

论文

《反海外腐败法》管辖权扩张的启示----兼论渐进主义视域下的中国路径

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摘要:

经济全球化使各国法治相互关联,腐败问题早已突破一国的界限,日益具有全球性。海外反腐败涉及各国经济、政治和社会文化等诸多因素,已成为世界难题,无法通过简单、线性的方式解决。此外,囚徒困境又使各国集体行动陷入进退维谷的境地。为了破解全球反腐败的难题,在渐进主义的路径下,美国《反海外腐败法》开启了海外反腐败的全球治理之门。我国日渐融入全球化进程,也与全球法治产生了更为密切的联系。《反海外腐败法》不仅对在美融资的中国私人发行人、非居民企业进行管辖,而且借由代理理论和共谋责任理论不断扩张其管辖范围,给我国政府和企业带来了巨大影响。因此,面对美国海外反腐败法律不断扩张的管辖权和日益提高的国际响应度,中国政府和企业也应该积极作为,在渐进主义的思路下参与全球反腐败治理,完善国内立法并规范企业商业行为,以更好地维护我国主权和国家利益,并为促进全球治理的达成和法治的繁荣作出努力。

关键词: 《反海外腐败法》 反腐败 司法管辖权 司法主权 渐进主义 全球治理

Implications of FCPA Jurisdiction's Expansion:China's Pathfrom the Perspective of Incrementalism

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Abstract:

Economic globalization has connected different countries in their rule of law . Corruption has likewise exceeded the boundary of a country ,and taken on a global nature . Anti-corruption is intertwined with multiple concerns such as economic ,political and cultural issues and finds no easy and simple solution . The prisoner,s dilemma further explains the difficulty in the coordinated action between countries .Following the approach of incrementalism , the Foreign Corrupt Practices Act (FCPA) of the United States has initiated the global governance in anti-corruption efforts . China,s integration into the globalization process has brought it into closer relation with global governance . FCPA exerts its impact not only by exercising jurisdiction over foreign private issuers and non-resident enterprises in the U .S .,but also by expanding its jurisdiction as proposed by the theory of proxy and conspiracy .This has significant impact on the Chinese government and Chinese enterprises . Through empirical deconstruction of a series of cases related to TSKJ ,we can clearly see that with the development of the U .S .judicial practice ,FCPA has been moving beyond traditional territorial jurisdiction and personal jurisdiction ,which may cause conflicts over jurisdiction .In view of this ,it is imperative to reflect on how to solve the conflicts and coordinate the sovereignty issues between countries to finally facilitate the efforts in tackling corruption . In essence ,preventing international corruption requires collective action .The difficulty in taking collective action and the prisoner,s dilemma show that in the complex international economic and political context ,it is very difficult to form a universally effective and coercive international convention in fighting against transnational bribery .The failure to directly reach an international anti-corruption agreement makes incrementalism a second-best but workable choice , and the unilateral measures of each country become the key to promoting incrementalism .In spite of the challenges that the expanding jurisdiction of FCPA has posed to the other countries, sovereignty ,FCPA has provided a new approach to fighting resolutely and powerfully against global corruption by making up for the current lack of an effective agreement of the international community to crack down on any firm that bribes foreign officials . With the incrementalist approach ,FCPA has become a stepping stone ,easing the way to its ultimate goal by directing anti-corruption efforts towards global governance . Faced with FCPA,s growing expansion of overseas jurisdiction and its increasing international recognition , China should actively construct effective regulatory mechanisms , improve its relevant legislations , strengthen the implementation of effective regulations on commercial activities (in particular ,China needs to strengthen the punishment on the foreign companies, bribery in China as well

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as on the Chinese companies, bribery overseas) ,and actively participate in transnational cooperation in fighting against corruption to better protect China,s sovereignty and interests , and to contribute to the development of global governance and international rule of law .Chinese enterprises should also react positively in order not to get involved in FCPA jurisdiction ,and in this way to realize further development globally .

Keywords: Foreign Corrupt Practices Act (FCPA) anti-corruption jurisdiction judicial sovereignty

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