The global anti-bribery collaboration in evolution

A systematic analysis of historical puzzles and key contemporary questions

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Abstract
Purpose – The purposes of this paper are to organize historical, solved questions and recent, unsolved questions in a coherent, progressive way; explore the key question to be answered under this systematic framework; and reflect on an alternative analytical perspective to the current “problem-solving-oriented” approach. Transnational bribery regulation, with the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention as the central governing legal instrument, is on the top agenda of international governance. However, its complex nature makes theoretical viewpoints on this topic rather fragmented. This fragmentation is used to help understand the wisdom of the Foreign Corrupt Practices Act (FCPA) approach in the early years. However, as the FCPA approach was internationalized and evolves to its current phase, in which individual inquiries become path-dependent and interdependent, the fragmentation causes more confusion than makes contribution.

Design/methodology/approach – Sections 2 and 3 retrospect the historical trajectory of academic research on the global regulation of transnational bribery, systemizes relevant theoretical insights and illustrates how people’s understandings of the wisdom of the FCPA approach in early years affect their evaluations of the effect of the OECD Anti-Bribery Convention in the contemporary era. Given that, at present, the most popular viewpoint is that the Convention is “ineffective”, Section 4 systemizes the diverse causal attributions of the “problem” in current academic literature, sorts out the roots causes and points out the key question for the next step forward under the version of the “problem-solving-oriented” analysis. Section 5 has a reflection on the inherent limitation of a “problem-solving-oriented” approach for our understanding of the effects of the Convention.

Findings – Under the version of a “problem-solving-oriented” approach, the key question to be solved is how to establish a mechanism to cope with the surreptitious nature of transnational bribery and the self-sacrificed nature of the FCPA-style approach simultaneously. The popular “problem-solving-oriented” approach has an inherent limitation to create new knowledge on the multilateral anti-bribery collaboration. A reality-based, historical analytical perspective is a good alternative to it.

Originality/value – The paper presents a personal, original organization of the conventional theoretical insights to the operation of the global anti-bribery collaboration and the underlying logics of these viewpoints. The paper also presents the author’s personal analysis of the “technical omission” and “inherent limitation” of a problem-solving-oriented approach to analyze the performance of the global anti-bribery collaboration, and the power of a historical analytical perspective as an alternative.

Keywords A “problem-solving-oriented” approach, A historical perspective, A systematic review, Multilateral anti-bribery collaboration, The effects of the OECD anti-bribery convention,
The wisdom of the FCPA approach

Paper type General review
1. Introduction
Transnational bribery refers to acts of bribes paid by multinational corporations (hereinafter “TNCs”) to foreign officials in business transactions. As a by-product of international trade, the phenomenon is, by no means, a recent existence. However, only very recently has it been taken as a criminal offence, marked by:

- the US's enactment of the Foreign Corrupt Practices Act (1977) (hereinafter “the FCPA”) in 1977, which prohibits US nationals from paying bribes to foreign officials in overseas business transactions; and
- the 1997 Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention (OECD, 1997), which popularized the FCPA approach to the whole world of industrialized countries and an increasing number of peripheral countries.

Transnational bribery regulation, with the OECD Anti-Bribery Convention as the central governing legal instrument, is currently on the top agenda of international governance of public affairs, and also one of the most popular topics in anti-corruption analysis.

1.1 The variety of puzzlements on the global anti-bribery collaboration
The creation and the internationalization of the FCPA approach raise much puzzlement for academic research:

- In the early years, as a revolutionary anti-corruption initiative of the USA, the wisdom of the FCPA attracted concerns. As transnational bribery inherits many characteristics of domestic corruption, previous works explore the wisdom of the FCPA by answering conventional anti-corruption questions like the nature of transnational bribery (Waldman, 1974; Nichols, 1997, pp. 310-332; Doig, 1998; Nesbit, 1998, pp. 1277-1295; Ackerman, 1999; Salbu, 2000, pp. 658-670; Salbu, 2001; Holmes, 2009; Dion, 2010), its social impacts (Cockcroft, 1996; Nichols, 1997, pp. 333-349; Williams and Beare, 1999, pp. 115-132; Zeldin and di Florio, 2000; Salbu, 2000, pp. 658-670; Nichols, 1999, pp. 270-278; Vega, 2010; Johnson, 2010, pp. 94-97) and possible countermeasures such as civil actions (Burger and Holland, 2006; Young, 2009; Vega, 2010). Out of the general belief that corruption originates in and affects a variety of aspects of our social life (e.g. economic, political and cultural aspects), individual inquiries to these questions could be quite divergent.

- The FCPA approach is different from traditional anti-corruption experience in terms of its regulatory means. In particular, the reasonability of its two anti-conventional characteristics – supplie-side control (Bertok, 1999, pp. 279-303; Salbu, 2000, pp. 671-677; Sung, 2005; Pieth, 2007, pp. 20-26; Holmes, 2009, pp. 384-387; Baughn et al., 2010) and extraterritorial application of criminal laws (Chaikin, 1997; Nichols, 2000, pp. 650-654; Kaczmarek and Newman, 2011; Magnuson, 2013, pp. 394-399) need justifications.

- In the era of the USA’s unilateral enforcement of the FCPA, the self-sacrificed nature of such sort of approach in terms of the USA’s export interests in overseas markets was realized by corporations and scholars (USDOC, 1980, pp. 10-11; Kaikati and Label, 1980; USGAO, 1981; Kim, 1981; Beck and Maher, 1989; Hall,
On the positive side, the complexity of the topic permits scholars to contribute theoretical insights from their favourite perspectives. This certainly makes sense – at any rate, it is often the combination of fragmented insights that builds up overall understandings of complex issues. In fact, the variety of puzzles on the multilateral anti-bribery approach to a significant degree accounts for the prosperity of current academic scholarship. However, this belief that it is possible to gain understanding of entirety through understanding fragments applies more to static, unchanging situations (or variations in context can be neglected or considered as a given) where there is a divisible problem with independent characteristics from each other. For example, in a given piece of time and space, corrupt incentives and impacts can be considered as variables independent from each other and analyzed separately – even though they are always discussed together (Nichols, 1997). In theory, corrupt incentives and impacts themselves are also divisible and can be analyzed separately from economic, cultural and political dimensions. Provided that research does not have to take variations in context into account, explanations from each dimension can be quite persuasive, and add up to a holistic landscape of corruption. Professor Susan and many other scholars used to adopt this approach to explain the nature of the social phenomenon (Ackerman, 1999; Williams and Beare, 1999, pp. 117-118).

1.2 The flaws of fragmented analysis in an evolutionary context
However, the divisibility of and the independence among analytical questions only apply to the early stage of research on the multilateral anti-bribery approach. For example, when the FCPA was enacted, there was a demand of demonstrating the wisdom of the FCPA approach. Thus, academic research mainly revolved around the “evil” of transnational bribery and analyzes the nature of transnational bribery and the nature of the FCPA approach. Research then was “reality-based” in nature. There were no variations in the context that had to be taken as variables by the research. There seems no methodological problem in this fragmentation of analysis[4]. When the analysis of the multilateral anti-bribery approach enters into a new phase in which we extensively rely on previous theoretical insights to make sense of new phenomena, and pose/answer questions, we have to observe the multilateral anti-bribery approach in an evolutionary context: social values, institutions and theories on transnational bribery regulation are all in evolution: tomorrow’s common senses – for example, the reasonability of regulating transnational bribery used to be in disputes (Salbu, 1997; Davis, 2002) but has won worldwide acceptance years later (Pieth, 2007, pp. 11-18); and the answers to old puzzles often become the intellectual foundation for new ones – for example, the wisdom of the FCPA approach is often taken as the intellectual foundation for the discussion on the internationalization of the FCPA
approach and the enforcement of international treaties in the next steps (Nichols, 1999; Pieth, 1999). Therefore, in the overall historical trajectory of the multilateral anti-bribery approach, there is no real predetermined, unchanging “entire enterprise” at all for us to divide and fragment. We see evolutionary situations rather than static situations, and we see more interdependence rather than independence among analytical questions.

The evolvability and interdependence of puzzlements on the global anti-bribery collaboration is determined by the context-dependent nature of our knowledge of transnational bribery and its control. In a broad sense, any kind of human knowledge of our collective social life is context-dependent. If we have to count on previous knowledge to make sense of new social phenomena, we must tolerate this “limitation”. However, it is also true that some kinds of knowledge are more context-dependent than others that we cannot overlook. Our anti-corruption knowledge is one of this kind. Despite the cumulative progress in describing and prescribing for corruption in the history of human beings, indicators like incentives and impacts of corruption and the extent to which national regulators have successfully controlled corruption are unquantifiable in nature. This reality determines that common people’s perception of the level of corruption and the effects of corruption regulation mainly result from academic explanations provided by scholars or anecdotal evidence in daily life, rather than accurate measurement by adopting scientific methods. Despite people’s various attempts to quantify corruption, in the ultimate sense, it is not whether researchers draw scientifically “correct” interpretations, but whether they draw interpretations that echo the underlying values of the times that determine the acceptability of their theories. As a result, the “correctness” of people’s views on corruption and reactions to it is not deterministic, final and close, but is perceived, refutable and developable in an evolutionary context. For instance, economists once argued that corruption was economically favourable before its opposite becomes dominant and remains refutable (Tarullo, 2004, pp. 676). Transnational bribery used to be considered as a legal business activity enjoying tax deductibility in major industrialized countries, but was worldwide criminalized in merely two decades (OECD, 2012b, WGB Annual Report 2011). As our knowledge of anti-corruption is inherently mental and perceived, individual inquiries can hardly converge on a same “reality”. More likely, they maintain isolate, without any clear discourse on their inherent logics.

The path-dependence of academic research on the multilateral anti-bribery approach can worsen this problem. Precisely because of the context-dependent nature of our knowledge of anti-corruption, new theoretical insights have to reflect contemporary senses of values and keep in line with institutional development to gain acknowledgement of other people and practical application. As both social values and institutions on transnational bribery regulation are path-dependent that their contemporary characteristics largely come from what they used to be, our knowledge of anti-corruption is path-dependent too. As a result, new theories are built on various old theories which remain in unidentified logical relations. With the logic chains getting longer and more complicated, fragmentation of individual inquiries cause confusion rather than make contribution.

The flaws of the fragmentation of individual inquiries are twofold. On the one hand, we are not clear about how to pose the right analytical question because it is unclear on what have been solved and how they are solved. For example, when the FCPA was enacted, its wisdom was in disputes (Salbu, 1997; Davis, 2002; Copeland and Scott, 2003).
So the wisdom of the FCPA approach was the central question to be explained at that time. Decades later, as the proponents managed to justify the wisdom of the FCPA approach by emphasizing the FCPA approach as the extension of domestic corruption control and popularize this belief worldwide (OAS, 1996; OECD, 1997; UN, 2003), it has become common sense reaffirmed by international organizations, countries and individuals. The question of the wisdom of the FCPA approach is outdated itself. However, the way proponents justified the FCPA approach exerts significant influence on subsequent research in a perceptible or imperceptible way. Particularly, people who consider the transnational bribery regulation as an extension of domestic corruption regulation tend to expect transnational bribery to be controlled as well as domestic corruption by individual countries and by similar means, and then claim the current achievement to be “ineffective”. Logically, the central question in the contemporary era is problem-solving-oriented (Nichols, 1997; Tarullo, 2004; Ashe, 2005, pp. 2915-2916; Heimann and Dell, 2006; Schmidt, 2009; Brewster, 2010, p. 309; Trace, 2011; Spahn, 2012). When the logic line becomes long and complicated, it is quite difficult for us to realize that our original answer to the wisdom of the FCPA approach, which is the intellectual foundation of subsequent questions that might be questionable; thus, the analytical question posed, which is problem-solving oriented, might be partial.

On the other hand, we are not clear about how to answer questions because it is unclear on how it should serve the next steps. In the current academic and policy literature, even under the version of a “problem-solving-oriented” analytical approach, in the absence of a full understanding of the whole knowledge framework, the ways scholars answer the same questions could be quite chaotic and confusing. For example, one popular way to explain the “ineffective enforcement” of the OECD Anti-Bribery Convention is attributing it to signatories’ “lack of political will” (Heimann and Dell, 2006), while another popular way is attributing it to the lack of “effective monitoring” in the OECD anti-bribery system (Tarullo, 2004). Both sound reasonable, but it is really unclear on the inherent logic between the two attributions, and it is also unclear on how these attributions can serve the practice or research in the next step.

Given the context-dependent nature of our knowledge of transnational bribery regulation, individual inquiries do not make sense but in its relations with solved questions (or preconceptions) by previous academic efforts and other unsolved questions that remain in disputes[5]. Before we figure out historical and recently generated questions, the solved and unsolved ones, and their articulations, we cannot even determine the right question which dominates our next step forward. A systematic review of their dynamic evolution and interdependence, and a clear conception of an individual inquiry’s position in this dynamic system, is critical to ensure the timeliness of the analytical questions and the completeness (sometimes the correctness) of the research. What we really need is gaining an understanding of the concrete, current question through understanding variations in the historical trajectory of how institutions and academic understanding of the multilateral anti-bribery approach evolve to what it is. However, previous works seldom realize this problem, or at least have not elaborated it in a coherent way. More often, they just selectively talk off part of the historical trajectory for the purpose of solving their targeted questions, but give no justification for why they overlook other parts. To fill this analytical gap, this article organizes historical, solved questions and recently generated, unsolved questions in a coherent, progressive way; explores the
key question to be answered under the current knowledge framework; and reflects on an equally powerful (if not more) analytical perspective as a supplement to the “problem-solving-oriented” approach.

1.3 The objective and structure of this article
This article takes into account the historical trajectory of academic development on transnational bribery regulation since the enactment of the FCPA in 1977 to now, categorizes the historical, solved puzzles and recently raised, unsolved ones and then works out the key problem currently which the OECD anti-bribery collaboration cannot bypass to take the next step forward. For this purpose, Section 2 provides a retrospect on the historical trajectory of academic development on the wisdom of the FCPA approach, which is the intellectual foundation for arguments in the following sections. Section 3 summarizes academic viewpoints on the performance of the OECD anti-bribery collaboration, and analyzes how their different understandings of the wisdom of the FCPA approach and their selection of evaluative criteria exert influence on their value judgement on the effects of the OECD Anti-Bribery Convention. Section 4 analyzes the existing insights to the performance of the OECD anti-bribery collaboration, which are mainly “problem-solving-oriented” out of the researchers’ judgement of the “ineffectiveness” of the Convention enforcement. Under the version of the “problem-solving-oriented” analysis, it systematizes causal factors demonstrated by previous works and searches out the root causes of the “ineffective enforcement” from the various causal attributions. On this basis, it points out the key question of the “problem-solving-oriented” analysis in the current stage. Section 5 briefly poses a question of the “inherent limitation” of the “problem-solving-oriented” analysis, and demonstrates the power of a reality-based historical perspective to overcome this inherent limitation.

2. Historical insights to the wisdom of the FCPA approach
In retrospect, the creation and internationalization of the FCPA approach, marked by the enactment of the 1977 FCPA and the formation of the 1997 OECD Anti-Bribery Convention, raised at least two general questions for scholars. First, as an unprecedented, revolutionary anti-corruption initiative in human history, the wisdom of the FCPA approach needs an explanation. Second, by 2013, the OECD Anti-Bribery Convention had been created for over 16 years. Its effects in controlling transnational bribery are concerned. Therefore, academic research on transnational bribery regulation is divided into two major phases by the enactment of the FCPA and the formation of the OECD Anti-Bribery Convention. How people answered the first question to a significant degree laid the intellectual foundation for their understanding of the second question.

2.1 The wisdom of the FCPA approach: three historical questions
When the USA enacts the FCPA in 1977, it challenged conventional anti-corruption theory in at least three aspects. First, transnational bribery used to be an acceptable business activity which even enjoyed tax deductibility in the Western Hemisphere[6]. The FCPA approach reversed the legal status of transnational bribery from a lawful business activity to an unlawful behaviour subject to criminal sanctions. The reasonability of this dramatic change needs an explanation. Second, the FCPA stipulates the criminal responsibility of bribe-paying TNCs independently of the
responsible of bribe-accepting officials, which breaks through conventional wisdom of corruption offences which affirms the principal role of bribe-accepting officials in bribery deals (Getz and Volkema, 2001, pp.7-30). For this reason, there is a need to make sense of the supply-side control created by the FCPA approach. Third, the FCPA extends its jurisdiction to nationals’ activities abroad which institutionalizes nationality principle in the application of laws. In an era when territoriality principle is dominant, the legitimacy of this approach in international law is questioned. As the three characteristics of the FCPA approach challenge conventional anti-corruption experience, whether they are well-explained, determines whether the FCPA approach is acceptable to the general public. Therefore, research in early years was missioned to answer the three sub-questions, of which individual inquiries may be even diverse.

2.2 Two interpretative paradigms

2.2.1 The “problem-centric” paradigm. While the unique characteristics of the FCPA approach pose a question of the wisdom of the FCPA approach, researchers’ underlying epistemological beliefs on the relation between the problem of transnational bribery and its regulators lead to two juxtaposing interpretive paradigms. A popular paradigm can be phased as “problem-centric”. This paradigm considers transnational bribery, like physical phenomena in the natural world, exists as an objective reality and exerts influence on social life. Regulators stay detached from it until they perceive that this problem goes against interests which they seek to protect. In the relation between the problem of transnational bribery and regulators, the “evil” of transnational bribery precedes and the regulator(s) is in the second place to respond. The FCPA approach is a logical result of regulators’ perception and evaluation of the “evil” of transnational bribery – although the “perception” and “evaluation” itself cannot be detached from subjective factors. Therefore, when researchers seek to analyze the wisdom of the FCPA approach, the “evil” of transnational bribery is the logical starting point, and the causality between this “evil” and corresponding countermeasures is highlighted. Researchers are supposed to draw common characteristics of transnational bribery which could gain universal acceptance among jurisdictions. This paradigm gains “public knowledge”.

This paradigm has yielded important insights. Generally, the “evil” of transnational bribery is viewed as divisible, so previous works illustrate it from more than a single perspective such as the economic ineffectiveness; the damage on governance; and the inherent immorality of the behaviours. One precondition for reasoning is a common intellectual foundation. Thus, the proof of the “evil” of transnational bribery draws much support from conventional wisdom of (domestic) corruption. Given the worldwide hostility towards corruption, despite the nuanced cultural differences in crimes and penalties, (domestic) corruption doctrine provides a good perspective to preach the “evil” of transnational bribery. It is believed that although the impacts of transnational bribery probably vary among jurisdictions and over time, as there is a universal hostility towards corruption around the world, regulators and citizens from different jurisdictions share a common intellectual foundation (Nichols, 2000, pp. 650-655). For this very reason, once again, studies on the “evil” of transnational bribery emphasize a lot on the similarities between transnational bribery and domestic corruption, and tend to consider the FCPA approach as an extension of domestic corruption control. In most
early academic and policy literature, they are mentioned together without a distinction (German, 2002; Johnstone and Brown, 2004).

It seems out of disputes that conventional anti-(domestic) corruption doctrine is not directly applicable to illustrate the “evil” of transnational bribery. It needs to be extended to fit the “transnational” nature of transnational bribery. Conventional corruption doctrine condemns bribery because it harms the integrity of public power of one country. The country of the bribed officials and its citizens are always taken as the victims of a bribe deal. This theory cannot directly help make sense of the home country’s condemnation of its nationals’ acts of paying bribes to a foreign official, given that there is no obvious national interest harmed. For this puzzle, some researchers introduce the context of globalization and the concept of “global welfare” to explain the “evil” of transnational bribery. Once the general public accept that there exists some “global welfare” beyond national territories, the damage of transnational bribery on fair competition and effective resource allocation on an international scale can be easily understood as a kind of “evil” (Glynn et al., 1997, pp. 7-27; LeVine, 1989, pp. 685-700; Elliott, 1997, pp. 175-233; Ackerman, 1997, pp. 31-60; Almond and Syfert, 1997).

Premised on the “evil” of transnational bribery, a progressive understanding of the reasonability of supply-side control and extraterritoriality is possible. Given the “evil” of transnational bribery, the supply-side control approach can be justified by proving:

- the active role of bribe-paying TNCs in bribery deals; and
- the effectiveness of supply-side control in reducing transnational bribery.

For the first point, the independent responsibility of bribe-paying TNCs can be illustrated provided the concept of “global welfare” and the private rights of business competitors of bribe-paying TNCs is taken into account. A number of works have demonstrated the active role of bribe-paying business people in the furtherance of transnational bribery deals (Sung, 2005; Holmes, 2009; Baughn et al., 2010) and the effectiveness of reducing transnational bribery by restraining bribes’ influx (Nichols, 1999). Likewise, the extraterritorial application of criminal laws can be justified by illustrating that it is in line with international law; and the effectiveness of extraterritorial application of laws in reducing transnational bribery. Many scholars suggest that nationality principle is a public acknowledgement around the world, even though it is not a routine (Nichols, 2000, pp. 648). They also clarify that the claim of “moral imperialism” or “cultural intrusion” (Salbu, 1997, pp. 275-280; Salbu, 2000) is actually a misunderstanding (Nichols, 2000, pp. 650-654). Besides, extraterritoriality of the FCPA approach is identified by empirical data and theoretical reasoning as an efficient means to reduce transnational bribery (Kaczmarek and Newman, 2011; Magnuson, 2013).

2.2.2 The “regulation-centric” paradigm. Another paradigm, in contrast, is “regulation-centric”. It considers the FCPA approach as the logical starting point to explain its wisdom. In the relation between the regulator and the “evil” of transnational bribery, the regulator is in the first place that defines the “evil” of transnational bribery. Transnational bribery and its “evil” might be objective, but it is also possible that a regulator’s condemnation of transnational bribery is fully or partly out of their perception of this “evil” – which the epistemological belief of this paradigm tends not to deny, the FCPA approach is just up to the regulator’s active choice. In this “regulation-centric” paradigm, the “evil” of transnational bribery is insufficient to be
taken as the evaluative criteria for the wisdom of the FCPA-style approach. Instead of affirming the objectivity of the “evil” of transnational bribery, this paradigm believes that researchers should not revolve around the value judgement declared by lawmakers. A “regulation-centric” paradigm sets insights on the property and effects of the concrete regulatory measures. Research of this kind tends to be a reality-based, *ad hoc* one, fixing on a specific, representational regulator(s) rather than that a general, abstract one. It is supposed to observe interactions between variations in regulatory measures and variations in its social impacts in a continuous time period. The wisdom of the FCPA-style approach lies in its own characteristics and influence rather than the nature of the regulated “problem”.

This paradigm yields important insights too. Interpretations start from the objective property of the FCPA approach to analyze or predict its social impacts. This paradigm permits to not only focus on similarities between transnational bribery regulation and domestic corruption regulation but also on their differences. Particularly, the unilateral enforcement of the FCPA is highlighted. The FCPA approach distinguishes itself from conventional anti-corruption approaches as a unilateral action taken by the USA but affecting all exporting countries. In the inherent logic of the FCPA enforcement, no matter a unilateral action of the USA in the early years or a multilateral collective action after the creation of the OECD Anti-Bribery Convention, obligates individual countries to reduce the influx of bribes into foreign countries, and thereby “level the playground” for all foreign business competitors (*Pieth, 2007*, p. 21). In essence, it requires individual countries to conduct completely altruistic behaviours in terms of overseas business interests. As this altruism seems to go against the classical rationality assumption on country behaviours, the motive of the USA, which initiated the FCPA approach, puzzles researchers. US academia has long been curious of, or worrying about, the destructive effects of the FCPA on their national interests.

Gaining an understanding of the impact of the unilateralism of the FCPA seems to be a progressive process in which new viewpoints tend to deny all old ones. In the early years after the promulgation of the FCPA, when transnational bribery was still held as an activity accelerating overseas business, the FCPA approach was widely considered as a behaviour of the USA’s “unilateral disarmament” and “pan-moralism”. Based on the general belief that national laws are principally missioned to serve national interests, academic and policy literature of the day analyzed the economic effects of the FCPA approach, concluded it as to be unwise and suggested to repeal or internationalize it (*Wall Street Journal, 1979*; *USDOC, 1980*, pp. 10-11; *Kaikati and Label, 1980*; *USGAO, 1981*; *Kim, 1981*; *Beck and Maher, 1989*; *Hall, 1994*; *Hines, 1995*; *Salbu, 1997*, pp. 275-280; *Zagaris and Ohri, 1999*; *Copeland and Scott, 1999*). On the contrary, other works argued that there was no evident causal relationship between the FCPA enforcement and the business loss of the USA (*Richman, 1979*; *Graham, 1984*; *Beck et al., 1991*; *Richardson, 1991*). There are also some works suggesting that the FCPA approach is partially consistent with the USA’s economic interests and conclude that the FCPA can be partially enforced “in a manner consistent with the economic interests of payor states” (*Davis, 2002, 2012*). Despite the conflict among viewpoints, arguments of this sort basically take the economic impacts of the FCPA as the evaluative criterion of the wisdom of the FCPA approach.

Another interpretative approach tends not to revolve around the FCPA’s impact on overseas business opportunities, but seeks to demonstrate the wisdom of the FCPA by
illustrating its consistency with the USA’s long-term, overall national interests. Research of this kind is loosely grounded on the assumption of rationality of state behaviours – which is one popular assumption of classical realism (Geertz, 1973; Keohane, 1989, p. 40), and defines the wisdom of the FCPA not as a question of altruism or rationality but as a question of how to understand its rationality. This approach rids of the purely economic dimension, and explains the FCPA as a result of an evaluation of trade-offs in which short-term export interest brought by transnational bribery is sacrificed for the sake of more superior national interests (e.g. defence interests). Professor Mark Pieth once conveys this message by arguing that “scholars have taken the enactment of the FCPA more or less for granted; few discuss the reasons for such an unusual step in the 1970s”:

[T]here must have been strong domestic reasons for the USA legislator to take this step unilaterally, reasons going beyond the general sympathy of the Carter administration for business ethics (Pieth, 2007, pp. 7-8).

Mark Pieth and other researchers give some speculations. For example, although transnational bribery accelerates export industry in a short timescale, a Laissez-Faire policy may lead the US companies to be too dependent on paying bribes that they can hardly maintain their real competitiveness (Pieth, 2007, p. 8; Johnson, 2010, pp. 94-98). Besides, the prevalence of transnational bribery had a tendency to affect other national interests (e.g. defence interests) beyond export interests, so the USA adopted the FCPA approach to counterbalance the potential negative effects of transnational bribery on other national interests (Pieth, 2007, p. 8). It is also argued that the USA engaged in such an unprecedented action for the purpose of rebuilding the reputation of the business community and American democracy which were damaged by the revealed cases at that time (Abbott and Snidal, 2002, p. 162; Klich, 1996). Being convincing or unconvincing, these arguments emphasize that the USA started the FCPA approach out of a holistic consideration of the country’s national interests. Even if the FCPA approach seems to go against USA’s export interests in a certain area or in a short term, it benefits the overall interests of the USA on a larger scale or in a long run.

Interpreting the FCPA as a result of the regulator’s evaluation of trade-offs is a good way to justify the rationality of the FCPA. Particularly, it points out that the approach which takes export interests as the sole criterion for evaluating the wisdom of the FCPA might be ill-considered. The rationality of the FCPA should be put and evaluated in a broader context. However, this interpretative approach has flaws. A comparison of trade-offs (e.g. short-term export interest vs. long-term export interest) helps to explain the FCPA as a rational approach of the USA. However, as the values of different national interests vary from one person to another, and the real decision-making procedure was also more complicated than a linear comparison of several national interests, this approach is more of heuristic value than leading to concrete conclusions. When this approach manages to demonstrate that USA policymakers adopted the FCPA for self-seeking purposes other than for ideological commitment to morality, it cannot answer another question which is critical for further progress: whether the FCPA was a happenstance or a logical consequence of the day? We need to prove whether the FCPA was the destiny of the times because we do not analyze the wisdom of the FCPA approach for making judgements but for progressive purposes – to understand its potential to survive and expand in a longer historical time period. For this end, we need
to exclude the impact of accidental historical events to prove or disprove a proposition that even if back to the 1970s, the FCPA would come out once again in the same manner. This is a requisite but unprepared work for our understanding of the enforcement of the FCPA-style approach in the new era of “collective unilateralism” (Pieth, 2007, p. 20). This unsolved historical question reconfirms my argument in the introductive part of this article: “we cannot understand the right question to be solved and the right theoretical resources to solve it before we understand how historical questions are answered”. However, this article does not tend to give further discussion on this question.

2.3 Implications of the two paradigms

Researchers adopt the two paradigms have produced many and quite different interpretations of the wisdom of the FCPA approach. In most situations, these interpretations coexist without a self-categorization. However, based on different epistemological beliefs, interpretative insights of the two paradigms are in fact of different practical and theoretical values.

In the appearance, both paradigms converge on a conclusion that the FCPA approach should be popularized (Abbott and Snidal, 2002, p. 162; Magnuson, 2013, pp. 383-386). However, the motives behind this argument are different. The “problem-centric” paradigm highlights the corruption nature of transnational bribery and makes use of people’s hostility towards corruption to warrant the legitimacy of the FCPA approach. One logic inference is that all countries which strive for economic growth and democratic values should join the fight. Following this logic, the FCPA approach should be popularized to as many jurisdictions as possible for the sake of the welfare of the whole human community. The subtext is that “each country should combat transnational bribery, no matter what others do”. As this paradigm has a sense of commitment to morality, it won worldwide endorsement from academia, national regulators and international organizations in the 1990s and the early 2000s, which is an extraordinary stepping stone to the organization of the OECD Anti-Bribery Convention. On the other hand, the “regulation-centric” paradigm which does ad hoc analysis of the characteristics and impact of the FCPA approach, emphasizes the negative effects of the USA’s unilateral enforcement of the FCPA. One logic inference of which is that the FCPA approach should be internationalized, otherwise it should be repealed to protect the USA’s national interests. A subtext is that “if other countries do not regulate transnational bribery, our country should not either”.

Although both paradigms support the popularization of the FCPA approach, researchers that adopt different interpretative paradigms are in fact following different logic, which may affect their insights to the performance of the anti-bribery collaboration in the next phase. The “problem-centric” interpretative paradigm is premised on the “evil” of transnational bribery to justify the FCPA approach. It is more or less idealist, and tends to consider moralism as the driving force of the FCPA-style approach and take this approach for granted, but leaves little space for exploring the real driving force of the FCPA approach. This paradigm’s overwhelming emphasis on the “corruption nature” of transnational bribery, tends to limit its vision to an individual jurisdiction (either a general one or a specified one) and drive people’s conception of transnational bribery to be away from international relations. Despite the international perspective of many works (e.g. those explaining the “evil” of transnational bribery in a globalization context), their focus is on separate jurisdictions instead of an international
community with intricate interactions between countries in an interest pattern built by the FCPA approach. Besides, as the “problem-centric” interpretations have assumed the FCPA approach to be a logical response to the “evil” of transnational bribery, people tend to assume that transnational bribery, as well as domestic corruption in individual countries, should be controlled. If individual countries’ behaviours are observed to be under this prediction, they are considered as “anomalies” or “problems”, and must result from objective obstacles (e.g. the difficulty in detecting) or external interventions (e.g. the fear of being exploited). Then the mission of the regulators and scholars is to work like an engineer to figure out and amend these technical problems (e.g. making use of the role of competing companies to reveal bribe deals) (Carrington, 2009, pp. 385-392).

The “regulation-centric” interpretative paradigm, on the other hand, realizes (or is able to realize) the influence of the FCPA approach on countries besides the host and home countries of parties of bribe deals. Because of its emphasis on the “altruism” of the FCPA-style approach, it is quite easy to realize the tension between the self-seeking nature of countries and the altruism of the FCPA approach. Besides, as the “regulation-centric” paradigm which seeks the wisdom of the FCPA-style approach in its inherent property and practical effects, there is no assumption on why signatories regulate transnational bribery and how the transnational bribery should be regulated[7], but flexible, developable and progressive insights to fit new situations. It permits a historical observation of the performance of the FCPA-style approach in a real, changing context (although researchers follow this paradigm not necessarily perform in this way). Interpretative insights of this kind are less likely to be troubled by “anomalies” and “problems” during the enforcement of the FCPA-style laws. There is no methodological difficulty in reasoning the “status quo” at all.

3. Evaluative criteria of and value judgement on the effects of the convention

3.1 Global institutional development and a new analytical question

Since the 1990s, because of the acceleration of global economic integration and the efforts by the USA, the “problem-centric” paradigm gradually becomes the intellectual foundation for policymakers, scholars and the general public to understand the wisdom of the FCPA-style approach. Meanwhile, the damage of unilateral enforcement of the FCPA also won wide concerns in the USA. Based on this intellectual foundation and as a result of the USA’s aggressive efforts (Pieth, 2007, p. 9, p. 16; Tarullo, 2004), around year 2000, there was a wave of establishing international and regional anti-bribery agreements (OECD, 1994, 1996; EU, 1996, 1997; OAS, 1996; UN General Assembly, 1996a, 1996b; UN, 2003; World Bank, 1997; IMF, 1997; TIBPI, 1999). The central instrument among these agreements is the OECD Anti-Bribery Convention (Pieth, 2007, pp. 11-12; Spahn, 2012, p. 251). Similar to the FCPA, the Convention regulates transnational bribery by supply-side control (i.e. reducing the influx of bribes from TNCs to foreign officials). So the essence of the participation of other major industrialized countries is to turn the USA’s unilateral enforcement of the FCPA to a “collective unilateralism”, as Professor Pieth (2007, pp. 20-26) phases.

The wave of establishing international anti-bribery agreements attracts a lot of concerns from academia. Scholars from multiple disciplines elaborate the achievements in legislative aspect during the period from the USA’s unilateralism to the collective unilateralism, analyze the specific programs (e.g. regulatory instruments and
compliance programs), identify underlying issues and predict the next steps (Low, 1998; Nesbit, 1998; Pieth, 1999; Williams and Beare, 1999; Zagaris and Ohri, 1999; Healy et al., 2003). Since the mid-2000s, the wisdom of transnational bribery regulation is less likely to be a disputable question. Alternatively, the implementation of these agreements becomes the overriding concern. Particularly, the search of the right ways to evaluate and improve the enforcement of the OECD Anti-Bribery Convention begins to dominate academic and policy literature in the new millennium. However, as this effect of the Convention is quite difficult (almost impossible) to be substantiated and quantified, researchers tend to draw divergent conclusions.

3.2 Two evaluative criteria of the effects of the convention

Given that the global politics are still state-centric in the absence of substantive supranational power, the enforcement of the Convention depends on individual countries’ making and enforcing national laws. Accordingly, there are two general dimensions taken as the indicators of effects of the Convention: lawmaking and law enforcement.

Academic and policy literature in the early years after the ratification of the Convention shed a great deal of attention on the achievement in lawmaking. Given the heterogeneity of global politics, how the Convention provisions could be equally incorporated into different jurisdictions without violating their own logic used to be a technical concern. However, this problem was foreseen and reflected in the Convention. Instead of a pursuit of uniform legislations, the Convention adopts a principle of “functional equivalence” to allocate obligations for signatories (Pieth, 2007, p. 28). It means that the Convention requires signatories to adopt measures of which the “overall legal effects” but not the literal provisions meet the requirements of the Convention (Pieth, 2007, p. 27). As this scheme involves individual characteristics of a variety of jurisdictions, the “overall legal effects” of individual jurisdictions fail uniform evaluative instruments. However, the peer-review system organized by the OECD Working Group on Bribery (OECD WGB) helps solve this issue. In reality, the OECD WGB has done a perfect job of evaluating whether and how treaty obligations are incorporated into national legal frameworks by way of its three-phase program (OECD Press Release, “Peer Review”). Basically, academic and policy literature has little disagreement on the significant achievement at this point.

The power of the OECD peer-review system to ensure the “functional equivalence” of measures adopted by individual signatories is inspiring. In fact, this monitoring system is a principal reason for the USA to foster the international anti-bribery agreement under the OECD framework (Pieth, 2007, pp. 9-10; Clinton, 1998, p. 2290). However, there is a gap between effective lawmaking and effective law enforcement. The OECD peer-review system was soon found to be incompetent to evaluate the Convention enforcement, although it aims to do so. Basically, the OECD measures enforcement by collecting and publishing data on investigations and prosecutions in signatories. It is generally believed by both anti-corruption scholars and criminalists that data of this kind have no direct correlation with the actual level of enforcement (Tarullo, 2004, p. 683; Burger and Holland, 2006, p. 47; Trace, 2011, p. 1). The weakness of the OECD peer-review monitoring system in measuring enforcement has been confirmed by a lot of academic and policy literature (Pieth, 2007, p. 30; Tarullo, 2004, p. 685; Heimann and Dell, 2006, p. 3).
Transparency International (TI), as a non-governmental organization caring about anti-corruption efforts, has made attempts to produce technical means to monitor and quantify corruption. Among all its measurements, Bribe Payers Index (BPI) is most relevant to our topic (TI, BPI). First issued in 1999, BPI measures the relative propensity to pay bribes in foreign countries of companies from leading exporting countries. The data sources mainly come from interviews to business people in emerging economies. This methodology is widely acknowledged to have inherent limitations. It is compiled on the basis of data from emotional human beings; their rankings reflect only subjective evaluation rather than objective reality. Another imperfection is the artificially defined 0-10 scoring system, where the scores themselves are meaningless unless being used for comparison purposes. As a result, although the academia is long thirsty for quantitative data on corruption, the methodological reliability and the usage of the BPI are in constant disputes (Chaikin, 2009, pp. 12-13). Apart from the BPI data, in the TI’s periodical reports on the enforcement of the OECD Anti-Bribery Convention (Heimann and Dell, 2006, p. 3), the data on investigations and prosecutions are still taken as an evaluative criterion of individual compliance, the weakness of which has been mentioned above.

### 3.3 Dualistic value judgments

The difficulty in substantiating and quantifying the enforcement of the Convention does and will continue to plague research on transnational bribery regulation. Meanwhile, the failure in finding a universal evaluative criterion of the enforcement of the Convention drives researchers to make judgements pursuant to the imperfect prosecution data and TI BPI. Consequently, evaluation results vary, and, in many situations, are controversial.

These value judgements can be categorized into two positions: the argument on “effectiveness” and the argument on “ineffectiveness”. Works of the first viewpoint are not many. Generally, researchers holding this viewpoint observe the gradual improvement in BPI scores and/or on investigations and prosecutions by signatories and conclude that transnational bribery is effectively controlled by the enforcement of the Convention and/or the Convention is adequately enforced (Sanyal and Samanta, 2011; Razzano and Nelson, 2008; Heimann and Dell, 2006). A natural inference of affirming effective enforcement is to maintain the status quo with moderate policy improvements. Mainstream academic viewpoints affirm the ineffectiveness of the Convention enforcement. Generally, researchers holding this viewpoint shed light on the smallness of the number of investigations and prosecutions. By 2013, a big number of signatories still keep zero records of investigations and prosecutions. The number of investigations and prosecutions is also very small in the remainder (OECD, 2011; Trace, 2011). Generally, it is claimed that the enforcement is far below an effective level. For some researchers, this smallness is unacceptable and can be taken as a direct evidence of the ineffectiveness of the Convention enforcement[8]. Although the correlation between prosecutions and the enforcement of the Convention obligations is disputable, the remarkable records of the USA, which are times bigger than the sum of prosecution records of all other signatories, seem to only reconfirm the ineffective enforcement of the Convention obligations by most signatories. Therefore, despite the lack of solid evidence, most researchers still tend to be convinced of the ineffectiveness of the Convention enforcement (Tarullo, 2004, pp. 673-675; Heimann and Dell, 2006).
3.4 “problem-solving-oriented” research

Both the arguments about the “effective enforcement” and that about the “ineffective enforcement” are based on the same factual evidence. Given that the ultimate goal of both arguments is to find ways to enhance the Convention enforcement, this distinction in value judgements does not cause any fundamental influence on the ultimate goal of research. However, they are quite different in the reasoning process and focal points. Along with the popularization of the belief of the “evil” of transnational bribery as a new form of corruption, people tend to expect transnational bribery is controlled as well as domestic corruption by industrialized countries, and are less likely to be satisfied with the “status quo”. The argument on “ineffective enforcement” better suits this demand. Besides, technically, the argument about “ineffective enforcement” considers the “status quo” as a “problem”. It permits researchers to work like doctors, making use of their existing knowledge to diagnose and prescribe for the “problematic parts” of the multilateral anti-bribery approaches. Thus, it is a more ambitious way to push forward the enforcement of the Convention. For these reasons, the argument on “ineffective enforcement” is more widespread than the “effective enforcement” argument. And logically, further research is often “problem-solving-oriented”.

4. A “Technical omission” in the current problem-solving-oriented research and the key question for the next step forward

4.1 A constructed “problem” and its attributions

Affirming the ineffectiveness of the enforcement of the FCPA-style laws leads researchers to conduct “problem-solving-oriented” research. Working out the sources is the intellectual foundation for institutional improvement, and also the part that current academic literature revolves around but has not reached a consensus on. Therefore, it is a central task of current academic research on the OECD anti-bribery collaboration, and it should be solution-oriented for practical application.

For diagnosing the “problematic parts” of the global anti-bribery collaboration established under the Convention, abductive reasoning is unavoidable. Abduction is a reasoning process explaining anomalous observations which run counter to people’s general prediction of things. To makes sense of these anomalies, people propose explanatory hypotheses of which the anomalous phenomena are a logical consequence[9]. One inherent characteristic of abduction is that the explanatory hypotheses are plausible explanations instead of definite sources even when we manage to prove causality. Therefore, conclusions can be refutable (Magnani, 2001)[10]. But I do not aim to revolve around the nature of abduction here. What I indeed argue is, because of this inherent characteristic of abduction, the central task of the causal attribution is not simply searching plausible explanations, but should also make an evaluation of “more relevant” and “less relevant” explanations.

For this end, there are two caveats: given the complex nature of transnational bribery regulation, the causal chain between the explanatory hypotheses and the “ineffective enforcement” is long with many intermediate links and offshoots. It is necessary to make a distinction between peripheral causes and root causes to catch the point of next step’s institutional improvement. On the other hand, it is also important to make a distinction between predominant causes and subdominant ones during this process.
4.2 Chaotic attributions in current literature

The two caveats are what are generally missing in current academic and policy literature. As a result, previous academic works on this topic present a rich but confusing landscape of causal attributions of the “problem”. The attributions are various; for example, they may attribute the “ineffective enforcement” to signatories’ lack of political will to regulate transnational bribery; to the high cost of detecting and investigation transnational bribery; to the consideration of export interests; to the fear of being exploited by others in a “public good game”; and to the absence of coercive power in world politics (for an elaborate discussion on these attributions, see the following part). Separately, every factor seems to account for the “ineffective enforcement” that we can work out solutions from various perspectives. However, there is no systematic analysis of the underling logic among these factors. It is not clear on whether these factors are juxtaposing or in a causal relationship themselves or contradictory. I phrase this confusion as a result of a “technical omission” of current academic literature, considering that it is technically avoidable. For this very reason, in this section, I analyze this rich but confusing version, starting from discussing the most intuitive causes to search the root causes, and make a distinction between predominant factors and subdominant factors. During this process, the fragmented causal attributions in current academic scholarship are reorganized in a logically coherent way. On this basis, I pose the key question for a “problem-solving-oriented” approach which the OECD anti-bribery collaboration cannot bypass to take the next step forward.

4.3 Searching the “root causes” in a progressive way

“Root causes” indicate the basic, fundamental factors which initiate the causal chains of the “problem”, but not factors in the intermediate links caused by root causes. Specific to the case of the global anti-bribery collaboration, we need to figure out the fundamental factors that impede signatories’ better compliance to the Convention. Whether an explanatory hypothesis finds the root cause or just a peripheral one largely depends on whether the explanatory hypothesis remains attributable. Besides, the causal attributions should also keep in mind its’ practical application in the next phase. Adopting these evaluative criteria, here we search the root causes of the “ineffective enforcement” of the Convention in a progressive way, from the most intuitive, surface causal factors to the most fundamental, deep causal factors. During this process, the underlying logical relations among these explanatory hypotheses contributed by previous works, their practical applicability and whether there is a consensus or it remains in disputes are discussed.

4.3.1 The most peripheral cause: signatories’ “lack of political will”. It is generally believed that the effects of the enforcement of the FCPA-style laws in signatories are determined by:

- the political will of the signatories to enforce these laws; and
- the objective capacity of these signatories to enforce these laws.

Considering the diversity of legal traditions and their capacity to control corruption, the Convention has tried measures to exclude the possible impact of the objective capacity of signatories on their law enforcement which may burden less capable signatories. It only makes requirements for signatories according to their handle of domestic corruption, so as not to pursue literal equality at the cost of substantive fairness (OECD,
In addition, when many researchers conclude the “ineffectiveness” of the Convention, they have already excluded the impact of individuals’ objective capacity. Meanwhile, the USA, being far ahead in investigating transnational bribery, reconfirms that what concerns academia and practitioners is more the political will of signatories than their objective capacity to regulate transnational bribery. As a result, a popular version of causal attribution for the “ineffective enforcement” is criticizing signatories shirking instead of criticizing their incapacity (Heimann and Dell, 2006, p. 8).

There is little doubt that, at present, most signatories have not tried enough efforts to fulfil their promises. However, reasonable as this attribution sounds, the lack of political will is more like a “symptom” attributable to more fundamental causes such as the unaffordable high cost of transnational bribery control or the consideration of the export interests. It is neither a fundamental factor nor can it be coped with by way of institutional improvement.

4.3.2 Causal attributions for the “lack of political will”: regulation cost and the exploitability of individual efforts. More deeply, researchers tend to attribute national regulators’ lack of political will – which is an intuitive one – to their regulatory environments which is largely determined by the nature of the activity and the institutions of the OECD system. Basically, these attributions are based on the classical rationality assumption – a fundamental assumption that has great influence on the way international relations scholars explain multinational cooperation and conflicts. Based on this assumption, countries can be analyzed as rational actors which calculate and compare costs and benefits of transnational bribery regulation. Thus, the payoff structure of transnational bribery regulation is very central for understanding and predicting one’s strategy. Analyzing the payoff of the strategy and its alternatives is the main approach for researchers to attribute the signatories’ shirking.

As the costs and benefits of one country’s regulation of transnational bribery is reflected in two aspects – one’s substantial expenditure on transnational bribery regulation and one’s position in the OECD Anti-Bribery system, how the payoff structure accounts for the “ineffective enforcement” can be interpreted from the two perspectives. On the one hand, some researchers attribute the “ineffective enforcement” to signatories’ consideration of the high cost of detecting and investigating transnational bribery. The “non-compliance” is not interpreted as an active choice of signatories, but the “inertia” of their tradition of law enforcement for which prosecutors may “continue to allocate their time and energies pretty much as before” (Tarullo, 2004, p. 688). As the “transnational nature” of transnational bribery can make investigations difficult, expensive and inefficient, prosecutors are disinterested in allocating resources to investigating transnational bribery cases but continue to target against other types of crimes. Scholars holding this viewpoint tend to suggest popularizing civil actions so as to free governments from the burden of collecting information and evidence on acts of transnational bribery (Carrington, 2009; Burger and Holland, 2006, p. 47; German, 2002, p. 256).

A more popular explanation, which is also the one dominating current literature, attributes signatories’ “lack of political will” to their calculation of their payoffs in the relations with other countries. Based on the general belief of the “evil” of transnational bribery, the global regulation of transnational bribery produces “a public good” for the world human community. Meanwhile, as one country’s adoption of the FCPA-style
approach is considered as an activity which provides a fairer competition environment for foreign TNCs by way of constraining their own TNCs, the effect of transnational bribery regulation is not merely a function of anti-corruption techniques but also a function of signatories’ interests in the interaction with other national regulators (Brewster, 2010, p. 310). Conventional theoretical wisdom on multinational cooperation contributed by international relations scholars – which emphasize the exploitability of country strategies and the function of international mechanisms to cope with the exploitability of country strategies – helps explain and prescribe for the collective action problem of the OECD anti-bribery coalition. In this formulation, it is observed that the OECD anti-bribery collaboration has a very peculiar cooperation model which requires co-operators to contribute towards the collective interests of all (i.e. a clear international market) by way of contributing towards the accounts of other countries in the first place (i.e. one’s prohibition of outbound bribery improves the competition environment for others at its own cost of export interests). This anti-rational cooperation model let both scholars and practitioners argue that the “ineffective enforcement” is a natural result which cannot be avoided before the exploitability of individual efforts is well coped with (Holmes, 2009, p. 396; Schmidt, 2009; Brewster, 2010, p. 309).

Another viewpoint which attributes the “ineffective enforcement” to the existence of a number of non-signatories (Nadipuram, 2013) can fit under this argument about the exploitability of individual contributions as well, given that the essence of this attribution is still highlighting the exploitability of individual contributions in the anti-bribery collaboration (Low, 2007, p. 513; OECD, 2011; Heimann and Dell, 2006, 2010; Tarullo, 2004, pp. 678-680; Pieth, 2007, pp. 11-17).

4.3.3 Factors accounting for the exploitability of individual efforts: the absence of effective sanction mechanisms and monitoring mechanisms. No matter whether signatories choose to shirk out of consideration of the high cost of regulating transnational bribery or out of consideration of their positions in the international system, conventional theoretical wisdom on collective actions has prescribed some countermeasures for the problem of non-compliance in public-good games. Therefore, the failure to cope with non-compliance can be viewed to be a result of failure in institutions. Researchers who attribute the signatories’ “lack of political will” to their calculation of payoffs in the collaboration may further attribute it to:

• the absence of a sanction mechanism (Tarullo, 2004, pp. 687-688; Magnuson, 2013, pp. 391-393) to punish non-compliance; or

• the absence of effective monitoring mechanisms to monitor corporate behaviours and regulators’ performance.

The usefulness of a sanction mechanism to guarantee compliance is very intuitive, and also a classical argument in cooperation theory. It is often argued that in the absence of a coercive power sanctioning non-compliance, countries’ entering into agreements is not a guarantee of compliance. Therefore, some researchers attribute the “ineffective enforcement” of the Convention to the lack of coercive power to guarantee the Convention enforcement, which is an intrinsic part of international law. Of course, we have a reason to believe that a sanction mechanism can guarantee the enforcement of the Convention. However, given the anarchy and decentralization of world politics, in which states are central actors (Keohane, 1989, p. 40), the scheme of a powerful sanction mechanism is not always realistic. In international collaborations, it
is a reality that some agreements are more institutionalized and more enforceable than others. In extreme situations, it is realistic to expect countries to commit substantial power to establish international sanction mechanisms to ensure the enforcement of multinational agreements (e.g. the World Trade Organization [WTO], 2013) (WTO, “Dispute Settlement”). However, an objective reality is that at the current stage of world politics, the feasibility of establishing a sanction mechanism is more likely to be limited to mutual-benefit international agreements, where reciprocity is the guarantee for compliance. In cases of public-good-producing agreements, the absence of a central sanction mechanism is predicted to be an unchangeable truth. Recalling my argument that the abductive reasoning should serve next step’s institutional improvement, attributing the absence of coercive power to guarantee that compliance makes sense, but is not progressive.

Other scholars who realize that other than coercive power, forces like countries’ concern for their reputations also work to guarantee compliance (Keohane, 1989, pp. 30-31; Goldsmith and Posner, 2003, p. 113), tend to set attention on effective monitoring mechanisms and information channels on non-compliance. The practice has showed that some public-good-producing treaties yield considerable products too in the absence of coercive power. One example of this kind is the Montreal Protocol. With the mission to protect ozone layer by reducing production and use of fluorinated products, it was well-enforced and achieved the target before the schedule (Hashim, 2009). This means that the lack of coercive power is not the root cause accounting for “ineffective enforcement” of the OECD Anti-Bribery Convention, although we have a reason to believe that the Convention can be better enforced in the presence of a powerful sanction mechanism. Alternatively, the role of an effective monitoring mechanism in detecting non-compliance is highlighted by some scholars. Compliance theory also suggests that a monitoring mechanism which evaluates individual inputs and outputs is an effective way to overcome collective action problems. As a monitoring mechanism can provide sufficient information on each co-operator, hard-working co-operators can watch others and are free from the worry of being exploited by others, and potential free riders may have scruples for being criticized and retaliated by others. Based on this belief, some scholars argue that the current OECD monitoring system is incompetent to monitor individual compliance (Heimann and Dell, 2006, p. 3).

4.3.4 Factors accounting for the “Ineffectiveness” of the OECD monitoring mechanism: the surreptitious nature of transnational bribery. However, a closer observation suggests that the “ineffectiveness” of the OECD monitoring mechanism is not a technical problem, but an inherent part of transnational bribery and its regulation. In other words, the “ineffectiveness” of the monitoring mechanism remains attributable. Some insightful scholars have further attributed the incompetence of the OECD monitoring system in monitoring individual compliance to the surreptitious nature of transnational bribery deals, or say the immeasurability of the level of transnational bribery, which is an intrinsic part of all corrupt behaviours. Burger and Holland (2006) argue that there is a huge “impunity gap” with respect to transnational bribery. This characteristic makes knowing the number of transgressions almost impossible (Burger and Holland, 2006, p. 47). Trace Global Enforcement Report 2011 states that:

[…] research on global anti-bribery enforcement is complicated by the secrecy surrounding international law enforcement, as well as by the desire of international companies to obscure public knowledge about their bribery allegations, investigations, convictions or penalties.
This means Trace cannot know or accurately estimate how many enforcement actions are unknown and thus not yet in the Compendium or the GER 2011 (Trace, 2011, p. 1).

**Tarullo (2004)** emphasizes the difference between bribery and many other economic phenomena in the measurability of individual obligations (Tarullo, 2004, p. 683). In many other cooperation situations, for example, in the cooperation against CO₂ emission, there are (or at least it is possible to make) rigid obligations of co-operators and rigid criteria for evaluating the compliance. In the global anti-bribery collaboration, however, as transnational bribery has the characteristics of normal corrupt behaviours, secrecy of behaviours and difficulty in evaluating the frequency, it is impossible to give an accurate evaluation of companies’ compliance to national laws and countries’ compliance to international agreements. The immeasurability of individual efforts fails the general experience provided by multinational cooperation theories to address collective action problems. For example, when centralized monitoring mechanisms and peer monitoring mechanisms work to monitor compliance in other types of cooperation, they are not so workable in the global anti-bribery collaboration.

4.3.5 **Two juxtaposing root causes that account for the current dilemma and the key question of “problem-solving-oriented” analysis.** Now we are very close to the essence of the collective action problem of the OECD anti-bribery collaboration, but still yet to reach it. When previous scholarly works have full awareness of how the surreptitious nature of transnational bribery accounts for the OECD monitoring mechanism’s failure in overcoming the exploitability of individual contributions, and then accounts for national regulators’ “lack of political will” to combat transnational bribery, they are not clear on the relation between the surreptitious nature of transnational bribery and the exploitability of individual efforts in the global anti-bribery collaboration or, in other words, which is the more fundamental cause for the “ineffective enforcement”.

On the one hand, scholars who start from international relations theory, which highlights multilateral interactions and the exploitability of individual strategies, the role of monitoring and sanction mechanisms, tend to consider the surreptitious nature of transnational bribery as an anomalistic part of a new type of international collaboration, and seek to supplement or extend the general theories on multinational collective actions to suit the case of the anti-bribery collaboration. For example, **Tarullo (2004)** applies game theory to analyze the payoff structure of signatories before and after the ratification of the OECD Anti-Bribery Convention, declares the “ineffectiveness” of the Convention and attributes it to the institutional failure of the Convention monitoring system in changing this payoff structure in which signatories have their maximum benefit in shirking instead of compliance, which has roots in the surreptitious nature of transnational bribery (Tarullo, 2004, pp. 683-690). This approach is restated by Magnuson. (Magnuson, 2013, p. 388). This interpretative approach manages to account for the “ineffective enforcement”. However, as it does not have a reflection on the relation between the surreptitious nature of transnational bribery, the subsequent discussion on the solutions unavoidably revolves around the information flows of transnational bribery, which is a classical argument in collective action theory, but fails to the realize that, in the collective history of human beings, corruption has ever been “controlled”, but never been really “monitored”. The idea of searching information channels might be misleading.

On the other hand, in theory, it is also possible to start with conventional anti-corruption wisdom, which have yielded insightful ideas on coping with the
surreptitious nature of corrupt behaviours by enhancing institutional articulations, to
discuss how these experiences can be applied to the global anti-bribery collaboration. A
predictable consequence is that this approach may lead research back to discuss the
problem of national regulators’ “lack of political will”. Regardless of the starting points
of these academic attempts, they only confirm that the exploitability of individual
contributions – which is a fundamental characteristic of international collaborations,
and the surreptitious nature of transnational bribery – which is a fundamental problem
in corruption regulation, has weaved into an almost insurmountable dilemma for the
enforcement of the OECD Anti-Bribery Convention. Starting from either the perspective
of international relations theory or the perspective of corruption regulation may result in
a process of circular reasoning.

It may be noted that no matter what perspective researchers take to attribute the
ineffective enforcement and search solutions, the collaboration of the surreptitious
nature of transnational bribery and the altruistic (or self-sacrificed) nature of the
FCPA-style approach, to some degree, like a chemical reaction, distinguishes the global
anti-bribery collaboration from both normal public-good-producing international
collaborations and domestic corruption regulation. Previous theoretical wisdom on
either international cooperation or anti-corruption can hardly be directly applied to
solve this dilemma. We need new theoretical insights and institutional designs.
Therefore, the central topic of next step’s “problem-solving-oriented” analysis is to
establish a mechanism that can cope with the collaboration of the surreptitious nature of
transnational bribery and the altruistic (or self-sacrificed) nature of the FCPA-style
approach simultaneously. In more straightforward terms, it is a question of:

RQ1. How can we motivate signatories to enforce the plausibly self-sacrificed
anti-bribery laws when they cannot monitor or be monitored by other
signatories?

5. A further reflection on the analytical approaches
As our understanding of the global anti-bribery collaboration is profoundly
path-dependent, the underlying preconceptions which constitute the intellectual
foundation of the value judgement may significantly affect the way people understand
the performance of the OECD anti-bribery collaboration, make attributions and
prescribe solutions. Given that the popular view on the OECD Anti-Bribery Convention
is its “ineffectiveness”, “problem-solving-oriented” discourses dominate current
academic scholarship. In view of this, Section 4 analyzes the root causes of the
“ineffective enforcement” and poses the central question of “problem-solving-oriented”
analysis in the next phase.

However, it is noteworthy that a “problem-solving-oriented” analytical approach has
inherent limitations. On the one hand, the formulation of a “problem-solving-oriented”
analysis is based on the argument on the “ineffectiveness” of the Convention. This
argument is only one kind of value judgement based on the belief that “transnational
bribery should be controlled as well as domestic corruption in signatories”, which is
rooted in more underlying and fundamental belief of people on the wisdom of the FCPA
approach formed in earlier time. It is just one perspective. On the other hand, it relies on
conventional theoretical wisdom to identify and address the problem, which is often our
existing knowledge drawn from past experience. Logically, we are further led to care
about anti-corruption techniques which are an old topic in anti-corruption analysis, or
solutions to collective action problems which is an old topic in international relations theory. There is little space for us to draw experiences and lessons from the real achievement. In contrast to the “technical omission” discussed in Section 3, this “limitation” is an inherent part of a “problem-solving” thinking. It is unavoidable in the logic of the analytical approach.

5.1 The “inherent limitation” of a “problem-solving-oriented” approach and a static, ahistorical perspective

The “inherent limitation” of a problem-solving-oriented analytical approach can find roots in its theoretical sources. A problem-solving-oriented approach is profoundly tied with the application of our general knowledge, which is often past experience and existing theories. Therefore, it is essentially knowledge-based. In our daily life, it is so natural for us to apply preconceptions, experience and knowledge to make sense of new phenomena that we seldom give an evaluation of its applicability and limitations. An emphasis of its applicability often leads research to adopt a static, ahistorical perspective to make sense of the contemporary characteristics of the multilateral anti-bribery approach.

An ahistorical, perspective is a broad concept. Generally, it indicates analytical approaches which seek to explain contemporary characteristics of things by observing its interrelations with contemporaneous environmental factors (David, 1985, pp. 332-337). For this purpose, it often counts on our static knowledge – often theoretical models to describe and prescribe the performance of new things. For example, to figure out corrupt incentives and the right approach to regulate corruption, an economic approach that relies on calculating the payoff structure of members (e.g. individuals who conduct corrupt behaviours and regulators who pay a price to control corrupt behaviours) to identify and eliminate corrupt incentives, is an ahistorical, static analysis. Game theory which emphasizes multilateral relations is also of this kind. Ahistorical, static analysis of corruption regulation quite resembles the process of medical diagnosis which selects a diagnosis from already-known diseases, or the work of an engineer. In an ahistorical static analysis, the applicability of existing knowledge to the new phenomena is predetermined, and the task of scholars is to explain new phenomena or diagnose anomalies by deductive reasoning. For example, out of the general belief that corruption is harmful, we can infer that transnational bribery, as a type of corruption, is evil in nature. Therefore, all human actions should be carried out to serve an anti-corruption goal. For another example, when the FCPA approach is popularized by the OECD Anti-Bribery Convention to individual countries, a contrast between domestic corruption regulation and transnational bribery regulation in these signatories can reveal the effects of the Convention and sort out the sources of ineffectiveness.

However, ahistorical analysis has inherent flaws. Because ahistorical, static perspective is too committed to conventional orthodoxy, we need to act in a Procrustean way, making successive assumptions, approximations and simplifications for the real case to suit an established theoretical framework. The similarities between new phenomena and general knowledge are highlighted, but the uniqueness of the new phenomena tends to be missing. However, the acceptability of making successive assumptions, approximations and simplifications to make sense of real cases is more likely a Newtonian idea, which
has been proved to be inapplicable in intricate situations. Both science and social
science have demonstrated that in intricate systems, a tiny change in the beginning
can lead to diametrically opposite conclusions (Kiel and Elliott, 1996; Davis, 1999).
In the case of the OECD anti-bribery collaboration, we can find that many
assumptions, approximations and simplifications made by previous theoretical
models are questionable. For example, after the internationalization of the FCPA
approach, people tend to calculate the effects of the OECD Anti-Bribery Convention
by contrasting individual countries’ efforts in regulating domestic corruption and
efforts in regulating transnational bribery. However, in view of that one country’s
resources are limited and should be allocated to its urgent needs, domestic
corruption regulation which protects “national interests” definitely precedes
transnational bribery regulation which principally protects “global welfare”. The
preconception that transnational bribery should be controlled as well as domestic
corruption could be improper.

While the above example illustrates how preconceptions could be misleading, the
following example reveals that how theoretical models, which often apply a set of
standard assumptions and a set of conditions to match real cases, may be inaccurate
or even wrong. Take the application of game theory in our explanation of the
enforcement of the OECD Convention as an example. Game theory is good at
explaining unsatisfactory collaboration in complex multilateral situations (Von
Neumann, 1944). However, as this theoretical model (like many others) engages in a
combination of predetermined assumptions (e.g. mutual interests among
individuals), successive approximations (e.g. the assumption that countries behave
like rational individuals, they have a common interest to combat transnational
bribery and their behaviours are profoundly affected by their consideration of
overseas interests) is necessary for its application to account for the global
transnational bribery regulation. This application tends to lead people to count too
much on an artificial model but deviate from the reality. Up till now, there is no solid
evidence proving that signatories participated in the Convention out of their pursuit
of the “common interests” – good international trade atmosphere. On the contrary,
there are arguments that countries may strategically accept the Convention which
they have no intention to comply (Tarullo, 2004, p. 709). Given this possibility, the
real motives of the USA to create the FCPA approach and the real motives of other
signatories to establish and participate in the OECD Anti-Bribery Convention
should not be given by assumption, but as a variable. Besides, there is no evidence
proving that the rationality assumption, which assumes signatories as “rational
actors” calculating their payoffs like mathematicians, is really applicable. The
reality shows that even inside a country, the interest pattern in terms of
transnational bribery can be complicated. There is no rational brain calculating the
payoffs at all.

Some other scholars have been aware of this problem, although not seriously posed.
Tarullo questions the application of game theory to explain the effectiveness of the
OECD Anti-Bribery Convention after he applies it. He states that:

[…] like all social science models, game theory is a heuristic, rather than representational,
device. Even in versions considerably more elaborate than that employed in this article, it
cannot capture all relevant factors, much less accurately quantify them in a payoff matrix
Magnuson (2013, p. 392) also points out the inapplicability of game theory to describe these facts. Particularly, he points out that game theory cannot explain many real facts in the Convention enforcement. However, Magnuson attributes these facts to the extraterritoriality of the FCPA, which makes sense but does not capture the essence of these positive clues. After all, these viewpoints are progressive because they realize that applying existing theories without a precise evaluation of its applicability might be problematic.

5.2 Historicity and a reality-based, historical perspective
At any rate, the ultimate goal of analyzing the effects of the OECD anti-bribery collaboration is to improve its performance, for which drawing experience from the reality is equally important. We need not only focus on the gap between the reality and our expectation, as the problem-solving-oriented approach does, but the social reality itself is a kind of resource. Particularly, we need to make sense of the minority’s compliance with the Convention such as:

- Why the USA created the FCPA in 1977, and maintained it when it failed to popularize the FCPA in the 1980s? (Magnuson, 2013, p. 392)
- Why some countries (e.g. Germany) are more active than others? (Schmidt, 2009, p. 1135)
- Why some industrialized countries (e.g. The Netherlands, Australia and Canada) are moving forward one by one, when there is still no external constraint mechanism? (Trace, 2011)

These anomalous phenomena in the real-world circumstance seem to run counter to our general understanding of the rationality of country behaviours. It fails any theories based on rationality assumption.

For this reason, a historical perspective is raised in this article. A historical perspective is the counterpart of ahistorical perspective. It emphasizes the importance of counting on the historicity of our anti-corruption theories and practice to make sense of its contemporary characteristics. Historicity, as Professor Keohane accounts, refers to “the social process of reflection on historical experience that human societies undergo”. In our case, it indicates the development trajectory of people’s (or countries’s) general attitudes towards the FCPA-style approach and related institutions. A historical perspective in my discourse is reality-based, instead of knowledge-based. When a historical perspective is applied to analyze the effects of the OECD Anti-Bribery Convention, for example, there is no assumption of the effect of the OECD Anti-Bribery Convention, but an investigation in the continuous historical context to explore the variations in interactions and decision-making of individual signatories. This process has great potential of creativeness. Thus, it quite suits the case of the multilateral anti-bribery approach which is too revolutionary in its times and differs the anti-corruption experience in the collective history of human beings in aspects such as the regulated objects (acts of paying bribes in international trade), regulatory means (supply-side control), application of laws (extraterritoriality) and the protected interests (global welfare or the interests of foreign countries).

In this discourse, our emphasis of a historical perspective does not assert that an ahistorical, static economic account of corruption cannot yield important insights. Both static ahistorical perspective and a historical perspective are useful methodological
approaches to develop our knowledge on transnational bribery and its regulation. They just differ from each other in terms of the knowledge they can generate. In fact, an ahistorical perspective still plays an equally or even more important role out of its power in making use of conventional theoretical wisdom. What I really pose is, as an ahistorical perspective is applied too much than too little in previous works, we need to have a reflection on its alternatives. As previous works reflect little on how the applicability of this analytical perspective matches their analytical questions, we need to fill this gap. More importantly, we need to make sense of the part of actual facts that conventional theoretical models fail to explain. For this end, we need to keep detached from orthodoxy and theoretical models as often as we count on it. Once there are important anomalist phenomena in the real-world circumstances which cannot be explained by the prediction of existing theories, the applicability of theories should be questioned, and a reality-based analysis should be adopted.

Notes
1. Transnational corporations are not the only subjects that may pay bribes. However, as they are the mainstream of bribe payers in international business transactions, this dissertation takes transnational corporations as the representative of bribe payers.
2. In general, people may pay bribes to foreign officials for many reasons other than for business interests. For example, they may also pay bribes for political interests. However, as business bribery constitutes the mainstream of bribe deals in transnational interactions, and OECD Anti-Bribery Convention exclusively governs the regulation of business bribery, this dissertation mainly focuses on business bribery as well.
3. Almost all Western industrialized countries participated in the Convention before or around 2000. Up till January 2013, there are 40 signatories to the Convention (OECD Press Release, 2013, Status of Ratification).
4. Basically, research in this phase all fits under the background of “globalization”. Although some research realized how the coming of the context of “globalization” caused variations in the frequency of transnational bribery or people’s awareness of the problem, their key points were still posed under the context of “globalization”.
5. At present, whether transnational bribery is economically “harmful” can be taken as an example of “solved questions”, while what are the sources determining the effects of the OECD anti-bribery collaboration is an example of “questions that remain in disputes”.
6. For the USA’s changing tax policies on transnational bribery, see the following two laws: Public Law 591-Chapter 736, approved 16 August 1954, enacted during the Second Session of the Eighty-Third Congress of the United States of America; Technical Amendments Act of 1958, Pub L. No. 85-866, 72 Stat. 1608.
7. Although researchers following this paradigm used to assume the “evil” of transnational bribery as the major motives of regulators as well, but the possibility of the existence of other considerations is not denied in this logic line.
8. Meanwhile, few of them are clear on what makes “an effective level” of the enforcement.
9. For instance, when we find the ground is wet, we may hypothesize that it just rained because, once this explanatory hypothesis is proven true, the wet of the ground was a logic consequence.
10. This characteristic is an inherent part of abduction. We assume “A” is an explanation for “B” because once “A” is true, “B” must be true. But the problem here is, “B” really exists, “A” is the
hypothesized one. Therefore, we can only prove that “A” is a plausible but not a definite source for “B”.

11. For example, environmental agreements.

12. The limitation of game theory in international relations is elaborated by Keohane (1989, pp. 47-49).

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Further reading


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