THE FOREIGN CORRUPT PRACTICES ACT: A COMPETITIVE DISADVANTAGE, BUT FOR HOW LONG?

I. INTRODUCTION

Throughout the Cold War, United States foreign policy focused primarily on national security concerns. The demise of the Soviet Union, however, has diverted United States strategic interests toward economic competitiveness and international trade.[1] Mindful of this change of priorities, the Clinton Administration is reshaping foreign policy to boost United States exports in the hope of expanding the nation's economy and creating jobs.[2] President Clinton remarked in a November 1993 speech: "Today's exports are the life blood of our economic growth. Since the mid-1980's, half our increases in incomes have been tied to exports....If you want to increase jobs and raise incomes, the only way to do it is to find more customers for each country's product."[3] Driven by this simple and politically appealing notion, the Clinton Administration formulated a National Export Strategy consisting of three primary points: (1) remove obstacles to trade; (2) focus United States global trade initiatives on the fastest growing regions; and (3) create new international arrangements to benefit the United States and its partners.[4]

In its efforts to focus on the fastest growing economies, the Administration made a list of ten countries that are driving economic

---

1. In a cable sent to United States embassies, Secretary of State Warren Christopher said, "U[nited] S[tates] competitiveness and exports overseas have assumed equal or greater importance in many areas of the world than the political/military concerns that traditionally dominated...priorities." Terry Atlas, *Trading Places: Business Now Tops U.S. Global Priority*, CHI. TRIB., Feb. 20, 1994, at 1.

2. In September 1993, President Clinton said in the announcement of his National Export Strategy that:

> [W]hat we have today at long last is a coordinated, targeted, aggressive export strategy. It means growth and jobs and incomes for Americans. Compared to our competitors, we have for too long had a hands-off approach to exports. We have paid for it. We now will have a hands-on partnership, driven by the market, guided by the private sector, limited where appropriate by governmental policy, but clearly tailored to help Americans compete and win in the world of today and tomorrow.

Bill Clinton, Remarks Announcing a National Export Strategy and an Exchange with Reporters, 29 WKLY. COMP. PRES. DOC. 1918, Sept. 29, 1993 [hereinafter National Export Strategy]. *See* Bill Clinton, Remarks to the Seattle APEC Host Committee, 29 WKLY. COMP. PRES. DOC. 2395, Nov. 19, 1993 [hereinafter APEC Remarks].

3. APEC Remarks, *supra* note 2.

4. *Id.*

forces in their geographical regions and of particular interest to the United States.[5] These nations are: Argentina, Brazil, Mexico, Poland, South Africa, India, Turkey, South Korea, Indonesia, and the economic zone of China, Hong Kong, and Taiwan.[6] Although these countries possess impressive growth rates and represent potentially lucrative markets for American products and services, many are among the most corrupt countries in the world, where bribery and "grease" payments are *de rigueur* in international business contracting.[7]

---

5. Amy Kaslow, *U.S. Targets World's Emerging Markets for Business*, CHRISTIAN SCI. MONITOR, Feb. 23, 1994, at 1. The growth rates for the Latin American nations are: Argentina: 9.0% (1992); Brazil: -1.0% (1992); Mexico: 2.6% (1992). *Latin American Growth Up 2.9% in 1992, Pickup Seen, IDB Says*, Int'l Bus. & Fin. Daily (BNA), Oct. 19, 1993; *Second Look at Performance in 1992; IDB's Annual Report Points to Keys for Future*, LATIN AM. WKLY. REP., Apr. 8, 1993, at 162. The estimated real growth rates in the Asian nations for 1993 and 1994, respectively, are: China: 13.5% and 10.0%; Hong Kong: 5.2% and 5.0%; Taiwan: 6.1% and 6.2%; Indonesia: 6.5% and 6.7%; and South Korea: 4.8% and 6.0%. *Asian Economies Predicted To Continue Growing*, CENT. NEWS AGENCY, Jan. 24, 1994 (citing research and analysis by Sakura Institute of Research). South Africa: -0.5%. Jerelyn Eddings, *Facing an Economic Meltdown*, U.S. NEWS & WORLD REP., Jul. 5, 1993, at 36. India: 5.7%; *India Update: Growth Forecast*, COUNTRY RISK SERV., Aug. 1, 1993. Turkey: 8.0%. *Executive Summary: Highlights*, COUNTRY FORECAST, Sept. 17, 1993. Poland, 4%. *Market Conditions in Poland in 1993*, BUS. NEWS IN POLAND, Jan. 31, 1994.

6. *See supra* note 5.

7. Evidence of this corruption has been well documented. *See generally* Maxwell Cameron, *A Stark Lesson for Latin American Democrats*, OTTOWA CITIZEN, Apr. 21, 1992, at A11; *Democracy, Mexican Style*, N.Y. TIMES, Dec. 1, 1993, at 18; *IBC International Country Risk Guide, The Americas, Regional Survey*, Feb. 1992; Linda Robinson, *Protesting an Old Evil: South America's Budding Democracies Are Rebelling Against Corruption*, U.S. NEWS & WORLD REP., Aug. 31, 1992, at 9; Barber Conable Jr. et. al., *China: The Coming Power -- A Troubled Relationship*, FOREIGN AFF., Winter 1994, at 133 (China); Louis Kraar, *China: Struggle for Control*, FORTUNE, Nov. 1, 1993, at 137 (China); Edward Gargan, *Scandal Taints India's Move To Economic Liberalisation*, N.Y. TIMES, Jul. 6, 1993, at D1 (India); Sanjoy Hazarika, *India Leader Faces Political Battle*, N.Y. TIMES, Jun. 20, 1993 (India); Maggie Ford, *Jakarta to Launch Pilot Project for Major Foreign Exporters*, BUS. TIMES, July 8, 1993, at 3 (Indonesia); Victor Mallet, *Survey of Indonesia*, FIN. TIMES, May 13, 1993, at 1 (Indonesia); *Corruption Believed to be Rampant*, POLISH NEWS BULLETIN, May 6, 1993 (Poland); *Poland: Corruption Rife Among Public Officials*, RZECZPOSPOLITA, Aug. 16, 1993 (Poland); Tina Rosenberg, *Meet the New Boss, Same as the Old Boss: How Poland's Nomenklatura Learned to Love Capitalism*, HARPER'S, May 1993, at 47 (Poland); Garth Alexander, *U.S. Firms Battle South Africa's Hurdles*, SUN. TIMES (LONDON), Oct. 3, 1993 (S. Africa); John Carlin, *Web of Corruption Ensnares South Africa*, INDEPENDENT (LONDON), Feb. 23, 1993, at 12 (S. Africa); Alan Fine, *The Siren Song of Corruption*, WORLD PRESS REV., Aug. 1993, at 12 (S. Africa); Maddy Gibbs, *Reforms to Economy Draw Wide Support*, S. CHINA

The international ubiquity of such corruption poses a unique problem for American businesses because the Foreign Corrupt Practices Act (FCPA) prohibits all United States companies and their agents from bribing foreign officials.[8] The United States is the only nation in the world with such a law.[9] Since the FCPA's enactment in 1977, United States business executives have complained that the law forces them to bear a heavy burden that their foreign competitors are not required to carry.[10] In essence, these executives perceive the FCPA as a hindrance in the international marketplace.

Given President Clinton's emphasis on removing obstacles to trade as demonstrated by the National Export Strategy, and the Administration's concentration on export markets that are renowned for corruption, renewed debate has focused on the FCPA and bribery abroad.[11] Two main factions in this debate exist: those who believe that the FCPA should be repealed, and those who support the FCPA and believe that the rest of the world should adopt similar laws.

This comment focuses on four areas of the Foreign Corrupt Practices Act in an attempt to shed light on the present debate. First, this comment explores the origins of the Foreign Corrupt Practices Act and discusses its structure and practical application. Second, it addresses the difficulties that have accompanied compliance with the FCPA, and the failure of the 1988 Amendments to alleviate these problems. Third, it discusses current views regarding the FCPA's effects on American competitiveness abroad. Finally, it addresses the United States government's efforts to improve American competitiveness, with special

---

MORNING POST, Oct. 2, 1993, at 1 (S. Korea); Ed Paisley and Adam Schwarz, *Bold As Brass*, FAR E. ECON. REV., July 16, 1992, at 62 (S. Korea); Lee Su Wan, *South Korea Promulgates Anti-Corruption Political Laws*, REUTERS, Mar. 14, 1994 (S. Korea); *Measures Outlined to Fight Corruption*, BEIJING REV., Nov. 8, 1993, at 5; Hooshang Amirahmadi, *Islam, Oil and the West*, MID. E. EXEC. REP., Jan. 1993, at 9 (Turkey).

8. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1464 (1977) (codified at 15 U.S.C. §§ 78a; 78m; 78dd-1; 78dd-2; 78ff (1988)) [hereinafter FCPA].

9. Michael Richardson, *U.S. to Seek Anti-Bribery Treaty: Firms' Complaints May Give 1970's Idea a New Life*, INT'L HERALD TRIB., July 28, 1993.

10. *Id.* For example, in a panel discussion with Secretary of State Warren Christopher, Fritz Taylor, Vice President for Government Relations of the American Business Council in Singapore stated that "a widespread feeling that our competition from other industrial countries [exists], where such behavior is not restrained by criminal penalties, uses bribery as a tool to compete with U.S. companies for government tenders." *Id.*

11. *See, e.g., Clinton Embarks on Broad Review of U.S. Trade Law -- Anti-Bribery Act Under Scrutiny*, FIN. TIMES, June 10, 1993, at 6.

emphasis on its aggressive pursuit of an international agreement modeled after the FCPA.

II. THE FOREIGN CORRUPT PRACTICES ACT OF 1977

A. *Background*

In the mid-1970's, improper payments by United States corporations to foreign officials became a hot topic in Washington D.C.. Following Watergate and the Lockheed Scandal,[12] the Securities and Exchange Commission (SEC), charged by Congress and spurred on by the scandal-hungry press, conducted a widespread investigation into "questionable" payments to foreign officials by American companies.[13] Assured that no actions would be brought if they voluntarily complied with the SEC's investigation,[14] over four hundred companies, 117 of which were Fortune 500 companies,[15] admitted to making substantial bribes to foreign officials.[16] The disclosed amounts were startling. The largest total payments came from Exxon ($56.7 million), Northrop ($30.7 million), and Lockheed ($25 million).[17] Congress responded by proposing the Foreign Corrupt Practices Act (FCPA or Act), which

---

12. *On the Take*, ECONOMIST, Nov. 19, 1988. Former Japanese Prime Minister Kakuei Tanaka was convicted in 1983 for accepting $1.7 million in bribes from the Lockheed Corporation to promote the American company's jetliners and anti-submarine planes. Forced to resign from the position of Prime Minister in 1974 after disclosure of the Lockheed scandal, he was arrested in 1976. Tanaka is currently appealing the conviction. *See* Robert Yates, *Tanaka to Take 1 Last Shot*, CHI. TRIB., June 23, 1986; *Supreme Court Takes Up Tanaka Appeal*, REP. FROM JAPAN, Oct. 9, 1992.

13. SECURITIES AND EXCHANGE COMM'N, 94TH. CONG., 2D.SESS., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976) [hereinafter SEC REPORT].

14. *See, e.g., SEC Offers Amnesty in Corporate Payoffs*, BUS. WEEK, Aug., 1975, at 20.

15. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 640, 95th Cong., 1st Sess. 4 (1977).

16. A "bribe" is defined as any money, goods, right in action, property, thing of value, or any preferment, advantage, privilege, or emoluments, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to induce or influence action, vote, or opinion of person in any public or official capacity. A gift, not necessarily of pecuniary value, bestowed to influence the conduct of the receiver. BLACK'S LAW DICTIONARY 173 (5th ed. 1979).

17. G. GREANIAS & D. WINDSOR, THE FOREIGN CORRUPT PRACTICE ACT: ANATOMY OF A STATUTE 122, 123 (1982).

passed with little debate in 1977.[18] In general, the FCPA prohibits bribery of foreign government officials, requires additional accounting measures, and grants enforcement responsibilities jointly to the SEC and the Department of Justice.[19]

B. *The Structure of the FCPA*

The FCPA is composed of three main sections.[20] Section 102 amended Section 13 of the Securities Act of 1934 to require improvements to the accounting and record-keeping systems of publicly-held corporations (Issuers) registered under the Act of 1934.[21] Together, Sections 103 and 104 explicitly prohibit both bribery by Issuers and "domestic concerns" other than Issuers.[22] Domestic concerns are defined broadly to include all United States citizens and residents, as well as any entity whose principal place of business is either in the United States, or incorporated under the laws of a state or commonwealth of the United States.[23]

The Department of Justice is responsible for criminal enforcement of the anti-bribery provisions of the FCPA, and for civil enforcement of the provisions contained in Section 104 respecting domestic concerns, their officers, and stockholders.[24] The SEC is responsible for civil enforcement of the anti-bribery and accounting provisions of Sections 102 and 103, with respect to Issuers.[25]

---

18. FCPA, *supra* note 8.

19. *Id.*

20. *See generally* A. Fremantle & S. Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755 (1989).

21. 15 U.S.C. § 78m(b).

22. *Id.*

23. *Id.* § 78dd-2(h)(1). "Domestic concern" means: (A) any individual who is a citizen, national, or resident of the United States; or (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 a territory, possession, or commonwealth of the United States. *Id.*

24. *Id.* §§ 78dd-2 (c), 78m(b), 78ff.

25. *Id.* §§ 78dd-1, 78ff.

C. *The Accounting Provisions*

The FCPA accounting provisions ultimately serve the same end as the anti-bribery provisions. In a 1976 report, the SEC disclosed that many large corporations maintained "slush funds" that were "off the books," in order to make bribes to foreign officials.[26] The SEC recommended that Congress require more in-depth accounting measures to make it difficult to disguise or hide slush funds.[27] To this end, the Act requires every Issuer: (1) to make and keep books, records, and accounts, that in reasonable detail accurately and fairly reflect the transactions of the Issuer; and (2) to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances of management control over firm assets.[28] These requirements ensure the existence of a "paper trail" that improves corporate accountability and serves as a mechanism for detecting illegal payments to foreign government officials.[29]

D. *The Anti-Bribery Provisions*

Five elements comprise a violation of the FCPA anti-bribery provisions. Although the Act discusses domestic concerns and Issuers in different sections, the elements of bribery are the same for both:[30]

(1) the firm or individual has made use of the mails or any means of interstate commerce;
(2) corruptly;
(3) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of value;

---

26. SEC REPORT, *supra* note 13, at 23, 24; Prevention of the Concealment of Questionable or Illegal Payments, Exchange Act Release No. 13, 185, II Sec. Docket 1514 (1977).

27. *Id.*

28. 15 U.S.C § 78m(b)(2)(A).

29. *Id.*

30. *Id.* §§ 78dd-1(a), 78dd-2(a).

(4) to any foreign official[31] or foreign political party or any candidate for foreign political party;
(5) while knowing or having reason to know that the purpose of the payment was to influence any official act or induce the official to use his influence to assist the domestic firm or individual to obtain or retain business.[32]

The most controversial and ambiguous part of the FCPA, as it was enacted in 1977, was the objective scienter requirement of "reason to know."[33] This standard was especially problematic for United States businesses that employed intermediaries. A violation of the law occurred when a person made a payment who knew or had reason to know that all or a portion of the payment would be used to bribe foreign officials.[34] Business executives argued that the objective reason to know standard was impractical, given the complexity of international business transactions.[35]

Another controversial aspect of the FCPA was Congress' failure to proscribe all bribes. The Act permitted "facilitating" or grease payments by excluding from the definition of "foreign official" those whose duties were essentially ministerial or clerical.[36] Thus, giving a

---

31. "Foreign official" is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical." *Id.* § 78dd-1(d)(2).

32. *Id.*

33. J.C. Bliss & G.J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?* 20 LAW & POL'Y INT'L BUS. 447, 448 (1989).

34. 15 U.S.C. § 78dd-1(a)(3) (emphasis added).

35. Bliss & Spak, *supra* note 33, at 448.

36. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b). *See also* John Impert, *A Program for Compliance With the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009, 1015 (1990).

> The definition of facilitating, or grease payments, which were permitted in the original 1977 FCPA, depended upon the identity or status of the foreign official who was the ultimate payee. Foreign officials to whom payments were legal consisted of those whose duties were 'essentially ministerial or clerical.' Thus, in order to benefit from the exemption of grease payments to minor foreign officials, it was necessary to

government office clerk a ten dollar grease payment to speed-up the bureaucratic process of extending a visa was permitted, but giving a foreign minister of transportation twenty thousand dollars to secure a construction contract was illegal. In this example, the law is clear and its application appears to be straightforward. In practice, however, business executives often found themselves in a gray area in which distinguishing a grease payment from a prohibited bribe was a difficult task fraught with ambiguity and the danger of criminal penalty.

III. 1988 AMENDMENTS TO THE FCPA ANTI-BRIBERY PROVISIONS

A. *The Omnibus Trade and Competitiveness Act*

After numerous attempts to reform the Act and subsequent proposed amendments, Congress finally amended the FCPA as part of the Omnibus Trade and Competitiveness Act of 1988 (1988 Amendments).[37] These Amendments primarily changed the knowledge requirement and the definition of grease payment. Congress also added several affirmative defenses and increased the penalties for violation of the Act. The impetus for change stemmed from the American business community's

---

determine whether their duties were ministerial or clerical as opposed to policy-making. This distinction was not always evident, particularly in unfamiliar cultures, and might have required a local administrative law opinion from counsel.

Id.

37. Fremantle & Katz, *supra* note 20, at 759 n. 27.

S. 2763 introduced by Senator Chefee, May 23, 1980; reintroduced by S. 708 on Mar. 12, 1981; on Feb. 3, 1983, S. 414 was introduced by Senator Heinz and co-sponsored by Mr. Chefee; on Mar. 16, 1983, Representative Mica introduced H.R. 2157; on Feb. 7, 1985, Senator Heinz introduced S. 430, which was identical in substance to S. 708 and S. 414; on Oct. 8, 1985, a group of Representatives led by Congressman Robert Michel introduced H.R. 3522, of which title 14 proposed amendments to the FCPA; on Mar. 12, 1986, Representative Mica introduced H.R. 4389 to replace the FCPA, portions of which were incorporated into H.R. 4800, the Omnibus Trade Package of 1986, and subsequently into H.R. 3, introduced Jan. 6, 1987; H.R. 15, introduced Jan. 6, 1987, was similar to S. 708, S. 414, and S. 430.

Id.

perception that the Act was needlessly ambiguous and competitively disadvantageous.

B. *Reason to Know*

The FCPA originally prohibited any payments made while knowing or having reason to know that they would be used to bribe foreign officials.[38] This language was designed to prevent a defendant from avoiding criminal liability by ignoring reasonable indications that an agent or intermediary was engaged in illicit bribery.[39]

The knowledge standard was criticized by many business executives.[40] For example, set-up and marketing efforts necessary for large sales often take months or years. Therefore many companies find it economically advantageous to use local representatives instead of maintaining American agents abroad.[41] These representatives, often called "sales agents," typically receive a fee contingent upon a sale.[42] If reason to know was construed broadly under the FCPA, as originally enacted, the question arose as to whether the engagement of *any* local sales agent would be suspect in a country thought to be corrupt, thereby inviting heightened scrutiny of all business efforts in those nations.[43] Also questioned was the extent to which legitimate reasons for engaging a sales agent negated reason to know if the sales agent later engaged in bribery.[44] These questions chilled legitimate business efforts because companies operating abroad deemed the risk of FCPA liability to outweigh the benefits.[45]

The language "reason to know" was removed from the Act in 1988, leaving only the subjective element of "knowing." Some notion of an objective standard remains, however, as is evident in the amended FCPA's definition of knowing:

---

38. 15 U.S.C. § 78dd-1(a)(3).

39. *Id.*

40. Impert, *supra* note 36, at 1013, 1014.

41. *Id.* at 1013.

42. *Id.*

43. *Id.*

44. *Id.*

45. GREANIAS & WINDSOR, *supra* note 17, at 122.

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if -

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is *substantially certain* to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is *substantially certain* to occur (emphasis added).[46]

The Conference Report on the FCPA indicates that the conferees agreed "simple negligence" or "mere foolishness" should not be the basis for liability.[47] The Report, however, is clear that "willful blindness" or "deliberate ignorance" should be included in the definition so that "management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other 'signaling device' that should reasonably alert them of the 'high probability of an FCPA violation.'"[48] The basic problem with such a knowledge standard, however, is that once a bribe has occurred, hindsight reveals that it was highly probable that a bribe would have, and in fact did, occur.[49] Although the amended standard of knowledge is narrower, business executives are still faced with many of the same difficulties relating to uncertainty and ambiguity.

C. *Grease Payments*

As originally enacted in 1977, the definition of facilitating or grease payments depended upon the status or identity of the foreign official who was receiving the bribe. The Act exempted bribes to foreign officials who performed ministerial or clerical duties, but not bribes to other foreign officials.[50] The distinction between the two types of officials, however, was not always apparent.[51] The 1988 Amendments simplified the old test by basing permissible bribes not on the person to

---

46. 15 U.S.C. § 78dd-2(h)(3).

47. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 919, 920 (1988).

48. *Id.*

49. Impert, *supra* note 36, at 1014.

50. 15 U.S.C. § 78dd-2(d)(2).

51. *See, e.g.*, Impert, *supra* note 36, at 1015.

whom the payment is made, but on the purpose for which payment is made. The Act also incorporated a general exclusion for payments to procure "routine governmental actions" by any foreign official.[52] Routine governmental action is defined as general bureaucratic tasks foreign officials ordinarily perform, such as processing visas and obtaining permits.[53]

To safeguard the general rule, the definition of facilitating payments excludes any foreign official's decision to award new business to or to continue business with any given party.[54] As with the amendment of the knowledge standard, this amendment may have little substantive effect because such payments are likely to be made by local freight forwarders, customs agents, or other service organizations without the knowledge of the United States client.[55]

D. Affirmative Defenses

The 1988 Amendments added two affirmative defenses. First, the payment of a gift, offer, or promise of anything of value is lawful if the written laws and regulations of the foreign official's country permit such payment.[56] This amendment, however, has little significance, because

---

52. 15 U.S.C. § 78dd-2(h)(4)(A).

53. *Id.* The definition of "routine governmental action" is:

> an action which is ordinarily and commonly performed by a foreign official in -
>
> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) processing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
>
> (v) actions of a similar nature.

Id.

54. *Id.*

55. Impert, *supra* note 36, at 1015.

56. 15 U.S.C. § 78dd-2(c)(1).

it is hard to imagine any overzealous prosecutor claiming a payment as a bribe that the laws of a foreign country would explicitly permit.[57]

Second, it is an affirmative defense that:

> the payment, gift, offer or promise of value that was made was a reasonable and bona fide expenditure, such as travel and lodging expenses...directly related to -
>
> (A) the promotion, demonstration or explanation of products of services; or
>
> (B) the execution or performance of a contract with a foreign government or agency thereof.[58]

This defense reflects the Department of Justice's existing policy that payments are not considered corrupt if they are used to reimburse foreign officials for visits or tours of manufacturing facilities.[59] Therefore, this amendment also represents no significant change from prior law.

E. Penalties

The 1988 Amendment increased the penalties for violation of the FCPA. The maximum fine for a corporation was increased from one million to two million dollars, and the maximum penalty for an individual was increased from ten thousand to one hundred thousand dollars.[60] The possibility of imprisonment for up to five years remained unchanged. Individual corporate employees, however, may now be convicted even when the corporation for which they work is not found to have violated the FCPA.[61]

F. International Agreement

The final section of the 1988 Amendments to the FCPA required the President to pursue the negotiation of an international agreement among the members of the Organization of Economic Cooperation and

---

57. Impert, *supra* note 36, at 1016.

58. 15 U.S.C. § 78dd-2(c)(2).

59. Impert, *supra* note 36, at 1016.

60. 15 U.S.C. § 78dd-2(g).

61. *Id.*

Development (OECD)[62] that would prohibit citizens of those countries from engaging in the activities that the FCPA proscribes.[63] This section also directed the President to report to Congress on the progress of these negotiations within one year of the FCPA's enactment.[64] Some commentators thought the United States might scrap the anti-bribery provisions of the FCPA altogether for the sake of competitiveness, if the international negotiations were unsuccessful.[65] As will be shown in the subsequent discussion, the United States has not been successful in its efforts to obtain an international agreement prohibiting bribery and, being the only nation with a law such as the FCPA, is concerned that the FCPA negatively affects American economic competitiveness.[66]

IV. FCPA'S EFFECTS ON BUSINESS AND COMPETITIVENESS

A. *Reactions to the FCPA*

It is impossible to know with certainty the effects of the FCPA on United States business abroad. Therefore, anecdotal evidence and subjective impressions form the basis for the most commonly-held opinions. Numerous American business executives claim that their companies lose valuable foreign government and private sector contracts because of bribery by their foreign competitors.[67] Others believe that the FCPA has had no effect on United States business abroad.[68] A third

---

62. Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 [hereinafter OECD]. The OECD was established in 1960 and currently consists of 24 industrialized nations. The member nations are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States of America. *Id.*

63. *See* 15 U.S.C. § 78dd-1.

64. *Id.*

65. Fremantle & Katz, *supra* note 20, at 764 (citing CORP. COUNS. INT'L ADVISER, SPECIAL REP., Oct. 1988, at 4 (comments of Eric Hirschhorn)).

66. Warren Christopher, A Foreign Policy That Strengthens America's Economic Future, Remarks at the National Foreign Policy Conference for Senior Business Executives, Washington, D.C., Oct. 20, 1993, *in* DEP'T ST. DISPATCH, Nov. 1, 1993.

67. *See, e.g.*, Richardson, *supra* note 9.

68. *See On the Take*, *supra* note 12. Studies conducted by Mr. John Graham of the University of Southern California and Mr. Mark McKean of the University at Irvine suggest that the businessmen's cries of pain are exaggerated. *Id.*

view is that even if some business is lost, the cost is worth the moral gain associated with maintaining honest behavior in United States businesses.[69]

B. *The FCPA as a Competitive Disadvantage*

For citizens and companies in Japan, Germany, Britain, and other countries, the bribery of foreign officials is not only legal, but also tax-deductible.[70] Consequently, many United States business executives claim that the FCPA is anachronistic in an era of increasing international trade.[71] For instance, R. John Cooper, Executive Vice President and General Counsel of Young and Rubicam Inc., a New York advertising agency, believes that the FCPA is outdated because it was enacted at a time when the competitive position of United States companies in the world was much stronger than today.[72] In 1970, the United States was the source of sixty percent of the world's foreign direct investment, as compared to only twelve percent in 1984.[73] Japanese, European, and East Asian companies have become significant factors in the global economy, thereby diminishing the economic hegemony of United States companies.

Given the increased international competition, Cooper believes that the United States should reexamine the FCPA.[74] Young and Rubicam and three of its executives were indicted under the FCPA in the late 1980's. As a result, they are now among the group of businesses exceedingly cautious in their dealings abroad.[75] In fact, Young and Rubicam now has a company policy that forbids facilitating or grease

---

69. Andrew Singer, *Ethics: are Standards Lower Overseas?*, ACROSS THE BOARD, Sept. 1991.

70. *On the Take*, *supra* note 12. *See* Frank Vogl, *U.S. Must Halt Corruption -- Abroad*, N.Y. TIMES, Nov. 21, 1993, at 13.

71. Singer, *supra* note 69, at 31. "It's like the antitrust laws in many ways. The world has passed it by." *Id.* (quoting William Norris, former Control Data Chief Executive). The antitrust laws, enacted at the turn of the century, originally embodied a strong ethical element: The government did not want the nation's large "trusts" to take advantage of average American consumers and small businesses. Some critics argue that the laws worked well when the United States was an isolated economy, but now the antitrust laws inhibit large United States companies from competing effectively abroad. *Id.*

72. *Id.*

73. *Id.*

74. Singer, *supra* note 69, at 31.

75. United States v. Young and Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990).

payments, even though these are expressly permitted by the FCPA.[76] Given the FCPA's ambiguous nature, many business executives choose to err on the side of caution, thereby passing up or losing business deals abroad.[77] Worse yet, some companies are likely to avoid potentially lucrative markets having a reputation for corruption, rather than deal with the difficulties of complying with the FCPA. John Kamm, an American businessman in China, believes that you should forego doing business in China if your corporation has a policy prohibiting the payment of bribes.[78]

Unfortunately, the countries that often provide the most dynamic markets for United States businesses are also those most fraught with corruption. For example, Indonesia, one of the Clinton Administration's top ten business prospects, is considered the most corrupt country in Asia, according to a March 1993 poll of business executives (Hong Kong Poll).[79] Indonesia is a market, however, that United States firms simply

---

76. Singer, *supra* note 69.

77. *Id.*

78. Lucinda Horne, *U.S. Corruption Laws "Hurt" Firms in China*, S. CHINA MORNING POST, Nov. 11, 1992, at 1.

79. Richardson, *supra* note 9 (citing survey in March 1993 of 74 senior executives of banks and corporations in East Asia by Political and Economic Risk Consultancy Ltd. in Hong Kong). Respondents in the Hong Kong Poll were asked to rate countries on corruption risks ranging from 0 (no problem) to 10 (extremely serious). Indonesia received the highest score of 8.47, and China received a 7.69. *Id.* *See also* S. SCHLOSSSTEIN, ASIA'S NEW LITTLE DRAGONS, THE EMERGENCE OF INDONESIA, THAILAND, AND MALAYSIA 85 (1991). Mr. Schlossstein relates an account of a typical case of "fee" payments in Indonesia:

> 'Let's say a foreign government wants to demonstrate a new helicopter for the Indonesian army,' my informant [a ranking foreign official] went on. 'First, the officer in charge will collect a 'demonstration fee' of $1000 from the foreigners, put a few dollars in his own pocket, and give some to his superiors, to his subordinates, and to his peers. Then he'll set aside an amount for the 'Widows and orphans' fund, which is used to help pay for births, weddings, and funerals in the department. Then the equipment gets demonstrated. If the Indonesians decide to buy it, a procurement contract is negotiated, and 10 percent is paid to the local agent who arranged the deal in the first place. There is always an agent, maybe a retired army officer, perhaps an influential businessman. The agent then makes the appropriate distributions throughout *his* hierarchy. When you have a contract worth $500 million or $1 billion, 10 percent is no small change.'

cannot ignore. With a population of nearly one hundred-ninety million people, Indonesia is a tremendous market for United States purveyors of advanced phone and power grid systems, among a myriad of other products.[80] With such vast infrastructure needs, developing countries like Indonesia provide United States firms with the opportunity for enormous sales. They are also markets in which bribery is tolerated and often expected. American business executives contend that American companies are forced to compete on an uneven playing field, since other nation's firms are not constrained by criminal anti-bribery laws.

Other countries such as Russia, are potentially lucrative markets in which, by most accounts, it is impossible to conduct business without bribery.[81] China presents United States firms with similar difficulties. China's rapid economic growth has been accompanied by a huge increase in official graft in which demands for kickbacks are becoming not only more common but also more exorbitant.[82] Cultural differences are also problematic in countries like China. For example, business executives often find it difficult to determine whether standard business transaction payments in China are legal under the FCPA.[83]

The vagueness of the FCPA becomes especially troublesome for small businesses unable to afford the legal fees necessary to ensure compliance with its terms.[84] President Clinton himself has pointed out that most of the job growth in the United States is in small and medium-sized companies.[85] In his National Export Strategy, announced in the

---

80. Kaslow, *supra* note 5.

81. Nancy Dunne, *Clinton Embarks on Broad Review of U.S. Trade Law - Anti Bribery Act Under Scrutiny*, FIN. TIMES, June 10, 1993, at 6.

82. Richardson, *supra* note 9 (citing survey in March 1993 of 74 senior executives of banks and corporations in East Asia by Political and Economic Risk Consultancy Ltd. in Hong Kong).

83. Horne, *supra* note 78, at 1.

84. *Id.*

85. National Export Strategy, *supra* note 2. President Clinton said:

> Most of the job growth in America is in small and medium sized companies. Now, many of those, to be sure, are supplying bigger companies; many of those are in high-tech areas where they're already attuned to exports. But many of them are basically stand-alone operations that sell to companies in America and could sell to companies overseas, but don't know how to do it, think it's too much hassle, haven't really figured out the financing, the paperwork, the market-opening mechanisms.

fall of 1993, Clinton stressed that the government would take strong measures to enable United States firms to conduct business abroad more effectively.[86] Although Clinton did not explicitly mention the FCPA, the Administration is keenly aware of the competitive disadvantage faced by United States firms in countries that tolerate corruption.[87]

C. *The FCPA as a Negligible Influence on Business*

Other commentators believe that the complaints of the American business community are unfounded, and that the enactment of the FCPA has not caused business to suffer. A study by John Graham and Mark McKean of the University of Southern California and the University at Irvine, respectively, most persuasively evidences this belief.[88] By comparing the United States' share of exports in countries considered to be corrupt versus the share in countries considered to be non-corrupt, Graham and McKean conclude that the United States' market share has

---

Id.

86. *Id.*

87. Christopher, *supra* note 66. Secretary of State Christopher said:

> I have long been concerned about the adverse effects that corrupt practices by others have on U.S. exports in foreign markets. I was concerned about this when I was in government in the late 1970's. Reports I have suggest that our companies are losing hundreds of millions of dollars in contracts every year because their non-American competitors are able to bribe foreign officials while American companies are bound by our Foreign Corrupt Practices Act.

Id.

88. *See On the Take*, *supra* note 12.

> Studies by Mr. John Graham of the University of Southern California and Mr. Mark McKean of the University at Irvine suggest that the businessmen's cries of pain are exaggerated. Using information from American embassies in 51 countries that together account for four-fifths of America's exports, Mr. Graham divides the countries into two groups: one where bribery is endemic, the other where it is not. He then checks the embassies' impressions against American press reports of bribery, which broadly confirms the corrupt/non-corrupt classification. He has found that in the eight years after the FCPA was passed, America's share of the imports of corrupt countries actually grew as fast as its share of the imports of non-corrupt ones.

Id.

increased by a roughly equivalent percentage in both categories of countries.[89] From this they inferred that on an aggregate basis no business has been lost due to the FCPA.[90]

Year	U.S. % Share of Imports of Corrupt Countries	U.S. % Share of Imports of Non-Corrupt Countries
1977	17.5	13.8
1978	17.8	13.6
1979	18.6	12.9
1980	18.6	13.7
1981	19.1	14.8
1982	18.9	14.8
1983	18.7	14.6
1984	18.2	14.4

This study, however, is far from conclusive. First, the categories and data are based on highly subjective impressions of what constitutes a corrupt practice. Second, the countries within each category have experienced quite different rates of growth, a variable not considered.[91] Thus, it is possible that but for the FCPA, total United States exports would have increased more in the corrupt countries than what has actually occurred.[92] The subjective nature of the data illustrates the principle problem in determining the FCPA's effects on United States sales abroad.[93]

---

89. *Id.* *See* Impert, *supra* note 36.

90. Impert, *supra* note 36.

91. *Id.*

92. *Id.*

93. *Id.* On the subject of knowing the effect of the FCPA, Mr. Impert states:

> In the end the effect of the FCPA is unknowable in individual cases of lost business because successful bribery by the winning competitor, if it has actually occurred, can almost never be proved. Short of proof "beyond a reasonable doubt," sellers realize they have little choice but to keep quiet. Public speculation by the losing bidder that the winner paid a bribe is likely to earn the enmity of the public official who are the target of the complaint. While the loser may gain some psychic satisfaction, the loser is unlikely to gain any future business. Thus it is unrealistic to expect, as one commentator has suggested, that "(i)f a company is harmed by a competitor's bribe to a foreign government official, the damaged company is likely to provide helpful information

D. *In Defense of the FCPA*

Some commentators believe that the United States and its companies should maintain honesty and fair dealing, even if other countries do not embrace these values, and even if it may be economically disadvantageous to do so. Donald Peterson, former Chairman and Chief Executive Officer of the Ford Motor Company, maintains that a company can prosper while adhering to high moral standards.[94] He states: "It's difficult. You'll be tested constantly, and at times you'll think you've lost business. But if you have a service that they want, they'll come around."[95] Similarly, Gene Laczniak, management professor at Marquette University in Milwaukee, admits it is a difficult tradeoff, but generally believes the United States public does not want its companies to pay foreign officials huge sums of money to secure business.[96]

Some view the FCPA and the values it embodies as a competitive advantage. John Swanson, a Senior Consultant of Communication and Business Conduct at Dow Corning Corporation, tells how high business standards once overcame an inferior product.[97] Dow Corning received numerous complaints regarding its response time and the quality of its product, but Dow's customers granted the company a three-year grace period to improve their products because of the company's reputation for integrity.[98] Swanson believes the customers might have taken their business to a foreign competitor were it not for Dow's high ethical standards.[99] Given Dow's experience, Swanson would not want to see United States businesses reduce their standards to meet those of others.[100]

---

to the SEC or the Department of Justice" On the contrary, the loser will gripe privately and perhaps give up on that particular market.

Id. (citing Note, *Clayco Petroleum Corp. v. Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 CORNELL INT'L L.J. 407, 422 (1984)).

94. Singer, *supra* note 69.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Singer, *supra* note 69.

100. *Id.*

On occasion, the FCPA can have practical advantages. For instance, in negotiations of a joint-venture in China in 1993, the American firm Colgate-Palmolive found the FCPA quite useful.[101] Chinese negotiators demanded that the joint-venture agreement provide jobs for their relatives and free trips abroad, but Colgate representatives were able to deny these demands primarily by referring to the FCPA.[102] No doubt it was convenient to have an American law to use as a scapegoat when denying China's requests. One can only speculate as to what Japanese or German negotiators would have had to concede to the Chinese negotiators in a similar situation. Moreover, Joanne Ciulla, a professor at the University of Pennsylvania's Wharton School of Business, points out that bribes and grease payments may be difficult to figure into financial planning.[103] Compliance with the FCPA avoids these problems.

V. THE EFFORTS OF THE UNITED STATES GOVERNMENT

A. *The Government Position*

Given the increased importance of international trade, and the Clinton Administration's emphasis on a strong export strategy, it is not surprising that the FCPA remains a prominent issue. In July 1993, Secretary of State Warren Christopher announced that the United States would renew its efforts to negotiate an international agreement banning the use of bribery in international business dealings.[104] This announcement was in direct response to complaints by American companies that they were losing business in Asia due to the FCPA.[105] In October 1993, Secretary Christopher reiterated that the Clinton Administration, in its effort to clear export obstacles, would aggressively pursue an international anti-bribery agreement.[106] Christopher said that

---

101. *Colgate-Palmolive Experience Guangzhou: Accommodating Success*, BUS. CHINA, Aug. 23, 1993.

102. *Id.*

103. Singer, *supra* note 69. *See* Jihad Al-Khazen, *Good Morning: Honesty Meeting*, MONEYCLIPS, Feb. 14, 1994. "The going rate for bribes is anywhere between 5 and 20%, and when you talk about multi-million dollar contracts you're talking about seven figure bribes." *Id.*

104. Richardson, *supra* note 9.

105. *Id.*

106. *See* Christopher, *supra* note 66.

he has been concerned about the competitive disadvantage caused by the FCPA since the late 1970's, and that he believes United States companies lose millions of dollars in contracts every year because non-American competitors are able to bribe foreign officials for contracts.[107] He emphasized that he did not wish to change the FCPA, but that "the time is long overdue for international action on this front, and...the United States [will] firmly and aggressively raise this issue [with] the OECD Council."[108]

B. *The Department of State's Lobbying Efforts*

The United States Department of State has aggressively lobbied for an international ban on bribery through the OECD council. The Department has proposed recommendations that would require OECD countries to make bribing a foreign official a criminal offense, as well as to ensure that companies would not be allowed to deduct bribes from their taxable income.[109] Although an ad hoc committee of the OECD had been working on recommendations concerning bribery since April 1993,[110] the United States has already dismissed these recommendations as overly lax and flexible.[111] The original OECD plans did not criminalize bribery, but considered invalidating contracts in which bribery is involved, banning offenders from public tenders, and eliminating the tax deductibility of bribes.[112] According to United States officials, the OECD's recommendations amounted to a flexible shopping list from which countries could escape their obligation to curb bribery by selecting only one or two small anti-bribery measures.[113] No agreement was reached through the OECD, but hope still exists for the American business community. Shortly after the meeting, an informed source said that several countries support the United States approach but not the specific language of the United States proposal, thereby making a

---

107. *Id.*

108. *Id.*

109. George Graham, *U.S. Seeks OECD Foreign Bribes Ban: Many Countries Wary of Extending Laws Beyond Their Own Frontiers*, FIN. TIMES, Dec. 6, 1993, at 3.

110. *OECD to Develop Guidelines to Curb Bribery in International Transactions*, Int'l Trade Daily (BNA) (Apr. 28, 1993) [hereinafter *Guidelines*].

111. Graham, *supra* note 109.

112. *Guidelines*, *supra* note 110.

113. Graham, *supra* note 109.

compromise likely.[114] The resulting international compromise, however, may be dramatically weaker than the FCPA, if the positions currently taken by major world political powers provide any indication. France and Germany are resistant to measures that would criminalize bribery overseas and disallow tax deductions, and the U.K. and Japan have stated categorically that they will not accept such measures.[115]

Some commentators do not believe an agreement will be reached. A. Rushdi Siddiqui, a lawyer and consultant in the field of privatization and international business, writes that "it is not in the best interests of competing countries to adopt laws like the Foreign Corrupt Practices Act. Adopting such laws would result in a loss of lucrative contracts to 'deep pocketed' American companies and the United States would be perceived as imposing its values on other countries and as meddling in their domestic affairs."[116]

Despite Mr. Siddiqui's argument, the anti-corruption movement, led by the United States, is gaining momentum.[117] Leaders of the

---

114. *OECD Working Party Fails to Reach Agreement on Bribery Crackdown Plans*, Int'l Trade Daily (BNA) 49 (Dec. 15, 1993).

115. Rosie Waterhouse, *The Sleazy State: Britain Resisting Moves to Halt Bribes to Officials; Policing Trade*, INDEPENDENT (LONDON), Mar. 16, 1994. Laurence Cockcroft, Secretary of Transparency International, an international anti-bribery group, said:

> Strong opposition from the [United Kingdom] and Japan has impeded the group's ability to reach an agreement which can be recommended to OECD finance minister in June. There is little doubt that member states have been pressed by their national confederations of large corporations not to support this initiative, or at least to ensure it is watered down to the extent where it is ineffective.

Id.

116. A. Rushdi Siddiqui, *Corruption Overseas*, N.Y. TIMES, Dec. 5, 1993, at 40. The FCPA in general and the notion of the United States "imposing its values" on other nations brings up some interesting issues of extraterritoriality, although the business community and the United States government do not seem to be to concerned with this, and it is beyond the scope of this comment. In a press briefing, Bowman Cutter, Deputy Assistant to the President for Economic Policy, talked of the need for the "harmonization of legal regimes" in the globalization of the world economy. Some give and take will occur, but to what extent will the United States legal regime and its accompanying values be the new world standard? *See* Bowman Cutter, U.S. Trade Policy in 1993 and Prospects for 1994, Foreign Press Briefing, *in* FED. NEWS SERVICE, Dec. 23, 1993.

117. *See, e.g., Taxation: Switzerland Stance on Bribes*, BUS. EUR., Mar. 14, 1994. A Swiss parliamentary commission recommended that companies no longer be allowed to deduct kickbacks and bribes from their taxes. The commission made the recommendation after Switzerland received a request for assistance from the United States. *Id.*

Group of Seven (G-7) industrialized countries are expected to place corruption on the agenda at their meeting in Italy in 1994.[118] Simultaneously, President Clinton and Latin American leaders are expected to launch an anti-corruption drive at the Summit of the Americas.[119] As one concerned commentator said, "Worldwide, people are becoming fed up with corruption...the public is demanding more government honesty and reformers are emerging to push the cause."[120]

C. *Building Momentum and "Transparency International"*

Evidencing the world's frustration with corruption, politicians and business leaders from more than twenty countries launched a watchdog group in May 1993 to fight large-scale corruption in government and world trade.[121] Based in Berlin and calling itself "Transparency International," the group cites widespread incidents of bribery in Japan and Italy, among other nations, as the impetus for its origination.[122] Patterned after the human rights group Amnesty International, Transparency International is crafting a code of conduct for international business transactions through which governments and aid programs may become more effective and less prone to bribery.[123] Transparency International initially focuses on corruption in less-developed countries.[124] Its strategy is to expose both givers and takers in under-the-table deals so as to encourage and facilitate legal action against them.[125] Frank Vogl, the Vice Chairman of Transparency International, believes the Clinton Administration can play an important role in promoting anti-corruption reforms by pressing other major industrial

---

118. Michael Holman & Stephen Fidler, *Corruption Drive on Cards: American Leaders Urged to Give Priority to Crusade*, FIN. TIMES, Mar. 7, 1994, at 5.

119. *Id.*

120. Vogl, *supra* note 70.

121. Tom Heneghan, *New Group to Fight Corruption in Business and Trade*, REUTERS ASIA PAC. BUS. REP., May 2, 1993.

122. *Id.*

123. *Id.*

124. Heneghan, *supra* note 121.

125. Kunda Dixit, *Development: Anti-Corruption Crusade Stemming the Rot*, INTER PRESS SERVICE, Jan. 28, 1994.

nations to adopt laws similar to the FCPA.[126] Given the Clinton Administration's past efforts to negotiate international anti-bribery agreements, it is no surprise that the White House supports the work of Transparency International.[127]

D. The Intelligence Community's New Role

Aside from the State Department efforts toward an international agreement, the United States government works on behalf of United States firms in other more innovative and perhaps more controversial ways. As a result of the end of the Cold War and the increased globalization of the world economy, the United States intelligence machine is now directing its attention to American business abroad. At a Senate Hearing on January 25, 1994, James Woolsey, Director of the Central Intelligence Agency, announced that the intelligence community intends to provide strong support in the international business arena, because "more than ever, our security is tied to economics."[128] Director

---

126. Vogl, *supra* note 70.

> The Administration must first press the other major industrial nations to adopt laws like our Foreign Corrupt Practice Act....Second, the Administration, led by the Treasury Department, must gather global support to make the World Bank and the [International Monetary Fund] use their lending leverage to promote anti-corruption initiatives. These powerful agencies should give higher priority in their programs to such corruption-curbing efforts as civil-service and legal reforms. The United States Agency for International Development should do the same, setting an example for other nations' aid agencies....Third, Washington must marshal donor nations to demand that recipient nations open up their procurement and competitive-bidding systems, so companies can see that the business goes to the best bidders -- not the biggest bribers.

Id.

127. Holman & Fidler, *supra* note 118.

128. *World Trouble Spots, Hearing of the Senate Select Intelligence Committee*, 103d Cong., 2d Sess. (statements of James Woolsey and James Clapper), *in* FED. NEWS SERVICE (1994) [hereinafter *World Trouble Spots*]. Mr. Woolsey stated:

> For nearly half a century, international economic issues took a back seat to our struggle against the Soviet Union and its allies. That has changed. As the president said last fall, more than ever our security is tied to economics. Interest rates, trade policies, and currency fluctuations all can have an immediate and significant impact on our economic well-being. Moreover, as industrialized nations pull

Woolsey outlined several tasks that the intelligence community would undertake, including an assessment of how some governments violate the rules governing international trade.[129] As part of this task, the CIA will scrutinize governments and foreign companies that attempt to use bribery to obtain contracts otherwise unattainable.[130] When the intelligence community learns of a bribe or a potential bribe, it disseminates the information to the National Security Council, the "intelligence consumers in Washington," and frequently to the Secretary of Commerce or the Secretary of State.[131] A United States representative then contacts the foreign government involved to deliver a diplomatic protest, called a *demarche*, to a high-ranking government official.[132] Following a *demarche*, contracts are frequently rebid or reassessed within the foreign government.[133] The American corporation tends to fare better in that market than it would have without the *demarche*.[134] In conclusion, Mr. Woolsey contends, the United States intelligence community can help the American business community earn billions more dollars.[135]

E. Publicity

The United States government may also use publicity as an alternative means of drawing attention to unfair treatment of an American Company.[136] This policy reflects the idea embodied by Transparency International: If corrupt practices are made public, then incidents of bribery will occur less frequently. In a culture in which bribery is normal and routine, this reasoning may be flawed, because those who know about the bribe will not care or will have no power to discourage it. In

---

> themselves out of the longest recession since the depression of the 1930's, they're discovering that their economic recoveries are not accompanied by a growth in jobs, thus making the competition on the world market that much sharper.

Id.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *World Trouble Spots*, *supra* note 128.

134. *Id.*

135. *Id.*

136. *Id.*

an international business context, however, those made aware of corruption often do care, and have more power to stop such behavior. Once incidents of corruption are made public, diplomatic protests can be made, legal actions can be taken, and the risks and costs associated with entering that market can be more easily ascertained.

VI. CONCLUSION

The Foreign Corrupt Practices Act may hinder American competitiveness abroad. Whether this is true is unascertainable given the subjectivity of the data; however, this has been the American business community's perception. In addition, the Clinton Administration, with its National Export Strategy, is determined to increase American competitiveness abroad by removing obstacles to trade and by focusing global trade initiatives on fast-growing regions renowned for corruption. This combination would seem to signal the end for a well-intentioned, but perhaps unrealistic and anachronistic law.

Another perception, however, is responsible for what will most likely cause laws like the FCPA to flourish worldwide: Corruption is the real detriment to business. Irrespective of the United States and its aggressive lobbying, other countries are learning an economic lesson. When a market requires the competitors to resort to bribery, none is sure of winning the contract, but each must pay so as not to be outdone. As bribers bid against each other, the cost rises, but the bribery's effectiveness does not. At this point of diminishing returns, the competitors realize that they would gain from an international agreement outlawing bribes.[137] For many, such as the founders of Transparency International, that realization has occurred. For others, it may be near. The escalating demands of foreign officials greedily taking advantage of rapid growth rates and increasing foreign investment have accelerated the learning curve worldwide, and the demand for a global agreement is steadily crystallizing. Developing a working international plan will be difficult, but the Foreign Corrupt Practices Act is a natural model for an

137. *On the Take, supra* note 12. In Beijing, China, some companies, having already reached bribery's point of diminishing returns, have made informal agreements with their competitors. Hill & Knowlton, a United States public relations group, has such an agreement with its main competitors, Burson Marsteller and InterAsia Communications, not to pay for Chinese media coverage of their clients. Apparently, Chinese journalists often demand "appearance money" to cover press conferences. Teresa Poole, *Greasing the Dragon: Foreign Firms Doing Deals in China Foot the Bill for Growing Corruption*, INDEPENDENT (LONDON), Apr. 3, 1994, at 9.

international agreement as the first and only attempt to limit the use of transborder bribery.

CHRISTOPHER L. HALL