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Multilateralization of the Foreign Corrupt Practices Act

Lisa Harriman Randall

Corruption can change the course of a nation's politics and alter the standard of living it affords to its citizens. The relationship between the public and private sectors is rendered less beneficial to both sides when corrupted by the practice of bribery. The United States expresses its disapproval of this practice in the Foreign Corrupt Practices Act (FCPA), which forbids American companies from engaging in bribery even when operating outside the borders of this country. However, there is vigorous debate over whether this law is the best means of giving effect to our national stand against the advance of corruption.

Recent years have seen increasing global interest in implementing antibribery measures. Developed countries are becoming more willing to limit their companies' freedom to give bribes to corrupt foreign officials. Conversely, developing countries are becoming more anxious to eliminate avenues through which corrupt officials collect bribes. The United States favors this trend. It has been working since the enactment of the FCPA to persuade other industrialized nations to follow its lead in outlawing bribery; however, the indigenous enthusiasm for antibribery initiatives shown by historically corrupt countries presents an unprecedented opportunity for the U.S. to broaden the effect of FCPA policies.

This Note will examine the Foreign Corrupt Practices Act and suggest a shift in the methods the United States uses to encourage the rest of the world to adopt the law's policies. Section I describes the circumstances that led to the enactment of the FCPA, and introduces general concepts that illustrate the motivation for national policies against this practice. Section II outlines the specific provisions of the FCPA and analyzes the debate between the law's supporters and its detractors. Section III reviews past and present attempts to spread the policies embodied in the FCPA beyond the United States. This Note concludes that these policies may be more effectively advanced by backing corrupt countries' own attempts to eliminate bribery than by

continuing to pressure other industrialized nations to enact their own versions of the FCPA.

I. BACKGROUND OF THE FOREIGN CORRUPT PRACTICES ACT

The Watergate affair of the 1970s was one of the most influential events in United States politics. It focused Americans' attention on the importance of elected officials' integrity and stamped certain individuals with permanent notoriety. In addition to the impact it had on American politics, the Watergate investigation brought to light a significant economic policy issue. Investigators started out looking for corporate slush funds,¹ suspecting that these funds were the source of illegal campaign contributions, but found more than they were expecting: many of these secret funds also paid for bribes² to foreign officials.

Aside from bribery's general distastefulness, it has several ramifications that make it a matter of concern. Public knowledge of the practice destabilizes friendly governments. In the 1970s, citizens of Japan, the Netherlands, and Italy were shocked to discover that their public officials had accepted bribes from American companies, creating domestic political tumult

1. Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOKLYN J. INT'L L. 385, 392 (1995).

Corporate "slush funds," uncovered during the Watergate investigations, consisted of off-the-record corporate accounts that would be used to make questionable domestic and foreign payments in order to win influence or business. Although the initial thrust of the investigation focused on illegal campaign contributions, it soon became apparent that many corporations involved in questionable behavior domestically were also practicing similar acts overseas.

Id. (footnotes omitted).

2. As used in this Note, "bribe" refers to a payment by a corporation domiciled in one country to a government official in another country, made for the purpose of influencing the official's judgment. An example of such a bribe is when a company bidding to be the contractor on a government construction project pays the official in charge of awarding that contract to select the company's bid even though it is not the best bid offered. In this context, a "bribe" does not include payments to other corporations or private individuals, however unethical, nor does it include "grease payments"—disbursements that encourage a government employee to do what he or she is already obligated to do. See discussion *infra* note 40 and accompanying text. Interestingly, according to one report, officials in different regions of the world seem to prefer different varieties of bribes: in Africa, a yacht, a sports car, or a lucrative job for a relative of the official; in Latin America, a weekend vacation, entertainment involving women, art, or jewelry for the official's wife; in Asia, a bet on a golf or poker game rigged for the official to win. Christopher Byron, *Big Profits in Big Bribery*, TIME, Mar. 16, 1981, at 59.

and disrupting diplomatic relations with other countries.³ A second negative consequence of bribery is economic inefficiency. A corrupt bidding process means the company that wins the bid is not necessarily the one that can produce the best product the fastest and for the least money, but the one willing to bribe the bid-taker.⁴ It also means that a corrupt bid-taker will prioritize government projects based on their relative potential to yield bribe money, rather than on public need.⁵ Since a company that wins a contract through bribery is not necessarily the lowest bidder, public prices affected by the corrupt contract will be higher than they need be.⁶ Finally, it is difficult for the public to have confidence in a free-market economy infected by corruption.⁷

Bribery is bad business for the corporation practicing it. Companies that bribe expose themselves to the dangers inherent in the instability of their host countries' political regimes: a company may cultivate illicit connections with a foreign govern-

3. Tamara Adler, Comment, *Amending the Foreign Corrupt Practices Act of 1977: A Step Toward Clarification and Consolidation*, 73 J. CRIM. L. & CRIMINOLOGY 1740, 1745 (1982). Disclosure of bribes "has allegedly precipitated 'the removal of a Central American president, embarrassed a Philippine regime, led to a constitutional crisis in the Netherlands, caused legislative paralysis in Japan, and shaken an Italian government.'" John W. Duncan, Comment, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 NW. J. INT'L L. & BUS. 203, 203 (1982) (quoting Gerald T. McLaughlin, *The Criminalization of Questionable Foreign Payments by Corporations: A Comparative Legal Systems Analysis*, 46 FORDHAM L. REV. 1071, 1072 (1978)). See also Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 75 (1985); Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 205 (1994).

4. See Pines, *supra* note 3, at 213. "Bribery sabotages the free market system at the core of capitalism; the best product at the best price does not win." *Id.* See also Murphy, *supra* note 1, at 393. "[B]ribery went against the basic tenet of the free market system, namely, that the sale of products should take place solely on the basis of price, quality, and service." *Id.*

5. See Murphy, *supra* note 1, at 390-91, where the author explains that [b]ribery creates the potential for widespread economic damage because it misallocates money that could otherwise be spent on worthwhile national needs. Examples of the waste that bribery encourages can be seen throughout corruption plagued Italy. A *Business Week* article describes, "highway overpasses . . . built on towering concrete pillars—even though the surrounding land is flat" and the existence of "superhighways to nowhere that begin and end abruptly."

Id.

6. *Id.* "Bribery and corruption inflate the cost of goods." *Id.*

7. Veronica Ann Deberardine, Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203, 222 (1984). An economist asks rhetorically, "[h]ow do you develop if you can't open a fruit stand without paying a bribe?" Andrew W. Singer, *Ethics: Are Standards Lower Overseas?*, ACROSS THE BOARD, Sept. 1991, at 34.

ment, only to become unwelcome when that government falls from power and its allies become suspect.⁸ Bribery is also detrimental to American businesses as a group, in that when some engage in it, the reputations and credibility of all suffer.⁹

At the time of the Watergate investigations, there was no law specifically forbidding foreign bribery.¹⁰ Corporations were required to disclose all questionable payments to foreign officials in the financial statements they filed with the Securities and Exchange Commission (SEC), and could be prosecuted for failing to do so. This provided an indirect means of discouraging the practice of giving bribes.¹¹ Apparently, though, corporate compunctions about violating disclosure laws were mild. The SEC, following Watergate investigators' tips, uncovered hundreds of cases in which companies had not reported slush fund payments they had made to government agents abroad.¹²

One of the most prominent SEC investigations in this early stage was that of United Brands, which paid the president of Honduras \$1.25 million to exempt it from the country's prohibi-

8. See David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7, 182 (1995). The author comments:

It is worth keeping in mind that foreign bribery, even if not illegal under the FCPA, still constitutes a substantial business risk for the companies or individuals involved. The same may be true of some charitable donations as well. Foreign governments change, and a payment that is unlawful in the foreign country and disclosed by a subsequent administration may cause significant problems, including criminal prosecution or incarceration without prosecution.

Id.

9. See Deberardine, *supra* note 7, at 222. "[B]ribery supports fears that American businesses operating abroad will have a corrupting influence on the host country's political systems." *Id.*

10. *Id.* at 221.

11. Levy, *supra* note 3, at 73. Issuers of publicly traded securities are required to file annual and quarterly reports with the SEC. Securities and Exchange Act of 1934, 15 U.S.C. § 78m(a)(2) (1994).

12. Pines, *supra* note 3, at 188. The author explains that

[t]he fact that over 300 companies engaged in such transactions was discovered only through voluntary disclosure. This indicates the inability of indirect means to combat the problem. The position of the SEC, and the use of the Bank Secrecy laws, required disclosure of bribes, but did not actually forbid the use of bribery itself. Meanwhile, the Mail Fraud Act was restrictive in that it only applied to bribes that used U.S. mail or wire communications. The loopholes in these indirect methods not only prevented prosecutions, but also failed to send the desired message that bribery of foreign officials was wrong.

Id. (footnotes omitted).

tive export tax on bananas.¹³ The episode, predictably labeled Bananagate, attracted particular attention because it followed the suicide of the company's chief executive officer¹⁴ and preceded a coup deposing the Honduran president.¹⁵ United Brands, however, was not alone in experiencing some degree of shame connected to foreign bribery; the list of companies found to have so acted is a long one.¹⁶

Because of the magnitude of the SEC's investigatory caseload, the agency added a program of voluntary disclosure to its regular disclosure enforcement efforts.¹⁷ Corporations that suspected they might come under SEC scrutiny could gain a measure of immunity from prosecution by admitting and rectifying improper behavior they had not previously disclosed.¹⁸ To qualify for this deferential treatment, a corporation was first re-

13. Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO ST. L.J. 655, 664 (1984). United Brands is now known as Chiquita Brands International, Inc.

14. *Id.*

15. Murphy, *supra* note 1, at 391.

16. Mathews, *supra* note 13, at 664 (describing the "incredible saga of Lockheed Corporation and its worldwide efforts to bribe senior ministers of friendly foreign governments . . . Gulf in South Korea, Exxon in Italy, and Northrop and Grumman in the Middle East"). Levy states that

[i]n the course of its investigation of questionable expenditures made by multinational corporations, the U.S. Subcommittee on Multinational Corporations revealed the payment of an estimated \$50 million by Exxon Corporation to Italian officials. Approximately \$5.5 million was paid by Gulf Oil to other foreign officials. While under investigation, Northrop Corporation disclosed to the Subcommittee that it distributed \$450,000 to several Saudi Arabian generals, \$15,000 to an Indonesian politician, and \$4500 to an Iranian government official. In addition, Northrop allegedly established a \$30 million slush fund for payments to foreign governmental authorities.

Levy, *supra* note 3, at 72.

17. Mathews, *supra* note 13, at 667. "As the scope of the payments problem became apparent, extending to foreign as well as domestic payments, the SEC realized that it did not have the resources to investigate each case carefully." *Id.* See also Deberardine, *supra* note 7, at 221. "In addition [to its ability to bring suits for failure to disclose corrupt payments], the SEC initiated a 'Voluntary Disclosure Program' to encourage corporations to report payments." *Id.*

18. Pines, *supra* note 3, at 187. "[T]he SEC indicated that it would likely refrain from taking enforcement action against U.S. companies that immediately disclosed having made any such questionable payments." *Id.* See also Marc I. Steinberg, *The Securities and Exchange Commission's Administrative, Enforcement, and Legislative Programs and Policies—Their Influence on Corporate Internal Affairs*, 58 NOTRE DAME L. REV. 173, 221 (1982) ("Although participation in the voluntary program does not insulate a company from Commission enforcement action, it does diminish the possibility that the Commission will, in its discretion, institute an action.") (quoting Exchange Act Release No. 15,570, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,959, at 8 n.7 (Feb. 15, 1979)).

quired to stop making questionable foreign payments and institute unimpeachable accounting procedures—steps designed to prevent ongoing bribery.¹⁹ Next, a participating corporation was to designate an independent special counsel to investigate the matter and make a report to the corporation's board of directors.²⁰ The special counsel's findings would then be released to the public in an 8-K filing.²¹ The corporation was also required to give consent for the SEC to use the disclosed information as the agency saw fit.²² For a corporation that had made bribe payments, the alternative was to risk subjecting itself to a formal SEC enforcement action.²³ Voluntary disclosure was preferable

19. Mathews, *supra* note 13, at 668. The author explains the program as follows:

First, a corporation's board of directors should declare an end to all payments of doubtful legality and practices involving maintenance of inaccurate books and records. Second, the board should authorize a special committee composed primarily of independent directors to perform a thorough investigation of the corporation's practices, using independent counsel and auditors to prepare a report for the full board. Third, information on the commencement and progress of the investigation should be lodged with the SEC on its Form 8-K, and a copy of the final report should be filed with the SEC. Fourth, "[i]t must be understood that the staff of the Commission will have access to any information that is discovered or developed during the investigation."

Id.

20. *Id.*

21. An 8-K filing is one in which a company subject to SEC reporting requirements—which applies to all companies whose stock is publicly traded—discloses the details of a significant corporate event. The 8-K is commonly used to report changes in control of the business as well as other significant corporate events. Form 8-K, 5 Fed. Sec. L. Rep. (CCH) ¶¶ 31.002-31.003, at 21.991-95 (Nov. 13, 1996).

22. Mathews, *supra* note 13, at 668.

23. Adler, *supra* note 3, at 1743. The author adds that

[i]n the majority of cases, the corporations consented to the entry of a judgment of permanent injunction without admitting or denying the allegations of the complaint. The consent decrees usually ordered the corporation not to make any future payments that would violate the federal securities laws. In addition, the corporation agreed to establish a special review committee to examine the payments made, analyze the corporation's accounting procedures, and make recommendations to its board of directors.

Id. (footnotes omitted). In addition to the companies discussed in *supra* note 7 and accompanying text, the SEC brought enforcement actions against Ashland Oil, Phillips Petroleum, Braniff Airways, General Tire & Rubber, Boeing, International Telephone and Telegraph, General Refractories, Page Airways, Firestone Tire & Rubber, General Telephone & Electronics, Textron, and International Systems and Controls. Mathews, *supra* note 13, at 664-65.

to a formal action because it was less public and more subject to the corporation's control.²⁴

The voluntary disclosure program was popular because it met the needs of both the SEC and the companies suspected of foreign bribery. The SEC was able to make sure shareholders knew about the disguised funds, and participants in the voluntary program were able to avoid liability and minimize publicity. The program's success manifested itself in a huge number of voluntary disclosures: approximately 450 companies admitted having made a total of more than \$300 million in bribes.²⁵ It was

24. See Mathews, *supra* note 13, at 666. The author summarizes the position of companies suspected of bribery as follows:

By employing a self-investigation procedure, a company could use inside or outside counsel, not necessarily wholly independent, and at least not subject to prior approval of the SEC or the court. It was thought that by putting the corporate house in order in advance of an SEC enforcement attack or during the pendency of an SEC enforcement investigation, a company should be able to negotiate a milder settlement when the SEC did strike in a formal enforcement action and thus, be able to achieve an internal investigation less painful and perhaps more private than the special counsel investigations mandated by a rigid SEC consent decree.

Id.

25. Commentators estimate 300 to 500 companies made voluntary disclosures, disclosing a total of about \$300 million in bribes. See, e.g., Murphy, *supra* note 1, at 392; Adler, *supra* note 3, at 1744-45; Pines, *supra* note 3, at 187. Enforcement actions and voluntary disclosures required corporations to reveal their bribery to the public. Adler summarizes some of the more notable incidents as follows:

Bell Helicopter, a subsidiary of Textron, Inc., reported kicking back \$297,000 to an official in Ghana to facilitate an aircraft sale in that country. A \$2.9 million payment by Bell in connection with the sale of helicopters to Iran was also reported. In addition, Gulf Oil Corporation reported spending \$10.3 million on gifts, entertainment and other items related to political activity in the United States and abroad, including \$4 million given to the political party of the late South Korean President Park Chung Hee. General Tire and Rubber Company disclosed that its affiliates paid \$18,600 to a Venezuelan government official to obtain confidential tax returns of competitors. General Tire also gave \$500,000 to Mexican purchasing agents to escape taxes and paid \$6 million in "consultants' fees" and \$4.4 million in "commissions" in Algeria to win contracts and ensure the cooperation of customs officials. Exxon Corporation acknowledged paying \$1.2 million in 15 foreign countries "to secure or influence government action." Exxon's Italian subsidiary made unauthorized commercial payments and political contributions totalling \$19 million. Also, Westinghouse Electric Corporation reported improper payments to a foreign business agent in Manila in order to obtain a major share of Philippine nuclear plant construction contracts.

Adler, *supra* note 3, at 1744 (citing Don Holt & John Wolcott, *The Missing Memo*, NEWSWEEK, May 22, 1978, at 22; *The Philippines: Tales from Disneyland*, TIME, Jan. 23, 1978, at 56).

not, however, flawless. Independent counsel could not always cause the subject corporations to disclose their illegal payments, and some confidential information became available to the public because of the SEC's obligations under the Freedom of Information Act.²⁶

II. PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT

A. REQUIREMENTS FOR BUSINESSES

The imperfections in the voluntary disclosure program,²⁷ along with Congressional outrage at the number and size of bribes that corporations disclosed,²⁸ prompted the drafting and passage of the Foreign Corrupt Practices Act (FCPA).²⁹ Congress' general intent in enacting the FCPA was "to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system."³⁰ Its strategy was to cut off the supply of bribes flowing from American businesses to corrupt foreign officials. One commentator opines that "no statute since the 1933 and 1934 Acts themselves has done more to effect corporate accountability by public companies than the FCPA."³¹

26. Adler, *supra* note 3, at 1743-44.

27. *Id.*

28. See Deberardine, *supra* note 7, at 220. The FCPA "represents Congress' response to the discovery that American corporations were engaged in widespread bribery of foreign officials to secure business abroad." *Id.* (footnotes omitted). See also Gantz, *supra* note 8, at 177 ("Congress enacted the [FCPA] . . . in a spirit of moral outrage . . .").

29. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1996) [hereinafter FCPA]. The FCPA was signed into law by President Carter on December 19, 1977. Pub. L. No. 95-213, tit. I, § 101, 91 Stat. 1494 (1977). See also Adler, *supra* note 3, at 1746 (describing motivation for passage of FCPA).

30. Levy, *supra* note 3, at 71. Adler goes into more detail, identifying what she believes to be

five distinct policy objectives. First, Congress believed that the payment of bribes was counter to the moral expectations and values of the American public. Second, Congress was concerned over the public scandals engendered by bribery and the resulting foreign policy problems for the United States when friendly governments were embarrassed. Third, Congress wanted to prevent the distortion of commercial competition caused by bribery. Fourth, Congress wished to prevent the spread of corruption in friendly governments. Fifth, Congress sought to minimize foreign mistrust of American business and to improve the American reputation for honesty in business dealings.

Adler, *supra* note 3, at 1745. These objectives correspond closely with the negative effects of bribery discussed in *supra* notes 3-9 and accompanying text.

31. Mathews, *supra* note 13, at 670.

The FCPA amends the Securities and Exchange Act, and contains mandates governing both accounting practices and bribery.³² It governs all "domestic concerns."³³ The United States was then, and is still, the only country in the world with such a law.³⁴ In fact, it is more common for governments to sanction bribery of officials outside their borders by allowing tax deductions for corrupt payments than to discourage foreign bribery.³⁵

The accounting provisions of the FCPA require that companies maintain their financial records "in reasonable detail," and institute accounting practices that furnish "reasonable assurances" that corporate assets are being handled responsibly and

32. FCPA §§ 78dd-1, 78dd-2, 78ff (bribery), 78m(b) (accounting).

33. FCPA § 78dd-2(a). The statute defines "domestic concern" as
(A) any individual who is a citizen, national, or resident of the United States; and
(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id. § 78dd-2(h)(1). A separate section of the statute, § 78dd-1, contains almost identical provisions addressing securities issuers, but the definition of "domestic concerns" incorporates nearly all issuers, so they need not be discussed separately. An important but often-overlooked point is that "[a]ll companies, whether or not they conduct business overseas," are subject to the FCPA. Duncan, *supra* note 3, at 206.

34. Pines, *supra* note 3, at 186; Murphy, *supra* note 1, at 386. "The United States is unique among major trading nations in outlawing as 'corrupt' under U.S. law the bribery of foreign government officials to obtain benefits." Gantz, *supra* note 8, at 16. See also Scott P. Boylan, *Organized Crime in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2019 (1996). Daniel Pines clarifies this point by noting that "almost every country forbids the bribery of its own officials, but only the United States through the FCPA forbids the bribery of another country's officials." Pines, *supra* note 3, at 186. Though there is near unanimity on this point, a few sources cite a Swedish law as similarly prohibiting bribery of foreign officials. See, e.g., Glenn A. Pitman & James P. Sanford, *The Foreign Corrupt Practices Act Revisited: Attempting to Regulate "Ethical Bribes" in Global Business*, INT'L J. PURCHASING & MATERIALS MGMT., Summer 1994, at 15, 19. It may be that the law to which they refer is similar to, but not as strong as, the FCPA. This is perhaps not surprising given the observation of a European writer, who comments, "[a]s with any developments in international business practices, the U.S. tends to lead the way, for better or for worse, and moral and ethical issues are no exception." Pat Lockett, *Suddenly Ethics Is a Buzzword*, THE HERALD (Glasgow), Aug. 25, 1994, at 6.

35. Boylan, *supra* note 34, at 2017 n.119. "While all the OECD countries have laws against domestic corruption . . . most industrialized countries allow businessmen to deduct payoffs and kickbacks, commonly described as 'commissions' or 'fees and promotional costs,' from their taxable income as a legitimate foreign business expense." *Id.*

tracked accurately.³⁶ These provisions are intended to prevent companies from maintaining the slush funds that enabled their bribery to go unnoticed in the past.³⁷ Though these provisions apply only to reporting corporations, the fact that all such corporations must comply with them may not be obvious to those that do no overseas trade.³⁸

The bribery provisions of the FCPA prohibit using any instrument of interstate commerce corruptly in the furtherance of an offer or delivery of anything of value to a foreign official, political party, or political candidate with the object of influencing that person's official decisions.³⁹ Notably, they do not criminalize what are generally called "grease" payments—those which merely "[expedite] a business-related activity that a government employee is already required to perform."⁴⁰ These kinds of ac-

36. FCPA, 15 U.S.C. § 78m(b)(2) (1996). The most controversial aspect of the accounting provisions is that "[d]espite the 'reasonableness' language, the statute contains no 'materiality' standard; all expenditures are subject to the accounting requirements, presumably on the ground that even a corrupt payment that is relatively small in absolute terms could jeopardize a far larger contract or sales relationship." Gantz, *supra* note 8, at 178.

37. Gantz, *supra* note 8, at 177. "Congress wished to make it more difficult for large corporations to conceal corrupt payments though 'slush funds' and other questionable accounting categories." *Id.*

38. Hurd Baruch, *The Foreign Corrupt Practices Act*, HARV. BUS. REV., Jan./Feb. 1979, at 32. For instance, one unlikely application of the FCPA was the SEC's investigation of television broadcaster ABC for payments it made to producers Aaron Spelling and Leonard Goldberg. The SEC asserted that ABC had not accounted for these payments in enough detail to dispel the appearance of fraudulent double-billing by the producers. Jeff Gerth, *ABC Is Under Inquiry Over Millions in Fees to Two TV Producers*, N.Y. TIMES, Aug. 17, 1980, at A1. Though this case never resulted in any official action, the investigation illustrates the point that all firms obligated to report to the SEC must comply with the FCPA's requirements.

39. FCPA §§ 78dd-1(a), 78dd-2(a). Also included in the prohibition is a transfer to a person acting as a conduit to a foreign official, political party, or political candidate. *Id.*

40. Duncan, *supra* note 3, at 206. The applicable statutory provision is contained in FCPA §§ 78dd-1(b), 78dd-2(b).

A "grease" payment does not obtain or retain business. . . . The classic example is paying \$20 to a customs official to move the necessary papers before the banana shipment rots on the dock. Such payments are allowed under the FCPA, even though this practice is illegal in the United States and in many other foreign countries.

Duncan, *supra* note 3, at 206-07 (footnotes omitted). See also Deberardine, *supra* note 7, at 224 (describing grease payments). "Unlike payments designed to induce preferential treatment, the purpose of facilitating payments is to provide an incentive to low-level foreign officials to carry out their duties efficiently. The payments do not result in these officials taking any new or changed discretionary action." *Id.* (footnotes omitted). But see Pines, *supra* note 3, at 203. "The 'routine actions' exemption [allowing grease payments]

tivities can be performed without prejudice to any other business desiring the same service, as opposed to a discretionary act that favors one business to the detriment of others.⁴¹ Individuals convicted of violating these rules may receive up to five years in jail, a \$10,000 civil penalty, and a \$100,000 fine;⁴² corporations are subject to civil penalties of \$10,000 and fines of \$2 million.⁴³

The FCPA places enforcement power in both the SEC and the Department of Justice (DoJ). The SEC may bring civil actions to enforce against (1) all violations of the accounting provisions and (2) those violations of the bribery provisions committed by reporting corporations.⁴⁴ The DoJ has (1) authority to bring all criminal charges plus (2) jurisdiction over civil bribery suits against companies that are not reporting corporations.⁴⁵

B. CRITICISM OF THE LAW

Soon after the FCPA became law, the business community began to criticize it.⁴⁶ Companies disliked the split in enforce-

helps, but it doesn't tell you whether you can safely buy dinner for the minister, or whether you can buy a snack in the cafeteria after a working session but not dinner at a French restaurant." *Id.* (citing William E. Holland, *Gift Rapping*, WASH. POST, Sept. 8, 1981, at E3). According to a former U.S. attorney, examples of uncontroversial grease payments are small payments to speed customs officials' clearance of goods or to expedite the connection of a transatlantic phone call. John S. Estey & David W. Marston, *Pitfalls (and Loopholes) in the Foreign Bribery Law*, FORTUNE, Oct. 9, 1978, at 182, 184.

41. Estey & Marston, *supra* note 40, at 184.

42. FCPA, 15 U.S.C. §§ 78dd-2(g), 78ff(c)(2) (1996).

43. FCPA §§ 78dd-2(g)(1), 78ff(c)(1). In an interesting proposed change to the penalty provisions of the FCPA, a bribery fine would be calculated as a percentage of the amount of the bribe, since a set amount such as \$2 million poses a greater deterrent for a small firm than for a large one. John L. Graham, *Don't Dilute Law Curbing Bribery Overseas by American Companies*, L.A. TIMES, June 15, 1986, Part IV, at 3.

44. FCPA § 78ff(c).

45. FCPA § 78dd-2(g).

46. Pines, *supra* note 3, at 189. "The ink was hardly dry before a steady drumbeat of attack on the statute began." *Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 708 Before the Subcomm. on Securities and the Subcomm. on Int'l Finance and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong. 414 (1981) (statement of William A. Dobrovir) [hereinafter 1981 Hearings]. The FCPA was passed in 1977 during the Carter presidency, but in 1981, the Reagan Administration, in response to business interests, introduced a package of legislation that would have substantially weakened the FCPA. George Lardner Jr., *The Assault on Watergate Reforms*, WASH. POST, July 5, 1981, at C1. The legislation would also have diminished the applicability of the Ethics in Government Act of

ment authority between the SEC and the DoJ, which meant they had to predict how both agencies would view their overseas activities.⁴⁷ In 1981, the DoJ instituted a program through which a corporation could propose a course of action for the DoJ's review and, if the DoJ approved of the action, obtain a prospective judgment offering a rebuttable presumption that the activity was legal under the FCPA.⁴⁸ However, there was no formal bar to the SEC bringing suit for the same conduct, and although the SEC stated that it would not prosecute companies for activities that the DoJ had approved, it reserved the right to find an independent cause of action in the subject company's acts.⁴⁹ The publicity involved with disclosing internal information to a government agency further deterred corporations from taking advantage of the review program,⁵⁰ as did the possibility of creating an aura of impropriety simply by inquiring about application of the FCPA.⁵¹ The DoJ has shortened its response time since the initiation of the program.⁵² Also, pursuant to 1988 amendments to the FCPA,⁵³ the DoJ has issued a report

1978, lightened restrictions on FBI and CIA surveillance activities, limited the authority of the Federal Elections Commission, and reduced the effect of the Freedom of Information Act. *Id.*

47. Duncan, *supra* note 3, at 203, 211.

48. *Id.* See also Adler, *supra* note 3, at 1755-58 (discussing procedure for DoJ reviews).

49. Duncan, *supra* note 3, at 211. See also Adler, *supra* note 3, at 1757 (SEC retained ability to enforce accounting provisions). Pines explains that . . . The original concept behind mutual enforcement was to have the SEC initiate investigations, closely cooperate with the Justice Department at the earliest stage of investigation, allow the SEC to bring injunctive relief for violations of securities law, and have the DoJ bring criminal sanctions.

Unfortunately, this cozy interplay between the agencies has never occurred. . . .

Pines, *supra* note 3, at 193 (footnote omitted).

50. Gantz, *supra* note 8, at 179. The Justice Department did express an intention to use all available exceptions to the Freedom of Information Act to keep proprietary data out of public circulation. *Justice Dept. Setting Up Review Process for Corrupt Practices Act Enforcement*, AVIATION WK. & SPACE TECH., Nov. 19, 1979, at 20.

51. Pines, *supra* note 3, at 204.

52. Gantz, *supra* note 8, at 179.

53. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, sec. 13(b), sec. 30A, sec. 104(a), §§ 5001-03, 102 Stat. 1107, 1415-25 (1988) [hereinafter Trade and Competitiveness Act]. The amendment process was a long one. As early as 1981, Senator John Chafee proposed a bill which would either clarify (as business claimed) or effectively repeal (as some public policy analysts believed) the FCPA. See Adler, *supra* note 3, at 1759 (discussing Chafee bill and arguments that it would clarify FCPA for business); Peter Grier, *U.S. Curb on Bribes: Too Prim Or Simply Proper?*, CHRISTIAN SCI. MONI-

outlining "general explanations of compliance responsibilities and potential liabilities under the FCPA."⁵⁴ However, the factors that originally made businesses hesitant to request reviews still exist, and the program is infrequently used.⁵⁵

Another complaint was the increased difficulty and expense of maintaining accounting standards that complied with the FCPA's requirements.⁵⁶ The 1988 amendments to the FCPA did not significantly relax its accounting requirements, but businesses seem to have adapted to keeping track of their finances with the high degree of precision that the law requires.⁵⁷

Further, companies were uncertain what acts would introduce FCPA liability when performed by foreign nationals hired to conduct business on behalf of U.S. corporations.⁵⁸ The statute originally held a corporation liable when it knew or had "reason to know" about a bribe offered by one of its foreign agents.⁵⁹ The

TOR, July 28, 1981, at 14 (citing commentary by original sponsor of FCPA that proposed Amendments would destroy FCPA). The pro-business Reagan Administration supported the amendment but advocated even more extreme diminutions to the law. Jeff Gerth, *White House Seeks Eased Bribery Act*, N.Y. TIMES, May 21, 1981, at A1 (Administration supported eliminating accounting provisions altogether). After two failed attempts to amend the FCPA, Republicans succeeded in attaching amendments to an omnibus trade act which, despite a last-minute veto threat over an unrelated provision, became law in 1988. Trade and Competitiveness Act §§ 5001-03; Levy, *supra* note 3, at 79 n.9 (describing amendment process); Sherry R. Sontag, *Is New Legislation Really Needed? Bribery: A Close Call*, NAT'L L.J., May 9, 1988, at 1 (discussing veto threat).

54. Pines, *supra* note 3, at 192 n.43. Stanley Sporkin, head of enforcement at the SEC when the FCPA was passed, opposed the issuance of such a document, explaining that "[w]e don't have guidelines for rapists, muggers, and embezzlers, and I don't think we need guidelines for corporations who want to bribe foreign officials." *White House Studies Changes in Bribery Law*, NAT'L J., June 23, 1979, at 1053, 1054.

55. Holland, *supra* note 40, at E3 (stating that as of 1991, DoJ only receives two or three requests for review each year).

56. Duncan, *supra* note 3, at 204-06.

An investigation by the General Accounting Office revealed that about seventy-two percent of the corporations responding to its survey had increased accounting and auditing costs by at least eleven percent because of the FCPA, and nearly a third of these companies reported increases exceeding thirty-five percent. These costs stem from the severe criminal penalties of the FCPA for accounting errors and control weaknesses.

Id. at 205-06.

57. Morton Mintz, *Hill Considers Changing Law on Foreign Bribery*, WASH. POST, Oct. 25, 1987, at H6 (citing Senate Banking Committee report indicating that American corporations have generally complied with bookkeeping and other provisions of the FCPA).

58. Duncan, *supra* note 3, at 208-09.

59. Pub. L. No. 95-213, tit. I, § 101, 91 Stat. 1494 (1977). The criticism went as follows:

amendments of 1988 reworded the law to omit "reason to know," but provided that "knowledge is established if a person is aware of a high probability" of an illegal act occurring, "unless the person actually believes" that it is not.⁶⁰ Now, the agency issue seems clearer. Every corporation is on notice that it cannot, as one compliance officer put it, "stick [its] head in the sand."⁶¹

As a more general criticism, businesses claimed that the FCPA was written too ambiguously to offer notice of whether particular activities were allowed or proscribed,⁶² deterring

[D]omestic concerns are liable for any corrupt political payments made overseas, if the domestic concern knows or has reason to know of the transaction. . . . Under the FCPA, a company and its directors and officers may be liable for an agent's actions that are more clearly visible in hindsight than in foresight.

Duncan, *supra* note 3, at 208-09.

60. FCPA §§ 78dd-1(f)(2)(b), 78dd-2(h)(3)(b). This amendment was a compromise between the preferences of businesses, which were hoping to avoid all liability for the actions of their employees or agents, and the concerns of policy makers, who worried that eliminating the reason-to-know provision entirely would "[invite] a wide-open return to the knowing wink and the pregnant nod." 1981 *Hearings*, *supra* note 46, at 402 (testimony of Theodore Sorenson).

61. *Proceedings of the Seventh Annual Conference on Legal Aspects of Doing Business in Latin America: Adapting to a Changing Legal Environment*, 9 FLA. J. INT'L L. 1, 40 (1994) [hereinafter *Conference Proceedings*].

A United States company can be held liable for its foreign agent's illegal payments, even if the company did not actually know of them; knowledge is imputed if circumstances should reasonably have alerted the company to the problem. Some of the circumstances considered to be red flags are obvious, like an agent that demands an excessive commission or payment in cash. Others are less so, like an agent that is related to a government official or partial ownership of the agent's company by the family of a government official.

Catherine Curtiss & Kathryn Cameron Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 161 (1995) (footnotes omitted). Gantz comments further on "red flags" that companies should recognize as clues to ongoing bribery:

These may include, (1) activities in a region—for instance, the Middle East—or with regard to products—aircraft, power plants, petroleum—where problems have occurred in the past; (2) lack of knowledge as to the reputation of a local agent; (3) requests for agent commissions significantly larger than the norm; (4) requests that payments be made to a foreign bank account or through fraudulent invoices, or in cash; (5) refusal of the agent to acknowledge the applicability of the FCPA in the contract; (6) a close relationship between the local agent and high officials of the foreign government or its political parties; and (7) other suspicious conduct that would raise questions in the eyes of a prudent person.

Gantz, *supra* note 8, at 181.

62. See Duncan, *supra* note 3, at 207. "[S]eventy percent of the respondents who reported that the FCPA caused a decrease in their overseas business rated the clarity of at least one of the anti-bribery provisions as 'inadequate' or 'very inadequate.'" *Id.*

them from participating in international markets.⁶³ Provisions criticized for ambiguity included corporate responsibility for acts of foreign agents, and the probability of being prosecuted under a scheme of dual enforcement, as discussed above. Companies were also unsure of "the definition of the term 'foreign official' . . . [and] whether a payment is a bribe, deemed illegal under the FCPA, or a facilitating payment, legal under the FCPA."⁶⁴

The distinction between bribes and grease payments was particularly unclear because the original language of the FCPA defined grease payments as those made to government officials "whose duties are essentially ministerial or clerical."⁶⁵ It was difficult for companies to identify these "ministerial" officials,⁶⁶ and it was unclear whether a particularly egregious payment would nonetheless be legal by virtue of having been transmitted to a fairly low-level official.⁶⁷ The 1988 amendments to the FCPA changed the definition of a grease payment, characterizing it as one intended to "secure the performance of a routine governmental action."⁶⁸ This alteration seems to have satisfied

63. Bartley A. Brennan, *Amending the Foreign Corrupt Practices Act of 1977: "Clarifying" or "Gutting" a Law?*, 11 J. LEGIS. 56, 62 (1984), *construing 1981 Hearings*, *supra* note 46. "[The] vagueness [of the definitions] has forced American corporations to forego business opportunities abroad for fear of violating the FCPA and incurring its stiff criminal sanctions." *Id.* at 62-63. *See also* James W. Singer, *The Crackdown on Improper Corporate Payments Made Abroad*, NAT'L J., June 3, 1978, at 880 (discussing whether the FCPA was discouraging American companies from engaging in international operations). "Frank A. Weil, [A]ssistant [S]ecretary of Commerce for [I]ndustry and [T]rade, said a number of businessmen have told him that they have abandoned their export efforts in some countries where the risks are great and the potential business is small." *Id.* Curiously, businesses seemed to worry in spite of evidence that the DoJ and SEC would take action only against egregious violations: the DoJ itself noted that it had declined to prosecute cases where the bribe was paid by a U.S. consultant in conjunction with a European firm, a \$13,000 bribe was considered to be too small to be worth prosecuting, or the bribe was paid to a member of a country's royal family who was not clearly a public official. *Foreign Bribery Clarified*, ENGINEERING NEWS-REC., Sept. 15, 1983, at 24.

64. Levy, *supra* note 3, at 79.

65. Pub. L. No. 95-213, tit. I, § 101, 91 Stat. 1494 (1977). *See also* Duncan, *supra* note 3, at 207 (asserting that the statute's characterization of some officials as "ministerial" or "clerical" was ambiguous).

66. Adler, *supra* note 3, at 1766.

67. *Id.* at 1752. "[T]hese terms could include bribes to customs officials to obtain lower-than-normal duties or bribes to license-granting authorities to obtain import or export licenses or industrial property protection that is not allowed by law." *Id.*

68. FCPA §§ 78dd-1(b), 78dd-2(b). To illustrate, under this definition, "you legally can pay a customs officer \$25 in order to make sure he doesn't dally in inspecting your shipment—a task he is supposed to perform anyway. But you

those who criticized the grease payment exception in the statute as originally written.⁶⁹

Companies have continuing difficulty in discerning the FCPA's mandate because there is little case law interpreting its provisions, and therefore little guidance for a corporation trying to determine whether a proposed course of action will comply with the law.⁷⁰ The scarcity of FCPA prosecutions seems to be partly circumstantial and partly strategic.⁷¹ It has been suggested that the real utility of the FCPA lies in its deterrent power rather than in its enforcement.⁷²

can't pay him to process your shipment without inspecting it at all." Ford S. Worthy, *When Somebody Wants a Payoff*, *FORTUNE*, Fall 1989, at 117, 118.

69. But see Larry Lempert, *FCPA Message Has Gotten Across, Prosecutor Says*, *LEGAL TIMES*, Sept. 20, 1982, at 5 (explaining that the head Justice Department prosecutor of FCPA cases doubts that "routine governmental action" is any clearer than "ministerial or clerical"). A collateral observation on the grease payment exception is that, contrary to most accounting rules, there is no materiality requirement for the reporting of bribes, which means that any bribe, no matter how small, can be the basis for liability. Gartz, *supra* note 8, at 178. Businesses sometimes object to this as unnecessarily stringent. See Lardner, *supra* note 46, at C1 (costs of accounting "in reasonable detail" said to be too high by Reagan-era U.S. Trade Representative William E. Brock, supporting bill that would have introduced a materiality requirement). As a practical matter, neither the SEC nor the DoJ is likely to prosecute a company for making a bribe in an inconsequential amount. See *Foreign Bribery Clarified*, *supra* note 63, at 24. But the use of a materiality test (such as comparing the size of a bribe to a company's revenues) would result in some highly egregious bribes going unreported when made by large companies. For instance, a company with annual revenues of \$50 million (not an uncommon figure) could most likely give a corrupt foreign official a Ferrari without the expense of the car being material by usual accounting standards.

70. See Adler, *supra* note 3, at 1749. "Since there is practically no interpretive case law or regulatory history under the Act, there is much confusion as to whether the anti-bribery provisions of the Act apply to certain commercial transactions." *Id.* (footnote omitted). "Despite several prominent cases, enforcement of the FCPA's antibribery provision has been extremely limited. From 1977 to 1988, the DoJ initiated only twenty antibribery cases under the FCPA, and the SEC only three." Pines, *supra* note 3, at 192 (footnotes omitted).

71. Factors which make it difficult for the government to compile the evidence necessary to bring an FCPA case include the likelihood the evidence will be in a foreign country and the possibility that any evidence discovered may only be available from corporate employees whose testimony will be protected by the Fifth and Sixth Amendments. Adler, *supra* note 3, at 1755. Furthermore, "any attempted prosecution, whether or not successful, may cause American companies to lose business or may damage United States foreign relations." *Id.*

72. One writer noted, however, that at least as of the end of 1981, FCPA cases invariably included other charges for the same conduct, suggesting that perhaps there was no need to have such a law. John F.X. Peloso, *The Foreign*

Many businesses assert that even though they seek to obey the law, compliance is difficult in countries where corrupt practices are standard.⁷³ Their foreign agents may not accept the elimination of bribery as a means of doing business, or local officials may resist the corporation's insistence that it is legally prohibited from fulfilling bribe requests. In the real world of business, the incentive to work outside the strictures of the FCPA is great; as one businessman explained, "[d]o you have any idea what it is like in Saudi Arabia? . . . you don't sell anything unless there is someone getting it one way or the other. . . . [The FCPA] is the stupidest [expletive deleted] law I've seen in my life."⁷⁴

Yet another criticism of the FCPA is that it fails to respect the moral codes of cultures in which bribery is an accepted part of the social order.⁷⁵ Some observers maintain that to require American businesses to adhere to the FCPA in their overseas operations is to "export our morality."⁷⁶ Those who disagree with this position reject the concept of bribery as a cultural tradition since "[n]o commentator on the FCPA has yet pointed to a nation that has legislation that expressly condones the bribery of government officials."⁷⁷ Proponents of this view also argue

Corrupt Practices Act: A Survey of the SEC's Enforcement Program, E. ASIAN EXECUTIVE REP., Dec. 15, 1981, at 18, 20.

73. Curtiss & Atkinson, *supra* note 61, at 160 (suggesting that this may be particularly true with regard to business dealings in Latin America, "because some practices common to establishing and conducting business there—such as using local consultants to thread through local bureaucracies, or dealing with the government during privatization—can create FCPA liability if not handled properly").

74. Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1509-10 (1984).

75. Pines, *supra* note 3, at 204-07 (discussing the contention that "the FCPA is an offensive display of moral imperialism"). The Eastern European saying, "[t]he person who does not steal from the state steals from his family," suggests that there may indeed be cultures where bribery is more likely to be an accepted part of trade. Gregory L. Miles, *Crime, Corruption, and Multinational Business*, INT'L BUS., July 1995, at 34, 43.

76. See, e.g., Singer, *supra* note 7, at 32-33 (quoting *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the House Comm. on Int'l Relations*, 94th Cong., 24 (1975) (statement of Mark B. Feldman, Deputy Legal Adviser to the State Department)).

77. Pines, *supra* note 3, at 205. The author adds that, "[i]n fact, if any nation is found expressly to allow bribery of its government officials, or changes its laws to so allow, the FCPA, by its very terms, will no longer apply to transactions occurring within that nation." *Id.* at 205 n.133. This is interesting because it illustrates what seems to be a lack of good information. The pro-business FCPA reform advocates wrote into the 1988 amendments that if a payment was legal in the country where made, it would not violate the FCPA, ap-

that countries often welcome the elimination of a corrupt relationship between business and government,⁷⁸ as traumatic as the exposure of that relationship may be.⁷⁹

Many commentators believe that the FCPA has reduced U.S. companies' international competitiveness and criticize it on that basis,⁸⁰ but this point is vigorously disputed.⁸¹ Some con-

parently believing that this would insulate many transactions from being labeled bribes. FCPA §§ 78dd-1(c)(1), 78dd-2(c)(1). Writers such as Pines insist that this provision has no effect because there are no countries that officially permit bribery of their government officials. Pines, *supra* note 3, at 205. The difference may possibly be that the anti-FCPA movement thought it was saying that U.S. firms could make bribes in any country which allowed its own companies to make bribes when out of the country, and the FCPA preservationists assume the provision means that bribes are only allowable in countries that do not make it a crime to bribe their own officials. The language is ambiguous and there is no case law interpreting it.

78. Pines, *supra* note 3, at 206.

[I]n the Middle East, a region renowned for its alleged corruption, the "host-country response to most cases [brought under the FCPA] was minimal with no immediate or clear destabilizing effect to the Middle Eastern regime involved." Furthermore, far from being damaging to the nation involved, such revelations are sometimes met with varying degrees of support.

Id. (quoting Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act*, 29 CAL. MGMT. REV. 9, 12 (1987)).

79. See *supra* note 3 and accompanying text.

80. See, e.g., Boylan, *supra* note 34, at 2016 (asserting that "because the United States acted alone in attempting to curtail corrupt practices abroad, the Act placed U.S. businesses operating abroad at a severe competitive disadvantage"); Gene Koretz, *Bribes Can Cost the U.S. an Edge*, BUS. WK., Apr. 15, 1996, at 30 ("U.S. corporate direct investment and exports declined markedly in 'corrupt' countries in the five years after the [FCPA] was passed. By contrast, investment and export activity in the same countries by America's foreign competitors accelerated sharply.").

81. See, e.g., Pines, *supra* note 3, at 208.

While some businesses complain about the harmful effects of the FCPA on American business abroad, no study confirms the validity of these claims. The only surveys which support the complaints are polls of the business community's *perceptions* of the Act's negative effects. More objective studies reveal that the FCPA has had no perceptible effect on U.S. international business.

Id. (emphasis in original). "[T]he claim that U.S. companies have lost exports because of the FCPA is often made and never substantiated. There is much evidence against it." 1981 *Hearings*, *supra* note 46, at 414 (statement of William A. Dobrovir). See also Robert M. Jarvis, *Adrift at Sea: The Muddled Relationship between Civil RICO and Maritime Law*, 12 TUL. MAR. L.J. 111, 128 (1987).

At its inception, the FCPA was roundly decried as a millstone around the neck of American industry that would make it impossible for American industry to compete with foreign industry. In more recent times, however, as cooler heads have prevailed and the perpetual doomsayers have been pushed off to one side, the FCPA has come to be viewed in a favorable light and has been recognized as actually helping American

cede that the FCPA creates losses at the level of the individual corporation, but counter with the assertion that non-economic benefits outweigh the cost of compliance. For instance, a law preventing companies from entering corrupt relationships also keeps them from becoming permanently entangled in local politics.⁸² It also eliminates the expense of bribe payments, which are an inefficient use of money since their effect can never be certain.⁸³ Many writers believe that forced compliance with the FCPA has made American companies stronger competitors on the merits of their businesses, which serves them well when they compete in non-corrupt environments.⁸⁴ Notwithstanding

businesses by sprucing up the international image of American businessmen.

Id. (footnote omitted). See also Singer, *supra* note 63, at 881 (citing a study that showed no harm to trade).

82. Pines, *supra* note 3, at 210. "Most corporations, frankly, are happy to have an excuse not to become entangled with shady practices overseas." *Id.* (quoting *When in Rome, MNCs Don't Always Do as the Romans*, BUS. INT'L, July 16, 1990). See also *Conference Proceedings*, *supra* note 61, at 53, in which an executive states, "I view the Foreign Corrupt Practices Act as a benefit to U.S. companies, because we do business on the up and up. You compete on quality." Another executive comments that

[y]ou can avoid such problems if you are persistent and you go in the first time it happens and talk to the people face to face. If a businessman does this, he will not have problems in the future. If he pays the first time he will pay forever.

There are people who do business cleanly and there are people who do business dirty. I expect most international business is done both of these ways in every country. You can choose which of the two you want to do and that is your choice.

Id. at 54.

83. Pines, *supra* note 3, at 211. As the author explains,

[b]ribery can prove exceedingly expensive, but yield no results. It is often difficult to know whom to bribe or how much to pay. Bribes often include payments made through intermediaries to unknown connected parties. In fact, payments may not be passed on to the "connected" party, or the connected party may not even exist. Finally, even if the payment is sufficient and goes to the right person, that person may not award the contract to the bribing corporation, possibly because another corporation has provided an even greater bribe!

Id.

84. See *On the Take*, ECONOMIST, Nov. 19, 1988, at 21, 22. One example is a U.S. businessman who distributes workplace safety products in Ecuador and says that, in lieu of bribing, he has achieved success "by carrying more stock than his competitors, by training employees heavily on the use of products and by doing repairs." Cristina Rouvalis, *The Ecuadorean Connection*, PITTSBURGH POST-GAZETTE, Jan. 8, 1995, at E1, E2. A corporate official at the European firm, Airbus, complains about the inaccuracy of the assumption that "[e]ach time we win a deal, it's because of dirty tricks. . . . [w]hereas [e]ach time Boeing wins, it's because of a better product." Amy Borrus, *A World of Greased Palms*, BUS. WK., Nov. 6, 1995, at 36.

these benefits, the FCPA was not enacted to invigorate trade but to recognize a moral principle. As a Justice Department official put it, "[c]ompliance with the new Act may not be costless for the United States. But living up to one's principles rarely is."⁸⁵

Finally, critics believed that the FCPA could not, as a unilateral measure, be effective in combating bribery—only a multilateral solution could have any significant impact.⁸⁶ The 1988 amendments to the FCPA addressed this concern by mandating that the President work through the Organization for Economic Cooperation and Development (OECD) to promote the enactment of similar laws in OECD member countries.⁸⁷ Other provisions of the 1988 amendments may have increased the likelihood that other countries will develop laws patterned on the FCPA.⁸⁸

C. MULTILATERALIZATION ATTEMPTS

As noted above, the 1988 amendments to the FCPA require the President to pursue international accord on the criminalization of foreign bribery.⁸⁹ Efforts to curtail the international supply of bribe money, which flows chiefly from developed to developing countries, are not new. While the United States worked on enacting the FCPA, a movement arose in the United Nations to establish a worldwide bribery ban.⁹⁰ Three years later, there had been no success and the effort was abandoned.⁹¹ After the failure of these initiatives, the G-7 took up the matter, again with no concrete results.⁹² In 1977, the International Chamber of Commerce began to promote an anti-bribery code of behavior for its member companies.⁹³ Though well-received, this code applied only to the businesses that chose to adopt it,

85. Philip B. Heymann, *Justice Outlines Priorities in Prosecuting Violations of For. Corrupt Practices Act*, AM. BANKER, Nov. 21, 1979, 4, 10.

86. Duncan, *supra* note 3, at 221.

87. Trade and Competitiveness Act, Pub. L. No. 100-418, tit. V, sec. 13(b), sec. 30A, sec. 104(a), §§ 5001-03, 102 Stat. 1107, 1424 (1988). *See also* Pines, *supra* note 3, at 191 (describing the provision).

88. Duncan, *supra* note 3, at 221-22.

89. *See supra* note 87 and accompanying text.

90. Catherine Yannaca-Small, *Battling International Bribery*, OECD OBSERVER, Feb./Mar. 1995, at 16 [hereinafter OECD OBSERVER]; *see also* G.A. Res. 3514, U.N. GAOR, 13th Sess., Supp. No. 34 at 69, U.N. Doc. A/10034 (1976) (U.N. initiative described by Yannaca-Small).

91. Rosie Waterhouse, *A Slap on the Backhanders*, THE INDEPENDENT, May 24, 1994, at 16.

92. Robert Pear, *Corporate Practices Dispute*, N.Y. TIMES, Feb. 8, 1981, at 20 (Int'l Econ. Survey).

93. OECD OBSERVER, *supra* note 90, at 16.

not to governments,⁹⁴ and was thus incapable of the kind of sweeping policy change that an international compact could have effected.

In the past few years, the Clinton Administration's advocacy of anti-corruption initiatives has reinvigorated international resolve to work against bribery. The Administration has even been able to induce several groups of nations to pledge not to tolerate foreign bribery by their businesses.⁹⁵ It has yet to be seen whether these pledges will develop into law, and whether these laws will be enforced.

In 1994, the OECD adopted a renewed anti-bribery stance, which it said represented "a commitment to effective measures based upon agreement that corruption is both harmful to fair competition and to the political process."⁹⁶ In April 1996, it committed each of its members to disallowing tax deductions for bribe payments,⁹⁷ a measure which the United States sees as positive but only a first step toward criminalizing bribery altogether.⁹⁸ A working group of the OECD is also constructing a set of guiding principles by which each member state can enact its own law against foreign bribery, a task it is scheduled to complete by May 1997.⁹⁹

The United States is also attempting to work through the World Trade Organization (WTO). Japan, the European Union, Canada, and the U.S. proposed a transparency agreement to the December 1996 Singapore Ministerial,¹⁰⁰ but were only able to secure an agreement for the ministers to study the issue.¹⁰¹ This compromise was necessitated by the opposition of a group of countries that did not see corruption as a trade issue and

94. *Id.*

95. See *infra* notes 96-102 and accompanying text.

96. Boylan, *supra* note 34, at 2017; see also Organisation for Economic Cooperation and Development, *Council Recommendation on Bribery in International Business Transactions*, 33 I.L.M. 1389 (1994).

97. Organisation for Economic Cooperation and Development, *Council Recommendation C(96)27/Final on the Tax Deductibility of Bribes to Foreign Public Officials*, 35 I.L.M. 1311-12 (1996). See also *Remarks of Secretary of Commerce Michael Kantor*, FDCH FED. DEPT. AND AGENCY DOCUMENTS, July 25, 1996, available in LEXIS, News Library, Curnws File.

98. Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10 (citing commentary of American diplomats).

99. Kantor, *supra* note 97.

100. *Id.*

101. World Trade Organization, *Singapore Ministerial Declaration*, Dec. 18, 1996, 36 I.L.M. 218 (1997).

feared that a multilateral agreement would limit state sovereignty.¹⁰²

III. A BETTER APPROACH

It may be too early to measure the effectiveness of the resolutions discussed above. At the very least, they bring public attention to the issue of corruption, which thrives in secrecy. Unfortunately, an agreement to act is not itself action,¹⁰³ and there has been no concrete progress to date. Some reports indicate that Sweden has banned its businesses from making bribes,¹⁰⁴ but the U.S. Department of Commerce maintains that the U.S. is still the only country with such a law,¹⁰⁵ in spite of the initiatives discussed above.¹⁰⁶

It appears, then, that even the diplomatic concessions recently won through arduous and protracted negotiations may

102. *Sleepless in Singapore*, WASH. POST, Dec. 15, 1996, at C6.

103. Murphy, *supra* note 1, at 396. "[S]imply because most member countries agree in principle that bribery should be prohibited does not lead to the conclusion that a meaningful agreement can be drafted." *Id.*

104. Gail Russell Chaddock, *More Trade Brings Graft to Light—and to Trial*, CHRISTIAN SCI. MONITOR, Jan. 10, 1996, at 1; Deepak Gopinath, *Rules of the Game*, INFRASTRUCTURE FIN., Oct. 1996, at 49.

105. Daniel B. Moskowitz, *Picking Up the Tab*, INT'L BUS., Nov. 1995, at 67 (citing comments by Charlene Barshefsky, then deputy United States Trade Representative).

106. Canada is an example. It has joined several multinational pacts to end foreign bribery, but in practice tolerates bribery as it has always done. *Ethics Lose Their Glitter: Tactics of Two Canadian Companies Seeking to Develop an Indonesian Gold Find Sparks Business Ethics Debate*, OTTAWA CITIZEN, Dec. 27, 1996 ("Canada has agreed in principle, through a number of international organizations, to support actions to criminalize foreign corrupt business practices. In practice, Canada pointedly looks the other way"). See also *Ethical Minefield: Projects in Corrupt Countries Raise Dilemmas for Canadians*, VANCOUVER SUN, Nov. 7, 1996, which states:

Canada is party to a 1994 agreement in the Organization for Economic Cooperation & Development that calls on member countries to "take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions." Canada also agreed this year to an OECD ministers' resolution "to criminalize such bribery in an effective and coordinated manner." This spring, Canada supported the Organization of American States Inter-American Convention against Corruption. And, for good measure, the Ontario Securities Commission [OSC] in June adopted an international resolution to outlaw "illicit payments made by public companies." Do any of these fine words mean that the Canadian government, or the OSC, will investigate just what Bre-X Minerals Ltd. [a gold mining venture accused of bribing Indonesian officials] is up to in Indonesia? Of course not.

The article goes on to conclude that "[i]t is past time that Canada's laws on bribery abroad matched its fine rhetoric." *Id.*

not yield real reductions in bribery. It is politically expedient for a country to profess an interest in the movement against international bribery; enforcement of anti-bribery measures, which threaten the country's balance of trade, may be less attractive. Although the OECD and WTO initiatives do represent progress, perhaps the U.S. should look elsewhere for ways of effecting meaningful changes in the transparency of world business transactions.

One promising alternative method of reducing corruption is for the U.S. government to work with developing countries that are trying to stamp out bribery on their own. U.S. efforts up to this time can be characterized as taking a "supply-side" approach, in that American diplomats have attempted to persuade other industrialized countries to stop their businesses from supplying bribes to officials of less-developed countries. In contrast to the United States' multilateralization attempts, which concentrate on the flow of bribes from developed countries, a "demand-side" approach would provide support for antibribery campaigns in developing countries. By helping these countries discover strategies that will keep their officials from accepting bribes, the U.S. can lessen the demand for these corrupt payments. By this method, the U.S. can reduce the number of bribes that change hands without having to continue to work through the administrative morass of international organizations representing countries with diverse interests. The U.S. can work with each "demand" country according to its own circumstances, helping it to develop an appropriate response to bribery as it occurs within that country's governmental structure.

Conveniently, the time is ripe for the rollout of a demand-side strategy. Developing countries around the world are waking up to the reality that corruption has significant hidden costs. Bribery increases the cost and decreases the quality of public works projects; it misdirects public money away from needed projects toward ones that have the potential to yield bribes; and it breeds an attitude of self-interest rather than public interest among government officials.¹⁰⁷ Less-developed countries are particularly unable to afford this kind of inefficiency, and they are responding with resolve to aggressively address the bribery of their own government officials.¹⁰⁸

107. See *supra* notes 3-9 and accompanying text.

108. In the words of one foreign businessman:

Reports of anticorruption campaigns in less-developed countries have appeared with increasing frequency in recent months—evidence of the vigor with which these countries are fighting back against bribery. Perhaps the best example is Ecuador, which has historically been known as severely corrupted but is now working with Transparency International¹⁰⁹ in a program to establish itself as an “island of integrity” whose model other countries can follow.¹¹⁰ Even Russia, where corruption is

... when we tolerate these “commissions” as normal business transactions, we are sending our younger generation the message that hard work and creative efforts will get them nowhere, and that the best way to make it is to make it crooked—hardly the kind of message that great nations are made of.

Jihad Al-Khazen, *Good Morning: Honesty Meeting*, MONEYCLIPS, Feb. 14, 1994, available in LEXIS, News Library, Arcnws File. Transparency International, a global nonprofit organization dedicated to supporting efforts to end corruption in international business, argues that reform campaigns are “driven not by developed nations, but by the desire of a generation of Third World leaders who see that their political progress and their economies are being destroyed by corruption.” Stevie Cameron, *Dreaming of a World Without Corruption*, MACLEAN’S, Apr. 8, 1996, at 36. The group attributes the timing of these movements to the “opening up of more and more countries to multiparty politics, coupled with greater press freedom and efforts by public prosecutors.” Gopinath, *supra* note 104. Even an agreement such as the OAS is grounded in the desire to preserve democracy and economic growth.

Enforcement of these principles [in the OAS agreement] would be a major shift in countries such as Mexico and Colombia, where allegations of corruption have reached the highest levels of government. . . . [One U.S. official states,] “I’m not imagining that everyone at every level of, say, the Mexican government has seen the light and taken the pledge.” But the Latin governments are serious about turning over a new leaf because “so many of them in this hemisphere are democratic now, and it is democratic governments that are being undermined by people’s lack of confidence in them. If you’re a military dictatorship, you don’t care about that.”

Thomas W. Lippman, *After 20-Year Campaign, U.S. Balks at OAS Pact Against Business Corruption*, WASH. POST, Apr. 7, 1996, at A11.

109. Transparency International is an organization with chapters in over sixty countries devoted to decreasing the prevalence of international bribery. Barbara Ettorre, *Why Overseas Bribery Won’t Last*, MGMT. REV., June 1994, at 20, 23. Its approach is collegial rather than confrontational; it intervenes only when its assistance is solicited. *Id.* The group was founded by a former World Bank executive who resigned in frustration at seeing international aid funds diverted to pay off corrupt officials when it was intended to assist underdeveloped countries. Raymond Bonner, *The Worldly Business of Bribery: Quiet Battle is Joined*, N.Y. TIMES, July 8, 1996, at A3.

110. Ettorre, *supra* note 109, at 24. As part of this program, Ecuador’s Energy Ministry recently began requiring each of its clients to sign an agreement not to offer bribes. Christina Katsouris, *Ecuadorean Energy Minister, Company Chief Plan to Clean House in Scandal-Ridden Sector*, OIL DAILY, Jan. 16, 1996, at 2. It was motivated by an episode in which an Ecuadorean transportation official accepted a bribe to contract with a firm to supply locomotives that were

becoming legendary,¹¹¹ was among the sponsors of the U.N. resolution against foreign bribery, which a U.S. official attributes to "a growing awareness of the economic toll which corruption takes on a nation's economy."¹¹² Many other less-developed countries have already begun to crack down on corruption, and the list continues to grow.¹¹³

Two recent international compacts also show that developing countries are committed to working against corruption. In March of 1996, the Organization of American States (OAS)¹¹⁴ passed a U.S.-sponsored resolution requiring the 21 signatory

too heavy to run on the country's railroad tracks. Valeria Merino Dirani, *Building Islands of Integrity—The Ecuador Model after One Year*, TI NEWSL., Mar. 1995, at 3-4. The program is hailed as a major success. *Id.*

111. See, e.g., Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 131-33. (1996).

112. UN Assembly/Bribery: Meant to Eliminate Trade Hurdle, DOW JONES INT'L NEWS SERV., Dec. 16, 1996, available in WESTLAW, 12/16/96 DJINS 17:39:00 [hereinafter *UN Resolution*].

113. South Korea, Guatemala, Argentina, and Romania have begun to crack down on corruption. Pines, *supra* note 3, at 212. The campaign in Argentina is being led by local lawyers tired of seeing corrupt officials enriched with public money. Michael Elliott, *Corruption*, NEWSWEEK, Nov. 14, 1994, at 42. In South Korea, "two former presidents and several corporate chieftains face corruption charges connected with a political slush fund that may have reached \$1 billion." Chaddock, *supra* note 104.

Chile, Colombia, Costa Rica, Mexico, Uruguay, and Venezuela have also begun to address the problem of corruption. Powers, *supra* note 103, at 12. Corruption reform was a major theme in Mexico's 1993-94 elections. Michael Skol, *Out From Under the Table: Governments Forge Ahead with Anti-Corruption Efforts*, BUS. MEXICO, Feb. 1996, at 24. The recent ouster of a Venezuelan president is attributed to "a sea change of opinion against questionable business practices." Gopinath, *supra* note 104. This movement has been led by investigative journalists. Elliott, *supra*, at 42.

The Philippines, Cambodia, Hungary, Pakistan, El Salvador, Tanzania, Thailand, and Zimbabwe are also addressing the problem of corruption. UN Resolution, *supra* note 112; Robert S. Leiken, *An End to Corruption*, WASH. POST, Apr. 16, 1996, at A15.

China is also taking steps to curb corruption. Another correspondent reports that "China's nearly two-year corruption drive has resulted in the death penalty for some lower-level municipal officials and last year toppled the party secretary of Beijing." Chaddock, *supra* note 104, at 7. Peter Eigen, head of Transparency International, has been quoted as saying that the Chinese executed 150 people in 1994 for corruption. Susan Lim, *Corruption: Can It Be Stamped Out?*, SINGAPORE STRAITS TIMES, Oct. 8, 1995, at 1. It is reported that "unhappiness about corruption is running so strongly, both within the [Communist] party and in the public at large, that China's leaders have no alternative but to continue." Charles A. Radin, *China Roots Out Corruption On High*, BOSTON GLOBE, Oct. 1, 1995, at 8.

114. The OAS is comprised of the U.S., Mexico, Canada, and countries in Latin America, South America, and the Caribbean. N.J. Renegger & John Campbell, TREATIES AND ALLIANCES OF THE WORLD, 6th ed. 1995, at 288.

countries to outlaw bribery.¹¹⁵ This agreement is entitled the Inter-American Convention Against Corruption and is particularly noteworthy because many of the countries involved have historically been known for unacceptable levels of corruption.¹¹⁶ In November 1996, the United Nations Economic and Social Council urged the 185 member states of the U.N. to criminalize foreign bribery and eliminate the tax-deductibility of bribe payments;¹¹⁷ the General Assembly ratified this declaration in December.¹¹⁸ Although past attempts to address bribery through the U.N. have progressed slowly and eventually been abandoned,¹¹⁹ the mere fact that this initiative has met with acceptance is a positive sign that the constituents of the United Nations—many of them less-developed countries—have come to agree that they must take action against bribery.

U.S. assistance to developing nations' clean-up efforts could take many forms. Perhaps the simplest would be for the U.S. government to make sure Transparency International has all the resources it needs to continue its successful intervention tactics.¹²⁰ U.S. foreign aid might incorporate advice aimed at building the administration skills of developing countries' governments, such as large-scale accounting and project management programs.¹²¹ In the end, however, corrupt countries

115. Organization of American States, INTER-AMERICAN CONVENTION AGAINST CORRUPTION, 35 I.L.M. 724 (1996).

116. *Id.*

117. *Id.*

118. *Assembly Acts on Financing of Six Peace-Keeping Operations, Adopts 10 Texts on Recommendation of Legal Committee*, FED. NEWS SERV., Dec. 17, 1996, available in LEXIS, News Library, Curnws File. "[T]he Assembly adopted the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, by which States pledged to deny the tax deductibility of bribes paid by any private or public corporation or individual of a Member State to any public official or elected representative of another country. Also under the Declaration, States pledged to criminalize bribery of foreign officials in an effective and coordinated manner." *Id.*

119. *Business Bribes: On the Take*, THE ECONOMIST, Nov. 19, 1988, at 21.

120. It should be noted that the United States and several American firms already provide a generous amount of backing for Transparency International. *Removing Obstacles to Exporting*, BUS. AM., Oct. 1994, at 30.

121. This offer would have to be carefully crafted to avoid policy conflicts or accusations of trying to influence the domestic politics of other countries. Robert Leiken, a respected corruption researcher, suggests other components of a possible transparency package: "laws protecting whistle-blowers and penalizing illicit enrichment, financial disclosure, mandatory reporting of bribe offers, strong enforcement mechanisms, management information systems and public-private partnerships." *Joint Hearing of the Senate Caucus on International Narcotics Control & the Senate Finance Committee's Subcommittee on Interna-*

themselves are in the best position to describe what aid they need in order to eliminate corruption.

In addition, there may be ways for corporations to participate in the drive to eliminate foreign bribery. Obviously, they must comply with the letter and spirit of the Foreign Corrupt Practices Act. They can support Transparency International, as some U.S. businesses already do. Finally, they should be encouraged to report incidents of bribe-seeking to the State Department or other appropriate governmental agency.¹²²

Independent initiatives by historically corrupt countries may quickly accomplish more than have the years of work by the United States to persuade other "supply" countries to change their ways. By lending support to antibribery drives such as these, the United States can not only accomplish its original goal of leveling the playing field for American businesses, but can also contribute to transparency, democracy, and open markets in countries in which it does business. The present Administration already recognizes the need for a demand-side component to its crusade against foreign bribery.¹²³ The success of programs already underway in developing countries indicates that more of the United States' focus should be directed toward curbing the demand for—rather than the supply of—bribes.

CONCLUSION

Although many assert that the Foreign Corrupt Practices Act has practical and philosophical flaws, few dispute that it embodies a noble goal—the reduction of bribery and its negative ramifications. There is a consensus that, toward this end, it would be beneficial for the nations of the world to adopt a uni-

tional Crime, FED. DOC. CLEARING HOUSE CONG. TESTIMONY, July 30, 1996 (testimony of Robert S. Leiken), available in LEXIS, News Library, Curnws File.

122. The State Department already handles CIA reports of foreign corporations offering bribes to decision makers where U.S. firms may be disadvantaged by obeying the FCPA. *Remarks by CIA Director James Woolsey to the American Bar Association*, FED. NEWS SERV., April 29, 1994, available in LEXIS, News Library, Arcnws File.

123. Moskowitz, *supra* note 105, at 67.

Washington hopes to get the major industrial nations to make it unlawful for their manufacturers to pay bribes for contracts and hopes to get less-developed countries—where the bribe-taking seems concentrated—to move to more transparent purchasing policies so that it will be evident to everyone what the criteria is [*sic*] for picking a supplier and how the winner stacked up against other bidders.

Id.

form stance with respect to this form of corruption. The difficulty has been in achieving such multilateralization.

The United States is to be commended for its efforts to eliminate bribery by persuading other developed nations to forbid their businesses from engaging in the practice. However, it may be more efficient for the U.S. to devote its energies to bolstering the anti-bribery efforts of countries whose officials have historically been the recipients of bribes. Supply-side negotiations have been going on for years and are, even now, barely yielding any international action. Meanwhile, developing nations have begun to mount their own campaigns against corruption. These efforts to quash the demand for bribes offer an excellent alternative to a continued struggle for multinational accord.