactly established to execute national strategic goals").

[139] *See* Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?*, 19 J. INT'L ECON. L. 657 (2016), https://academic.oup.com/jiel/article/19/3/657/1751149 ("Contrary to what might be expected, state-owned enterprises (SOEs) still play a role in twenty-first century trade. More importantly, the (possibly) competition distortive behaviour of SOEs is no longer only affecting the domestic markets, but has expanded to international trade."); Evan B. Shaver, *Two Paths to Development: Policy Channeling and Listed State-Owned Enterprise Management in Peru and Colombia*, 21 J. BUS. L. 1006, 1009 (2019) ("As economies with large mixed-ownership SOEs like China and Brazil become increasingly influential, analyzing policy channeling will be vital to understanding the global economy.").

[140] Chad P. Bown & Mary E. Lovely, *Trump's Phase One Deal Relies on China's State-Owned Enterprises*, PIIE (March 3, 2020), https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-phase-one-deal-relies-chinas-state-owned-enterprises ("The phase one accord committing China to buy additional US goods seems certain to strengthen Chinese state-owned enterprises (SOEs) and state control of the economy.").

[141] Amir Guluzade, *The Role of China's State-Owned Companies Explained*, WORLD ECON. FORUM (2016), https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/.

[142] *See Trump Administration Says Huawei, Hikvision Backed by Chinese Military*, CNBC (June 25, 2020), https://www.cnbc.com/2020/06/25/trump-administration-says-huawei-hikvision-backed-by-chinese-military.
html ("The Trump administration has determined that top Chinese firms, including telecoms equipment giant Huawei Technologies and video surveillance company Hikvision, are owned or controlled by the Chinese military, laying the groundwork for new U.S. financial sanctions.").

[143] *See also* Evan B. Shaver, *Two Paths to Development: Policy Channeling and Listed State-Owned Enterprise Management in Peru and Colombia*, 21 J. BUS. L. 1006, 1008 (2019) ("Generally, states weigh social, economic, and strategic interests. These can include industrial policy, regional development, public goods supply, as well as corrupt motives.").

known to be more corrupt and inefficient than privately-owned entities.[144] Two, national security concerns are heightened when an SOE[145] is involved since the suspicion is that the SOE needs to take into account governmental objectives.[146] Chinese corporate violations of the FCPA may potentially be regarded by U.S. authorities as puzzle pieces within the greater context of the U.S.-China geo-economic contest. Therefore, China's state-capitalism and control may serve to constitute a more visceral exemplar of adverse "domestic effects" than if engaged in by a purely private market actor without a sovereign controller.

A. Effects in the U.S.: National Security, Technological Rivalry and National Economic Interests

Once the presumption is rebutted, a U.S. court will examine whether the overseas conduct caused adverse effects in the United States. As more fully discussed above, China's stunning rise is now starkly perceived by the United States as a national security threat: "[n]o country presents a broader, more severe threat to our ideas, our innovations, and our economic security than China."[147] Economic, technological and military power are overlapping foundations of hegemonic leadership. Innovations within emerging technologies such as 5G and AI will be led by corporations exemplifying the significance of corporations in the hegemonic rivalry. Specifically with respect to emergent technologies, dominating them will likely crown the hegemonic winner for two reasons: One, the offensive capabilities of emerging technology *even in the non-military context* — are potentially devastating: the power to shut down electricity, water and critical infrastructure; interference with a nation's capital markets and financial

[144] *See* OECD, STATE-OWNED ENTERPRISES AND CORRUPTION: WHAT ARE THE RISKS AND WHAT CAN BE DONE (2018), https://www.oecd-ilibrary.org/executive-summary_5j8mrpgm7s8n.pdf. . .itemId=%2Fcontent%2Fcomponent%2F9789264303058-3-en&mimeType=pdf (extensive corruption problems at SOEs globally).

[145] EUROPEAN COMMISSION, STATE-OWNED ENTERPRISES IN THE EU: LESSONS LEARNT AND WAYS FORWARD IN A POST-CRISIS CONTEXT (2016), https://ec.europa.eu/info/sites/info/files/file_import/ip031_en_2.pdf ("SOE objectives often go beyond mere profit maximization and include societal objectives.").

[146] Li-Wen Lin & Curtis J. Milhaupt, *Bonded to the State: A Network Perspective on China's Corporate Debt Market*, 3 J. FIN. REG 1 (2017), https://doi.org/10.1093/jfr/fjw016 ("[E]xtensive state intervention in the economy, weak formal institutions to check state power, and the pervasive influence of the Communist Party — encourages all firms to seek rents from the state by cultivating ties to party and government organs *and by aligning their business models with the policy objectives of the Party-state.*") (emphasis added).

[147] *See supra* note 10 (American officials believe that "[n]o country presents a broader, more severe threat to our ideas, our innovation, and our economic security than China."). *See also Remarks by Vice President Pence on the Administration's Policy Toward China*, *supra* note 133 ("China's aggression was on display this week, when a Chinese naval vessel came within 45 yards of the USS Decatur as it conducted freedom-of-navigation operations in the South China Sea, forcing our ship to quickly maneuver to avoid collision. Despite such reckless harassment, *the United States Navy will continue to fly, sail, and operate wherever international law allows and our national interests demand. We will not be intimidated and we will not stand down* . . . [O]ur message to China's rulers is this: *This President will not back down*.") (emphasis added). In contrast, just a few years ago, the United States perceived itself as "the exceptional nation".

stability; election hacking to run a desired candidate and/or influence public opinion and other permutations all offer effective and efficient paths to virtually conquer or seriously degrade a strategic adversary.[148] Two, nations able to exploit emergent technologies will bring vast sums of wealth to the sovereign.

For example, the U.S. claims that Huawei poses a national security threat and is in reality an arm of the Chinese military.[149] The U.S. has attempted to convince allies not to allow Huawei 5G infrastructure in their economies threatening to withhold security cooperation should an ally permit Huawei into their nation.[150] The concern over Huawei is a key motivator of heightened U.S. enforcement exemplified by the China Initiative on the basis Huawei poses a national security threat to the U.S.[151] Of course, U.S. enforcement is negatively perceived by China who is threatening retaliation for nations heeding U.S. warnings.[152]

U.S. government enforcement agencies could argue that the clear Congressional intent in enacting the FCPA — and its amendments[153] — was to defend U.S. business interests and reduce the corrosive effects of overseas corruption on the national interests of the United States. The primary intent was to level the playing field and to eliminate adverse consequences to U.S. businesses facing competitors willing to engage in bribery by vesting the corrupt corporations with an unfair advantage. If foreign corporations corruptly take business from U.S. corporations, such conduct may be understood as inherently and directly affecting the national interests of the United States. U.S. government agencies can argue that such adverse effects on the U.S. is particularly compelling in the context of the U.S.-China hegemonic rivalry. Enforcement agencies could argue that — and this may

[148] *See* Nicole Perlroth & Scott Shane, *In Baltimore and Beyond, A Stolen N.S.A. Tool Wreaks Havoc*, N.Y. TIMES (May 25, 2019), https://www.nytimes.com/2019/05/25/us/nsa-hacking-tool-baltimore.html ("For nearly three weeks, Baltimore has struggled with a cyberattack by digital extortionists that has frozen thousands of computers, shut down email and disrupted real estate sales, water bills, health alerts and many other services.").

[149] *See Trump Administration Says Huawei, Hikvision Backed by Chinese Military*, *supra* note 143.

[150] Christopher Bing, Jack Stubbs, *U.S. Pressuring Allies to ban Huawei 5G*, Reuters (April 16, 2019), https://www.reuters.com/article/us-usa-cyber-huawei-tech/u-s-to-press-allies-to-keep-huawei-out-of-5g-in-prague-meeting-sources-idUSKCN1RR24Y.

[151] *See US Moves to Cut Huawei off from Global Chip Suppliers* (May. 15, 2020), https://asia.nikkei.com/Economy/Trade-war/US-moves-to-cut-Huawei-off-from-global-chip-suppliers (U.S. seeks to ban chip sales to Huawei).

[152] Shi Jiangtao, *Chinese Ambassador Accused of Threatening German Car Industry if Huawei is Frozen out,* SOUTH CHINA MORNING POST (December 15, 2019, https://www.scmp.com/news/china/diplomacy/article/3042190/chinese-ambassador-accused-threatening-german-car-industry-if (China will retaliate should Germany Ban Huawei 5G); Li Sikun, *China Ready to Target Apple*, *Qualcomm, Cisco and Boeing in Retaliation Against US' Huawei Ban*, GLOBAL TIMES (May 15, 2020), https://www.globaltimes.cn/content/1188491.shtml (China will retaliate against U.S. measures against Huawei).

[153] *See* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 368 (2019) ("Courts may also weigh congressional intent, especially in regard to the policy rationales that have encouraged Congress to amend and enact certain statutes.").

depend upon the particular Chinese enterprise — the particular Chinese business is a state-controlled or directed actor and therefore, given the context of the geo-economic competition, attempts to corruptly win business directly and negatively affects the United States.

The China Initiative already specifies China as a strategic adversary — heightened FCPA enforcement scrutiny against Chinese technology corporations — particularly Chinese corporations involved in emerging technology — on this basis is a reasonable possibility. Therefore, depending upon the specific Chinese entity and the conduct involved, U.S. enforcement agencies may have grounds to argue that the Chinese violation affected the national security interests and/or economic interests of the United States.

B. Effects in the U.S.: Accessing the U.S. Banking System

As discussed above, the 1998 FCPA Amendments conferred additional jurisdictional hooks applicable to foreign entities. Pursuant to this amendment, the DOJ interprets the applicability of the FCPA anti-bribery provisions to non-U.S. persons if the foreign entity uses "any means" or "other act in furtherance" of the bribery within the United States.[154]

Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce — as does sending a wire transfer from or to a U.S. bank *or otherwise using the U.S. banking system*, or traveling across state borders or internationally to or from the United States.[155]

According to U.S. enforcement agencies, jurisdiction is thus established should the foreign entity utilize the U.S. financial system from overseas — even without being physically present in the U.S. — vesting the United States government jurisdiction over FCPA violations.[156] FCPA enforcement actions

[154] 15 U.S.C. § 78dd-3(a).

[155] FCPA GUIDE, *supra* note 10, at 11 (emphasis added).

[156] *See* United States v. JGC Corp., No. 11-CR-260 (S.D. Tex. Apr.il, 6, 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-dpa.pdf. (The DOJ claimed jurisdiction based on the defendant's wiring of funds that were routed through correspondent banks in the U.S. thus establishing a territorial act in furtherance of the FCPA violation). *See also* United States v. Snamprogetti Netherland BV, No. 10-CR-460 (S.D. Tex. July 7, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-07-10snamprogetti-info.pdf ("caused wire transfers totaling approximately $132 million to be sent from Madeira Company 3's bank account in Amsterdam, The Netherlands, to bank accounts in New York, New York, to be further credited to bank accounts in Switzerland and Monaco controlled by Tesler for Tesler to use to bribe Nigerian government officials."); United States v. Technip S.A., No. 10-CR-439 (S.D. Tex. June 28, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/06-28-10-technip-information.pdf (same); United States v. Snamprogetti Netherland BV, No. 10-CR-460 (S.D. Tex. Jul.07, 2010), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-07-10snamprogetti-info.pdf ("corrupt U.S. dollar payments to be wire transferred from Madeira Company 3' s bank account in Amsterdam, The Netherlands, via correspondent bank accounts in New York, New York, to bank accounts of Tri-Star in Switzerland for use in part to bribe Nigerian government officials."); United States v. Unitell, LLC, No. 16-CR-137 (ER) ¶¶ 66-71 (S.D.N.Y. Feb 18, 2016),

have alleged jurisdiction because the transactions were denominated in U.S. Dollars and used correspondent banks located in the U.S. to further the bribery. The ability to bring Chinese corporations within the enforcement rubric of the FCPA via the defendant's utilization of U.S. banking would allow government agencies to reach a large majority of international transactions which are generally U.S. Dollar denominated.

Although a discussion of the historical relationship of extraterritoriality as an outgrowth of state sovereignty is beyond the scope of this article, it is sensible to conclude that in a virtual world the concept of "territory" should reflect the huge leaps technology that render a requirement of "physical presence" a more nebulous concept. The fact that modern technology enables the seamless transfer of funds instantaneously would favor a conceptualization of the FCPA's "territorial jurisdiction" to encompass the use of accounts held in the United States without regard to being physically present. In other contexts this is already evident. For example, the U.S. efforts at combatting terrorism and money laundering translate into financial accounts located in the U.S. as a basis for jurisdiction.[157] Even with respect to civil law suits, banking through the U.S. may constitute a sufficient nexus to rebut the presumption.[158]

No U.S. court has ruled whether utilization of banks in the United States satisfies the "territorial hook" of the FCPA as no defendant has raised this defense. If challenged, a court might concur that based upon modern technologies, using a sovereign's financial system does not require physical presence. The conceptualization of a "territorial nexus" via the use of wiring funds through U.S. based banks may therefore be sufficient to demonstrate the conduct touched and concerned the United States territory. Banking relationships with U.S. correspondent accounts in the United States, because of the significance of such accounts to further the bribery, might very well be found by a court as a sufficient jurisdictional basis to allow enforcement agencies to pursue FCPA violators.[159]

https://www.justice.gov/criminal-fraud/file/827496/download (Noting defendants transferred money into and out of correspondent banks located in New York).

[157] *See* Pamella Seay, *Practicing Globally: Extraterritorial Implications of the U.S.A. PATRIOT ACT's Money-Laundering Provisions of the Ethical Requirements of U.S. Lawyers in International Environment*, 4 S.C. J. INT'L L. & BUS. 29 (2007); Lani Cossette, *New Long-Arm Authority over Foreign Bank Raises Due Process Concerns but Remains A Viable Tool to Prevent Money Launderers from Abusing the U.S. Financial System*, 71 GA. WASH. L. REV. 272, 274 (2003).

[158] Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 214–15, 219 (2d Cir. 2016) (Second Circuit ruling that a foreign bank's wire transfers between through a U.S. bank was in fact sufficient "domestic conduct" to overcome the presumption against extraterritoriality. Such activity included "numerous New York-based payments" and "financing arrangements conducted exclusively through a New York bank account.").

[159] *See, e.g.*, 18 USA PATRIOT ACT § 981(k) (2001) ("if criminal proceeds are deposited in a foreign account in a foreign bank, and that bank has a correspondent U.S. based account at a U.S. bank, the U.S. government can seize an amount of money equal to the criminal proceeds from the correspondent account").

V. CONCLUSION

In view of the U.S.-China strategic rivalry, Chinese corporations that are not "domestic concerns" nor "issuers" may be subject to enhanced FCPA enforcement for bribery which occurred completely outside the United States. Pursuant to the recent Supreme Court cases re-emphasizing the presumption against applying Federal statutes to overseas conduct, U.S. courts will examine the language, content and structure of the statute to determine whether Congress intended the statute to be applied extraterritorially. The *Scoville* ruling held that once the presumption is lifted, the traditional "conduct and effects" test was to be used by courts to determine whether the statute applies to overseas conduct.

The language, context and legislative intent militates strongly in favor of rebutting the presumption with respect to the FCPA bribery provisions. U.S. government enforcement cases against Chinese entities for FCPA violations will likely be able to demonstrate sufficient Congressional intent to rebut the presumption. Once the presumption is overcome, the question of extraterritorial application will be controlled by the conduct and effects test. Depending upon the specific facts, U.S. government agencies can likely satisfy the "conduct and effects" test by demonstrating the defendant's actions that threaten or impair the economic and/or national security interests of the United States and/or by establishing the defendant's usage of the U.S. financial system to further the bribery.

Chinese corporations should re-evaluate their international practices to ensure ongoing compliance with U.S. laws such as the FCPA and understand that their conduct is potentially seen as a direct threat to United States national security and/or economic security interests. Chinese corporations should also note that utilizing U.S. banking may also serve as an independent basis to bring them within U.S. FCPA enforcement jurisdiction. Prior FCPA enforcement actions have relied upon the defendant's use of U.S. banking in connection with the bribery and this jurisdictional is sensible given modern technology and is likely to remain unless successfully challenged by a defendant.