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Cover Page Footnote

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EXTRATERRITORIAL IMPACT OF UNITED STATES ANTITRUST LAWS AND COMMERCIAL BRIBERY CONSIDERATIONS

James G. Park*

Historically, the United States has sought to impose its moralistic values extraterritorially. Our antitrust laws and the Foreign Corrupt Practices Act[1] are two well-known examples. Thus, in making the determination to engage in investment in the United States, a foreign entity must consider not only the more publicized restrictions of the Sherman Act[2] and the Clayton Act[3] on its activity within the borders of this country, but also must be concerned with the extraterritorial impact of the United States' antitrust laws and the extent to which the decision to invest in the United States may create exposure under United States antitrust laws with respect to other operations of the foreign investor conducted in other countries.

A foreign investor in the United States must also be aware of various restrictions placed on all companies soliciting business in the United States. A perfectly acceptable and customary practice abroad may here be held to be commercial bribery or the grant of an illegal commission.

I. Extraterritorial Impact of United States Antitrust Laws

Let us first examine the extraterritorial impact of

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1. 15 U.S.C. §§ 78a, 78m, 78o, 78dd-1, 78dd-2, 78ff (1976 & Supp. IV 1980).
2. 15 U.S.C. §§ 1-7 (1976).
3. 15 U.S.C. §§ 12-27 (1976 & Supp. IV 1980).

United States antitrust laws and then the jurisdictional problems presented by the presence in this country of a subsidiary of a foreign corporation.

The substantive reach of the Sherman Act has not been altered since its passage in 1890. The statute condemns all conspiracies to restrain, or attempt to monopolize, trade among the several states of the United States or United States trade with foreign nations.

Although there have been no fundamental changes in the Sherman Act itself, there have been important interpretive shifts regarding its application to extraterritorial conduct. At first it appeared that the antitrust laws had no extraterritorial effect. In American Banana Co. v. United Fruit Co.,[4] the Supreme Court considered a complaint by the defunct American Banana Company that the United Fruit Company had driven it out of business in Costa Rica by inducing the government there to expropriate its land, send troops across its property and cut its railroad connections to the sea. In an opinion written by Justice Holmes, the Court held that the complaint was not cognizable in United States courts because the relevant events occurred in a foreign country and also because the alleged acts were sovereign acts of state.

Although American Banana remains a viable precedent with regard to the "act of state" doctrine, the statement to the effect that antitrust laws have no extraterritorial effect is no longer a correct statement of law. A number of cases establish that conduct outside the United States is encompassed by our antitrust laws if that conduct has an effect on United States commerce. While the precise standard to be applied remains unclear, it appears that an

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4. 213 U.S. 347 (1909).

expansive interpretation will be applied and a significant percentage of the conduct challenged will be held to be within the scope of the American antitrust laws.

The courts are not in agreement on the degree of effect on United States foreign commerce which is required to trigger application of the antitrust laws. Reference is made to "direct and material effect",[5] "substantial impact"[6] and "any effect that is not both insubstantial and indirect."[7] Additionally, conduct overseas must involve both an intent to affect American commerce and an actual effect thereon. In 1945 the Second Circuit ruled in _United States v. Aluminum Co. of America_[8] (Alcoa) that a cartel scheme entirely among foreign firms and occurring entirely in Europe would fall within the coverage of the Sherman Act if the scheme's intended and actual effect was to restrain the trade of the United States.

That portion of the _Alcoa_ ruling was, however, dicta as the foreign cartel members were not named as defendants in the case. The _Alcoa_ approach has received mixed reviews. The majority interpretation appears to be that presented by the International Law Association in 1972 which stated that a state has a right to punish foreign conduct when either a significant constituent element of the offense takes place in its territory or the foreign conduct produces substantial reprehensible effects on its territory that occur as a direct and primarily intended result. The I.L.A. stressed,

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5. Sabre Shipping Corp. v. American President Lines, Ltd., 285 F. Supp. 949, 953 (S.D.N.Y. 1968), _cert. denied_, 407 F.2d 173 (2d Cir. 1969), _cert. denied_, 395 U.S. 922 (1969).

6. Sulmeyer v. Seven-Up Co., 411 F. Supp. 635, 639 (S.D.N.Y. 1976).

7. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 103 (C.D. Cal. 1971), _aff'd_, 461 F.2d 1261 (9th Cir. 1972), _cert. denied_, 409 U.S. 950 (1972).

8. 148 F.2d 416 (2d Cir. 1945).

however, that if other states had concurrent jurisdiction over the conduct, each state should, in applying its own law to the conduct in other states, "pay due respect to the major interests and economic policies of such other states."[9]

A factual situation involving solely foreign conspirators with no overt acts on United States soil has not been litigated since Alcoa in 1945. But in 1962, the Supreme Court modified the American Banana territorial rule in Continental Ore Co. v. Union Carbide & Carbon Corp.,[10] involving a United States-Canadian vandium monopolization attempt. The Court held:

> A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.[11]

Starting with the decision in Timberlane Lumber Co. v. Bank of America,[12] a trend has emerged to the effect that the exercise of national jurisdiction as to extraterritorial acts also subject to foreign law should be tempered by comity. This is in keeping with the recommendation of the International Law Association that restraint in such circumstances be imposed by either: (1) a conflict of laws approach as to jurisdiction, based on a weighing and balancing of relative United States and foreign interests; or (2) a type of limited abstention based on diplomatic suggestions and considerations. The law here, however, remains in a state of flux.

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9. See Hunter, Some Progress Toward the Avoidance and Resolution of Conflicts Between the Anti-Trust Laws of Different Countries, in Papers and Reports of the Tokyo International Conference on International Economy and Competition Policy 235 (1973).
10. 370 U.S. 690 (1962).
11. Id. at 704.
12. 549 F.2d 597 (9th Cir. 1976).

In Timberlane Lumber, the Ninth Circuit ruled on the issue of whether United States jurisdiction existed over an alleged conspiracy primarily involving foreclosure of a lien in the courts of Honduras. A denial of jurisdiction was overruled on remand for further consideration on the grounds that the alleged conspiracy apparently prevented export of lumber to America (and thereby creating the requisite effect on commerce) and because the matter did not "challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to the relations between Honduras and the United States."[13] The lower court was directed to be aware of the foreign policy implications of cases involving extraterritorial issues, especially in private suits where "there is no opportunity for the executive branch to weigh the foreign relations impact . . . ."[14]

The opinion in Timberlane Lumber stated that the "effects" test formulated in Alcoa was inadequate unless balanced within a "jurisdictional rule of reason."[15] The court suggested that the elements to be weighed should include:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties, . . . the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, ... the explicit purpose to harm or affect American commerce . . . and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[16]

The Timberlane Lumber approach was cited favorably by the Third Circuit in Mannington Mills, Inc. v. Congoleum

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13. Id. at 549 F.2d at 608.
14. Id. at 613.
15. Id.
16. Id. at 614 (footnote omitted).

Corp.[17] Unlike the Ninth Circuit in Mannington Mills, the Third Circuit interpreted the issue as a question of abstention or comity rather than an issue of jurisdiction. In Mannington Mills an American floor covering manufacturer sued an American competitor for monopolization. The plaintiff claimed that the defendant blocked United States competitors from export or direct foreign competition by fraudulently obtaining patents in twenty-six foreign nations. The trial court was held to have erred in deciding the matter on the basis of an act of state defense. The case was remanded for application of a balancing test to determine if subject matter jurisdiction should be exercised. The opinion lists ten factors to be considered in comparing United States and foreign interests:

1. Degree of conflict with foreign law or policy;
2. Nationality of the parties;
3. Relative importance of the alleged violation of conduct compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;
7. If the relief is granted, whether a party will be placed in a position of being forced to perform an act illegal in either country or by under conflicting requirements by both countries;
8. Whether the court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.[18]

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17. 595 F.2d 1287 (3d Cir. 1979).
18. Id. at 1297-8 (footnote omitted).

The balancing test concept is mentioned in a few other recent cases but in none of these did the balance result in an immediate dismissal or restriction of the litigation. The courts recognize that the balancing test usually requires more facts than can be gleaned from the pleadings. Hence, there must either be a "mini-trial" of the jurisdictional issue, or the motions to dismiss must be held in abeyance until the completion of the trial. In the case of *In re Uranium Antitrust Litigation*,[19] the Seventh Circuit affirmed the ruling of a district court judge to the effect that foreign defendants who declined to appear in court were not entitled to argue the merits of the balancing test for jurisdiction. The court also refused to give weight to balancing test arguments offered in *amicus curiae* briefs filed by the home governments of the non-appearing defendants.

The Seventh Circuit, by stating that the comparative relations test employed in *Mannington Mills* (which essentially restates the *Timberlane Lumber* test) provides an "adequate framework"[20] for determining whether to abstain from exercising subject matter jurisdiction, seems to imply that it accepted the reasoning, if not the exact test, of *Mannington Mills*. The district court focused on three factors, including the possible unfairness to the plaintiff should adjudication be delayed, the seriousness of the charges and the fact that the recalcitrance of the non-answering parties could necessitate use of strong sanctions.

Nevertheless, it appears that the district court's analysis fails to deal adequately with the possible effects

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19. 617 F.2d 1248 (7th Cir. 1980).
20. *Id.* at 1255.

on foreign relations that the exercise of jurisdiction might have. The claim that the approach of the district court was functionally equivalent to that of Mannington Mills is not valid. The fact that the defendants contested the existence of United States jurisdiction by not appearing, and the fact that the claim was raised by their governments appearing as amici curiae, indicates foreign opposition to the exercise of extraterritorial jurisdiction by American courts. Thus, a court sensitive to notions of international comity might have found it inappropriate in this case to exercise jurisdiction. In a sense, In re Uranium Antitrust Litigation indicates a retreat from a "jurisdictional rule of reason."

The Departments of State and Justice have indicated their support for amicus participation in antitrust suits filed in this country. To date, however, the position taken has not had a perceptible impact. Nevertheless, concern with the extent of the extraterritorial reach of the United States' antitrust law should continue.

Let us now examine the jurisdictional problems presented by the presence in this country of a subsidiary of a foreign company.

United States law establishes a clear distinction between the issues of jurisdiction over the offence and jurisdiction over persons or parties. As a general rule, if the offence would not adversely effect United States commerce, existence of jurisdiction over the parties is not relevant. Conversely, if the offence is cognizable under United States antitrust law, but the defendants are not subject to service of process, no action can take place, at least in a civil

case.[21] There is precedent in criminal cases, including criminal antitrust cases, for indicting foreign persons who can be subjected to trial should they ever enter the jurisdiction. In United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie,[22] a defendant was arrested six years after indictment for participation in a quinine cartel when he stopped in New York and attempted to change planes. American courts uphold service of process by mail on natural persons or corporations who previously did business in the United States and took part in an antitrust offence directly or through an agent such as a corporate subsidiary.[23]

The exposure of the conduct of a foreign parent corporation as the result of the presence of a wholly owned American subsidiary is an issue that, while touched upon, is not yet resolved. In Sunrise Toyota, Ltd. v. Toyota Motor Corp.,[24] the court held that where an American subsidiary doing business in the United States was the agent of the foreign (Japanese) parent corporation (as determined by applicable state law) the jurisdictional requirements of the Clayton Act were satisfied for purposes of a suit against the foreign parent in federal district court. The promotion, sale and service of the product manufactured by the foreign parent was held to be sufficiently "continuing and substantial"[25] to justify jurisdiction over the

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21. See United States v. De Beers Consolidated Mines, Ltd., 1944-45 Trade Cas. (CCH) § 57,354 (1945), rev'd, 325 U.S. 212 (1945).
22. [July-Dec.] Antitrust & Trade Reg. Rep. (BNA) No. 690, at A-6 (Nov. 26, 1974).
23. See In re Japanese Electronic Products Antitrust Litigation, 402 F. Supp. 262 (E.D. Pa. 1975).
24. 55 F.R.D. 519 (S.D.N.Y. 1972).
25. Id. at 531.

foreign parent.

But in Saraceno v. S.C. Johnson & Son, Inc.,[26] the court held that, in the absence of an agency relationship, the "doing businsss" test does not subject a foreign subsidiary to personal jurisdiction simply because there existed jurisdiction over the parent, even where the parent is the lone shareholder of the subsidiary. The court indicated that personal jurisdiction also exists where control of the subsidiary by the parent is so complete that the subsidiary is, in reality, a mere department of the parent. In a footnote to Saraceno, the court further indicated that the same analysis would apply regardless of whether it was the parent or the subsidiary that was the domestic entity.[27]

The most recent decision to address the issue of personal jurisdiction over a foreign corporation in an antitrust suit is Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.[28] The court applied the state law jurisdictional standards of in personam jurisdiction. The operative requirement in that determination was whether the foreign parent could be held to be "doing business" in the forum. The court held that the parent-subsidiary relationship does not, in itself, constitute sufficient grounds to establish personal jurisdiction over a foreign parent, and that further inquiry must be made, including factors such as the direct or indirect control over the local subsidiary, and the treatment of the subsidiary as an incorporated

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26. 83 F.D.R. 65 (S.D.N.Y. 1979).
27. Id. at 67 n.5, citing with approval, Titu-Serban Ionescu v. E.F. Hutton & Co., 434 F. Supp. 80, 83 (S.D.N.Y. 1977), aff'd, 636 F.2d 1202 (2d Cir. 1980).
28. 508 F. Supp. 1322 (E.D.N.Y. 1981).

division or as an agent of the parent. The decision indicates that the parent corporation will be deemed present in the forum for purposes of jurisdiction where the relationship between the foreign parent and the local subsidiary gives rise to a valid inference of an agency relationship, considering in addition to control, the type and range of the products sold by the subsidiary, the age of the subsidiary and the extent to which the subsidiary developed independently of the parent.

Applying the law to the facts of Bulova, the court held that personal jurisdiction did indeed exist. The determination was based on (1) the parent's penetration of the American market by the use of subsidiaries to market a single product manufactured by the parent; (2) the parent continued to engage in market penetration and expansion; (3) the American market was too important to the parent's welfare to use independent and uncontrolled sales agents and distributors; (4) almost the entire American sales of the parent's production moved through subsidiaries; (5) the export market was crucial to the parent and the subsidiaries were the means by which the parent had established and sought to maintain its base; (6) the subsidiaries did for the parent everything the parent would have done were it operating in the jurisdiction; and (7) the cause of action was integrally related to the doing of business within the jurisdiction.

Another list enumerating factors to be considered in determining the existence of personal jurisdiction was set forth in Zenith Radio Corp. v. Matsushita Electric Industrial Co., Inc.[29] The court stated:

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29. 402 F. Supp. 262 (E.D. Pa. 1975).

> From these cases, some involving venue, other jurisdiction, emerges a comprehensive set of factors which a court should examine in order to determine whether a corporation, though superficially absent from a district, is in fact transacting business there through a subsidiary or affiliated corporation.[30]

The court then listed the following as some of the factors to be considered:

> 1. [T]he performance by the subsidiary or affiliate of business activities in a district, for example sales and services, that in a less absent corporation would perform directly by its own branch offices or agents.
>
> 2. [A] partnership in world-wide business competition between the absent corporation and the corporation that is present in the district.
>
> 3. [T]he capacity of the absent corporation to influence decisions of the subsidiary or affiliate that might have antitrust consequences. Controlling stock ownership and interlocking directorates are, of course, indices of such capacity.
>
> 4. [T]he part that the subsidiary or affiliated corporation plays in the over-all activity of the absent corporation.
>
> 5. [T]he existence of an integrated sales system involving manufacturing, trading and sales corporations.
>
> 6. A related factor is the status of the subsidiary or affiliate as a marketing arm of the absent corporation.
>
> 7. [T]he use by the subsidiary or affiliate of a trademark owned by the parent.
>
> 8. The transfer of personnel back and forth between the absent corporation and its subsidiary or affiliate.
>
> 9. [T]he presentation of a common marketing image by the related corporations . . . . This is especially true when those corporations hold themselves out to the public as a single entity that is conveniently departmentalized either nationally or worldwide.

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30. Id. at 327.

10. [T]he granting of an exclusive distributorship by the absent corporation to its subsidiary or affiliate.[31]

Several foreign commentators suggest that the United States could avoid much diplomatic irritation if it applied its antitrust laws to the foreign conduct of Americans but not to that of foreigners.[32] The contrary view maintains that to base jurisdictions and standards of behavior on nationality is inappropriate in antitrust as it encourages chauvinism and discrimination.[33] Also, since foreigners victimized by violations of American antitrust laws may have the right to sue for damages and injunctive relief, it would be anomalous to allow them the benefits of the law without their being subject to it.

The Justice Department recognizes that criminal sanctions against individuals should turn on their knowing violation of United States law, with a slight presumption that foreign nationals may lack such knowledge and intent. Foreign individuals rarely are named as defendants. Few, if any, are sentenced to a prison term, though many American individuals have received jail sentences. Also, the decision by the Antitrust Division to name only a United States firm as a defendant in the uranium cartel criminal case[34] may indicate a decision to allow foreign firms somewhat more leeway in cooperating with foreign governmental policies that would be acceptable to American firms. Thus, there seems to be some flexibility and prosecutorial

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31. *Id.* at 327-8 (citations omitted).
32. *See*, *e.g.*, A. Neale & D. Goyder, *The Antitrust Laws the U.S.A.* 369-71 (3d ed. 1980).
33. *See*, *e.g.*, Kintner & Joelson, *An International Antitrust Primer* 26 (1974).
34. *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).

discretion in deciding how to treat foreign firms and individuals under United States law, but it does not seem at all likely that any general policy of applying the law only to United States firms and individuals will be adopted.

What does all this mean to persons who will be advising or counselling with foreign entities seeking to invest or to do business in the United States and to foreign businessmen who must make the decision to engage in business here? I suggest the following for your consideration:

1. The foreign businessman and his foreign counsel should be made aware of the basic principles of United States antitrust laws. Without a working knowledge of these principles, they will not be able to evaluate the risks, not only as to the domestic operation of his business here, but also as to any possible extraterritorial effect of the antitrust laws on his foreign operations.

2. A free exchange should be encouraged regarding the foreign operations so that the United States counsel may participate in the process of risk evaluation.

3. The domestic subsidiary should be structured with reference to the factors set forth in _Bulova_ and _Zenith_.

It must be understood, however, that the law is far from clear, and changing interpretations by the courts and changing policies of the executive branch will have to be monitored closely in the future.

II. Conduct Prohibited As Commercial Bribery Or By The Robinson-Patman Act

In 1977 Congress enacted the Foreign Corrupt Practices Act.[35] The principal purpose of the Act is to prevent the

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35. 15 U.S.C. §§ 78a, 78m, 78o, 78dd-1, 78dd-2, 78ff (Supp. IV 1980).

practice of bribery overseas by United States business concerns. If the objective is to eliminate bribery throughout the world regardless of the identity of the perpetrator, it must be realized that the Act cannot, in and of itself, achieve that objective, and it apparently does not even set a model which other developed countries are anxious to reproduce. The United States is the only country in the world which makes bribery outside its jurisdiction by an entity incorporated within its jurisdiction a criminal offence within its jurisdiction.

Foreign entities seeking to invest in the United States, while not restricted at home by regulations similar to the Foreign Corrupt Practices Act, must nevertheless be aware of the United States laws with respect to commercial bribery. Conduct perfectly acceptable and customary in the foreign businessman's country or in foreign countries in which he does business may subject him and his United States friends to great embarrassment and possible criminal charges.

Commercial bribery has been defined as the offence of bribery by an employee, servant, or agent, with the intent to influence him in his relation to his employer, master, or principal.[36] The gravamen of the offence of commercial bribery is the attempt to bribe. The attempt need not be successful nor is it necessary that money actually be tendered.[37] Commercial bribery is a creature of state law and applicable state statutes should be consulted.[38]

The federal and state statutes which outlaw commercial

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36. 15 U.S.C. § 78dd-2 (Supp. IV 1980).
37. *Id.*
38. *See, e.g.*, Pa. Stat. Ann. tit. 18, §§ 4108, 4701 (Purdon 1972).

bribery do not distinguish the point at which the entertaining of an employee for the purpose of creating a favorable business climate ends and the crime of commercial bribery begins. The "Travel Act"[39] prohibits use of interstate commerce to violate federal bribery statutes or the bribery statute of the state in which the bribe occurred. The "RICO Act",[40] prohibits bribery that is chargeable under state laws and punishable by imprisonment for more than one year. Other federal statutes prohibit the bribery of public officials,[41] use of National Bank money to bribe state officials,[42] and acceptance of gifts or money by an internal revenue agent or officer for the compromise, adjustment or settlement of any charge or complaint.[43]

Few cases have addressed the matter of defining acts which will constitute commercial bribery. Those which do are applications of state law and hence turn on the interpretation of the particular statute involved. These state statutes vary so significantly as to make more than the grossest generalizations impractical.

In United States v. L'Hoste,[44] tacit recognition was made of the legitimacy of "goodwill expenditures" and customer entertainment practices routinely provided in the private business world. The defendant's attempt to equate its payments to a public official with such customer entertainment practices and thereby remove its conduct from the scope of the Louisiana bribery statute was rebuffed by the

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39. 18 U.S.C. § 1952 (1976).
40. 18 U.S.C. §§ 1961-1968 (1976 & Supp. IV 1980).
41. 18 U.S.C. § 201 (1976 & Supp. IV 1980).
42. 18 U.S.C. § 656 (1976).
43. 26 U.S.C. § 7214(9) (1976).
44. 609 F.2d 796 (5th Cir. 1980), cert. denied, 449 U.S. 833 (1980).

court. In making its ruling the court distinguished between "goodwill expenditures" made to or on behalf of public officials and those made to potential customers.

While customer entertainment practices on the order of those discussed in L'Hoste are not held to constitute commercial bribery, care must be taken in this area. It is unlawful under the Federal Trade Commission Act,[45] for a price, reward, gift, or favor to be bestowed or promised by a seller for the express purpose of influencing the action of its own customers or prospective customers, or its competitor's customers or prospective customers. The FTC applies the term "commercial bribery" to the practice of sellers secretly paying money or making gifts to employees or agents to induce them to promote purchases by their own enployees from the sellers offering the secret inducements. The vice of conduct labeled "commercial bribery" by the FTC as related to unfair trade practices. is the advantage which one competitor secures over his fellow competitors by his secret or corrupt dealings with employees or agents of prospective purchasers.[46]

Commercial bribery is also punishable under the Travel Act.[47] While it is contended that the Act was meant to apply solely to public officials, it appears that commercial bribery generally is within the purview of the Act. The Fifth Circuit expressly rejected an attempt to limit the reach of the Travel Act to bribery of public officials.[48] Bribery of private employees, if prohibited by state law,

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45. 15 U.S.C. § 45 (1976 & Supp. IV 1980).
46. See American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582 (7th Cir. 1939).
47. 18 U.S.C. § 1952 (1976).
48. United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979).

falls within the meaning of bribery as used in the Travel Act.[49]

Thus, while certain "goodwill expenditures" are clearly permissible, acquisition of an advantage by a competitor by use of secret and corrupt dealings with employees or agents of prospective purchasers is not allowed. The distinction between these two categories remains hazy and will, to a large extent, be a creature of state law. The unanswered question is, "How much is too much?"

Section 13(c) of the Robinson-Patman Price Discrimination Act[50] also touches on the area. Section 13(c) reads as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to whom such compensation is so granted or paid.[51]

One of the purposes of the section is to protect the integrity of the principal-agent relationship where a violation has an anti-competitive effect.[52] Section 13(c) of the Act was held to reach commercial bribery cases.[53] That conclusion was based on the reasoning that commercial bribery constituted indirect price discrimination. Additionally,

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49. Perrin v. United States, 444 U.S. 37 (1979).
50. 15 U.S.C. § 13 (1976).
51. 15 U.S.C. § 13(c) (1976).
52. *See* Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976); Modern Marketing Service, Inc. v. Federal Trade Commission, 149 F.2d 970 (7th Cir. 1945).
53. *See* Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1976); Ragen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1975).

where an employee of one party to a sales transaction accepts a bribe from the other party to the transaction to induce his employer to behave in a way favorable to the payer of the bribe, such a payment can constitute a violation of section 13(c).

Whether certain conduct indeed will constitute a violation of section 13(c) is a question of fact.[54] The language of 13(c) does, however, except payments made in return for services rendered. There is a split of authority. Some courts have held that the exception merely preserves the right of one party to a transaction to pay his own agents for services rendered, but does not justify payment to the other party's agent even if they do render services to the person making the payments.[55] In contrast, it has also been held that the "services rendered" exception can justify the payment by one party to a sales transaction to the other party to the transaction or the other party's agent provided that it can be shown that the person receiving the payment did indeed render services to the person making the payment.[56] In any event, care must be exercised in any decision involving payments to employees of competitors, customers or potential customers.

The important point here is that foreign businessmen must be warned that a good faith expression of friendship or appreciation, perfectly acceptable abroad, may be interpreted here as an attempt to secure an advantage, thus

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54. Cf. Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829 (N.D. Ohio 1964); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 447 F. Supp. 867 (S.D.N.Y. 1978), _rev'd_, 602 F.2d 1025 (2d Cir. 1979).

55. Quality Bakers of America v. Federal Trade Commission, 114 F.2d 393 (1st Cir. 1940); Freedman v. Philadelphia Terminals Auction Co., 145 F. Supp. 820 (E.D. Pa. 1956).

56. Ragen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), _cert. denied_, 383 U.S. 936 (1965).

destroying the very business climate that the unwary businessman sought to promote.