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The United States’ Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won’t Work, Try the Money Argument

Beverley Earle*

I. Introduction

When the United States passed the Foreign Corrupt Practices Act (FCPA) in 1977, it was the lone voice for reform in the international arena of business transactions. It was an attempt to regulate transactions by United States companies and individuals and their agents abroad. The legislation represented efforts to enforce a concept of morality and to “level the playing field” in forbidding the use of corrupt payments offered to foreign officials to obtain or retain business. The anticipated rush by other countries to follow the United States’ lead never occurred.2

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Nonetheless, the U.S. standing alone defended its action based on moral principles.

The criticism of the FCPA resulted in significant amendments in 1988.\(^3\) Embedded in these changes was a recognition that the law needed to be reevaluated in light of the progress, or lack thereof, by other countries. The legislation called for a report within a year.\(^4\) Six years after the amendments, however, a surprise occurred. In 1994, the OECD\(^5\) passed an Antibribery Recommendation (ABR) and urged member nations to adopt legislation that would mirror the principles enshrined in the Recommendation.\(^6\)

One year later, there has been no great rush to enact such legislation in these countries.\(^7\) However, there is a growing recognition that an environment in which bribery is fostered, condoned, tolerated or ignored is not conducive to economic development.\(^8\) Furthermore, the economic costs of bribery are much higher than the moral cost. A fact which may persuade countries that have balked at United States absolutism, to reevaluate their position.\(^9\)

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5. Organization for Economic Cooperation and Development. See infra notes 143-44 and accompanying text (discussing the creation and purposes of the OECD).


7. Telephone Interview with Peter B. Clark, Esq., Deputy Chief, Fraud Section, Criminal Division, Dep't of Justice, Washington, D.C. (May 1995).


Fighters of corruption, such as former President Jimmy Carter, were often ridiculed as "do gooders" who ignored the realities of business. Conventional wisdom dictated that attempting to change business practices was the equivalent of Don Quixote tilting at windmills. However, a new development may alter the business landscape. Transparency International (TI), modeled on Amnesty International, is dedicated to ending the inefficient and costly system of bribery of foreign officials. This grass roots movement by a non-governmental organization (NGO) represents an important philosophical shift on this issue. This thrust is coming from those countries where bribery has been endemic and citizens can appreciate the costs to their society. These costs can be seen in poorly planned projects that serve to hide payoffs and in the large foreign bank accounts of public officials. This shift from a moral to an economic argument is a significant change that may presage a better result in the effort to eliminate corruption.

This Article will examine the enforcement of the FCPA and the erroneous perception that it is a "dead letter." The adoption of the OECD Antibribery Recommendation and the utility of voluntary codes will also be examined. The Article will conclude with some recommendations for the future.

II. The United States Foreign Corrupt Practices Act

A. The Statute

The statute, as amended in 1988, applies to both the issuers of securities under U.S. securities law and to domestic concerns, defined as any:

individual who is a citizen, national, or resident of the United States and 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.
United States, or which is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.  

All of the above entities are prohibited from offering money, gifts, promises, or anything of value, to any foreign official who assists in obtaining or retaining business in a corrupt fashion.

An exception exists for payments made for routine government actions, which are defined as obtaining permits or government documents to authorize one to do business, processing paper work, obtaining visas, etc. Paying for police protection, mail pick-up, inspections related to goods in transit across country, obtaining phone service or utilities, and loading and unloading cargo are also exempted. These activities are also distinguished from larger governmental decisions to award contracts. Affirmative defenses are available, e.g., if the action was legal in the host country, if it was a bona fide business expenditure, or if it involved the execution or performance of a contract.

Under the FCPA, as amended, the U.S. Attorney General (AG) was to consider issuing guidelines, but the current Attorney General has determined that guidelines are unnecessary. The law also provides a procedure for seeking opinions of the Attorney General if there are questions about the application of the law to specific instances. However, the official procedure is infrequently used. An Attorney General’s opinion creates a rebuttable presumption that the conduct, if the description was accurate and if the company followed the AG’s instruction, “is in conformity with the Department of Justice’s present enforcement policy.”

“Knowing” is a requirement for liability to be imposed under the FCPA. It is defined as:

14. Id.
17. Id.
21. Id.
THE MONEY ARGUMENT

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 such person has a firm belief that such circumstance exists or that such result is substantially certain to occur . . . knowledge is established if a person is aware of a high probability of the existence of such circumstances unless the person actually believes that such circumstances do not exist.  

"Knowing" was amended from the original version which merely required "reason to know."  The significance of the change may not have great practical impact other than the clear statement that one has a defense if one truly did not know that the payment was a bribe. However, willful blindness, or a wink and a nod, will not be an excuse.

B. Recent Enforcement

Ironically, some businesses erroneously believe that the FCPA is a low priority for enforcement. In fact, Lockheed paid a $24.8 million fine. The company acknowledged wrongdoing in paying an Egyptian legislator and her husband, via their consulting firm, a fee for assisting Lockheed in securing the sale of three transport planes. It is reported that the figure includes a $21.8 million dollar criminal fine and a $3 million dollar civil settlement. John Davis, Chief of the Criminal Division of the U.S. Attorney's office, reported that it was the maximum fine, representing twice the profit to Lockheed on the sale of its C-130 planes. Allegedly, Lockheed had agreed to pay a $600,000 commission per plane to the government official, Ms. Takla. However, after auditors discovered the arrangement in 1989, Lockheed told the Pentagon it would not pay the fee. Yet Lockheed paid a one million dollar "termination fee" to Ms. Takla "in lieu of a commission after the sale." The indictment charged Lockheed paid Takla "for the purpose of inducing Takla to use her influence with the Egyptian Government to direct business to defendant Lockheed." Lockheed's Director of Middle East and North African sales also

27. $24.8 Million Penalty Paid by Lockheed, N.Y. TIMES, Jan. 28, 1995, § 1, at 35.
28. Id.
pleaded guilty individually "to helping the company pay and conceal the bribe." Another Lockheed executive, a regional vice president, is a fugitive living in Syria.

The fine imposed on Lockheed certainly does not sound like a paper tiger. The fine will not bankrupt large multinational corporations, but rather, it should cause them to re-evaluate their sales practices. Similarly, the vice president who is living in exile is testimony to the impact of the FCPA.

Is it possible there was a legitimate question of the legality of these payments? Was it an unfortunate consulting contract that would have been legal but for the presence of the Egyptian legislator who was a government official for FCPA purposes? Or was the firm selected precisely for that connection, that it could deliver the contracts? The sale, after all, involved $79 million dollars in airplanes. The United States government believed there was a strong case here and that no mistake was made. The regional sales director's plea buttresses this view.

The facts appeared less clear cut in an earlier plea agreement, entered into by Young and Rubicam, the New York-based advertising agency. The agency pled guilty in 1990 to a felony and paid a $500,000 dollar fine. Executives of the fined company, hoping to secure a contract with the Jamaican Tourist Board, hired a former head of the Ministry of Tourism. The former minister allegedly funneled money to the current minister. The agency pled guilty just before the trial began in federal district court. One executive, whose statement was announced through General Counsel, expressed his disdain for the proceedings, "Having just pled guilty to a felony in federal court, it's hard to feel I have a complete victory, but it is pretty damned close . . .

29. Id.
30. Id.
31. See AM. HERITAGE DICTIONARY (2d ed. 1991) (referring to one who seems outwardly powerful but is in fact impotent and weak). The Chinese Leader, Mao Tse-Tung often used this phrase when referring to the United States following World War II.
32. Id.
33. Id.
35. See Lipman, Young and Rubicam, supra note 34.
36. Id.
(this) is the most metaphysical felony I've ever pleaded guilty to.37 The agency maintained that they had hired an agent who was not a foreign official, but an employee who simply lobbied on their behalf.38 Young and Rubicam argued that any violation of the FCPA was unintentional and de minimis. Perhaps their position was a natural attempt to put a positive spin on otherwise bad news. This case underscores the necessity of carefully choosing international business agents. Ignorance and willful blindness will not be a defense to FCPA violations.

Another recent plea-bargained case illustrates the perilous waters of not only securing international contracts, but also of collecting payment on existing contracts. Vitusa Corporation, a New Jersey company, pled guilty in 1994 to a violation of the FCPA.39 Denny Herzberg was the President and sole shareholder of the company. Vitusa entered into a contract with a Dominican Republic company, Horizontes Dominicanos.40 Horizontes was to act as Vitusa's broker for the sale of milk powder to the government of the Dominican Republic.41 Servio Tulio Mancebo owned Horizontes.42 Vitusa entered into a contract in 1989 to sell 1,500 metric tons of milk powder at $2,200 per metric ton for a total price of $3.3 million dollars (U.S.).43 Vitusa agreed to pay a commission of $102 per metric ton — a standard industry commission.44 The Dominican Republic government (DR) was obligated to pay within 60 days of delivery or else pay interest at the rate of prime plus one percent on the balance due.45

Vitusa shipped 870 metric tons between 1989 and 1990 in three shipments for a total of $1,914,000 due.46 The DR government

37. Id.
38. Id.
39. See United States v. Vitusa Corp., 3 Foreign Corrupt Pract. Act Rep. (Business Laws, Inc.) 699.155-699.175 (1994) [hereinafter FCPA Rep.]. The corporation, Vitusa, and its president, Mr. Herzberg, entered into a plea bargain. There was a difference noted between the Government's position on the fine range ($163,000-$326,000) and Vitusa's ($12,000-24,000). Vitusa was fined $20,000. Mr. Herzberg was placed on 2 years probation and fined $5,000, to be applied to the $20,000 fine. Telephone Interview with Clerk's Office, U.S. District Court, New Jersey, Case No. 94-254 (July 1995).
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
paid $1,762,750.\textsuperscript{47} Vitusa shipped the final three lots by May 1990 under pressure from the government to release the milk without immediate payment due to the upcoming election.\textsuperscript{48} Herzberg did so based on the promise that payment would be forthcoming.\textsuperscript{49} As of November 1990, the DR government had paid $2,384,580 of the $3.3 million dollar contract price and still owed $1 million in principal and interest.\textsuperscript{50} No further payments were made until July 1991 despite the DR’s acknowledgement that it owed Vitusa the money.\textsuperscript{51}

Mr. Herzberg tried letters and phone calls to collect the past due money.\textsuperscript{52} He also appealed to U.S. government officials as well as the President of the DR to assist.\textsuperscript{53} Herzberg continued to talk to Mancebo about how he could collect the money.\textsuperscript{54} According to the information filed:

\begin{quote}
[a]t some point in these discussions, Mancebo communicated to Herzberg a demand made by a senior official in the Dominican government. This demand called for a payment of a “service fee” to a senior official of the Dominican Republic in return for the official using that official’s influence to obtain the balance due to Vitusa for the milk powder contract.\textsuperscript{55}
\end{quote}

In the interim the government paid $400,000 in July and September 1991.\textsuperscript{56}

In August 1992, Herzberg agreed to Mancebo’s proposal.\textsuperscript{57} The balance due was $163,000.\textsuperscript{58} Herzberg faxed a letter to a DR bank instructing them to accept payment from the government on his behalf and to transfer $50,000 to Mancebo and transmit the rest to his company.\textsuperscript{59} On August 11, 1992, the DR government transmitted $100,000 to the bank of which $30,000 was credited to Mancebo and $70,000 was credited to Vitusa.\textsuperscript{60}

\begin{flushleft}
\textsuperscript{47} Id. at 699.162-699.163.
\textsuperscript{48} Id. at 699.163.
\textsuperscript{49} Id.
\textsuperscript{50} Vitusa, 3 FCPA Rep. at 699.163.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\end{flushleft}
Five days after payment, Herzberg spoke to a U.S. embassy official and related the request that had been made for a service fee.\footnote{Id.} One day later the same U.S. official faxed Herzberg that the service fee payment would violate the FCPA.\footnote{Id.} Herzberg replied on August 24, 1992 that he agreed and had already made a decision.\footnote{Id.} By this time payment of the $30,000 service fee was made.\footnote{Id.}

On September 3, 1992 the DR paid $63,905.12 and the bank according to Herzberg’s instructions, withheld $20,000 of this amount and transferred it to Mancebo’s account.\footnote{Vitusa, 3 FCPA Rep. at 699.164.} The U.S. government charged that:

Vitusa authorized, promised, and offered payment of the money that is “service fees” totalling all or a portion of the $50,000 to the senior official, indirectly, through an associate, while knowing that all or a portion of the money would be given to the foreign official for the purpose of inducing the official to use that official’s position and influence with the Government of the Dominican Republic in order to obtain and retain business, that is full payment of the balance due for Vitusa’s prior sale of milk powder . . . .\footnote{Id.}

Vitusa was placed on two years probation and was levied a $5,000 personal fine and a $20,000 corporate fine.\footnote{Id.} The personal fine was to be applied to the corporate fine. Thus, the total fine was $20,000.\footnote{Id.}

This case should serve as a wake up call to businesses who might consider a fee to secure payment of an executed contract as nothing more than discounting a bill for collection. However, the U.S. government considers such payments illegal and the penalty underscores their view. The penalty levied in Vitusa may seem mild in comparison to the Lockheed or Young & Rubicam cases, but note that Mr. Herzberg now has a criminal record. Although he shares that distinction with such illustrious figures as Michael Milken and Spiro Agnew, it is a criminal record nonetheless.
C. Cases

In several recent cases, the defendants were apparently unwilling to plea bargain. In one instance, Richard Liebo, an aerospace executive, was convicted for violating the anti-bribery provisions of the FCPA and for making a false statement to the government. He was acquitted on seventeen other counts. He appealed his convictions and was granted a new trial in 1991. Liebo was vice-president of the Aerospace division of NAPCO International, a military equipment company located in Minnesota. In 1983, NAPCO was sought out to assist a West German company, Dornier, in refurbishing C-130 cargo planes for the country of Niger. Liebo and Axel Kurth, a Dornier sales representative, flew to Niger to seek the President of Niger's approval of their contract. They met first with Captain Ali Tiemogo, chief of maintenance for the Niger Air Force. Kurth and Liebo told Tiemogo that they would "make some gestures" towards him if he helped get this contract approved. Following Tiemogo's recommendation, the President signed the contract.

Liebo then met with Tiemogo's cousin, Tahirou Barke, who worked at the Niger Embassy in Washington, D.C. Liebo mentioned the "gesture" and asked the cousin to open a bank account in the United States. With Barke's help, Liebo opened an account in Minnesota in the name E. Dave. NAPCO deposited about $30,000, which the cousin used to pay bills. The cousin also gave a portion of the money to Tiemogo. In 1985 the cousin, Barke, told Liebo he was returning to Niger to be married. Liebo made the flight arrangements and paid for Barke's
airline tickets which cost $2,028, by charging them to NAPCO’s Diner’s Club account.\(^{84}\)

NAPCO received two other contracts from Niger totalling over $2,550,000.\(^{85}\) NAPCO paid $130,000 to other “commission agents” — Tiemogo’s brother-in-law, Tiemogo’s sister-in-law, and Tiemogo’s cousin’s girlfriend.\(^{86}\) At Tiemogo’s request, the sister-in-law and brother-in-law set up bank accounts in Paris.\(^{87}\) None of these parties, however, received the commission checks or acted as NAPCO’s agents.\(^{88}\)

In accord with U.S. government defense security requirements, Liebo certified that “no rebates, gifts or gratuities have been given contrary to United States law to officers, officials or employees” of the Niger government.\(^{89}\) He also certified that NAPCO’s commission agent under the contract was Amidou Mailele (Tiemogo’s brother-in-law), and that he would be paid $47,662.\(^{90}\)

At trial, Liebo was acquitted of all charges except for the purchase of the airline tickets and the related false statement count.\(^{91}\) He challenged the conviction based on the anti-bribery provisions of the FCPA, on the basis of the airline tickets Liebo argued that there was insufficient evidence the tickets were “given to obtain or retain business,” and that there was no evidence to show that his gift was made “corruptly.”\(^{92}\) In reviewing the conviction, and Liebo’s motion for a new trial, the appeals court noted that a reasonable jury could “conclude that the gift was given to obtain or retain business.”\(^{93}\)

However, Liebo argued that “corruptly” means that the offer, payment or gift must be intended to induce the recipient to misuse his official position.\(^{94}\) Liebo asserted that he intended the tickets to be a personal gift to the cousin, and therefore, were not given with corrupt intent. The court, however, dismissed his argument:\(^{95}\)

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84. Liebo, 923 F.2d at 1310.
85. Id.
86. Id.
87. Id.
88. Id.
89. Liebo, 923 F.2d at 1310.
90. Id.
91. Id.
92. Id. at 1310-11.
93. Id. at 1311.
95. Liebo, 923 F.2d at 1312.
We are satisfied that sufficient evidence existed from which a reasonable jury could find that the airline tickets were given "corruptly." For example, Liebo gave the airline tickets to Barke shortly before the third contract was approved. In addition, there was undisputed evidence concerning the close relationship between Tiemogo and Barke and Tiemogo's important role in the contract approval process. There was also testimony that Liebo classified the airline ticket for accounting purposes as a "commission payment." This evidence could allow a reasonable jury to infer that Liebo gave the tickets to Barke intending to influence the Niger government's contract approval process. We conclude, therefore, that a reasonable jury could find that Liebo's gift to Barke was given "corruptly." Accordingly, sufficient evidence existed to support Liebo's conviction.96

Next, Liebo claimed that the lower court erred by refusing to give his jury instructions distinguishing a "gift or gratuity," from a bribe.97 The court upheld as adequate the following instruction that:

"[c]orruptly" meant that the offer, promise to pay, payment, or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so and that "an act is 'corruptly' done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."98

A new trial was eventually granted due to newly discovered evidence in the form of a memo. The memo surfaced two months after trial and showed that Henri Jacob, NAPCO's corporate president, approved the charge of the airline tickets to the NAPCO Diner's Club account.99 Liebo pointed to the fact that during deliberations the jury had asked for information about "[a]ny information regarding authorization for payment of wedding trip."

96. Id.
97. Id.
98. Id.
99. Id. at 1312-14. See United States v. Gustafson, 728 F.2d 1078, 1084 (8th Cir. 1984), cert. denied, 469 U.S. 979 (1984) (motions for a new trial based upon newly discovered evidence are not favored, and decisions will not be reversed absent a clear abuse of discretion). The Liebo court granted a new trial on such grounds, however, because it considered the evidence against Liebo weak. 923 F.2d at 1313-14.
In another case, the Fifth Circuit concluded that foreign officials who accepted a bribe could not be prosecuted under the FCPA, since the act does not criminalize the receipt of a bribe by foreign officials. The court further concluded that the foreign officials could not be prosecuted for conspiracy to violate the FCPA. The result reflects a common sense limit on the extra-territorial application of the FCPA.

The Third Circuit considered an FCPA case as well. At issue was a contract with the Republic of Nigeria to construct an aeromedical facility. Two U.S. corporations, Environmental Tectonics (ETC) and W.S. Kirkpatrick competed for the project. After the contract was awarded to Kirkpatrick, ETC alleged that it was procured on the basis of fraud. The United States, having established evidence of illegal payment of commissions to Panamanian entities controlled by a Nigerian citizen prosecuted Kirkpatrick officials. The defendants pled guilty to violating the FCPA, were fined, and sentenced to community service.

The facts of Kirkpatrick also gave rise to charges of racketeering. However, the defendants asserted that the "act of state" doctrine barred judicial determination of such claims. The case reached the Supreme Court on the last issue, wherein Justice Scalia flatly dismissed the defendants’ invocation of the act of state doctrine because U.S. courts were not required to decide "the

100. United States v. Castle, 925 F.2d 831 (5th Cir. 1991) (per curiam).
101. Id.
102. Id. at 832-36.
104. Id. at 1054-56.
105. Id. at 1055-57.
106. Id. at 1056.
108. This is a judicial doctrine which precludes a court from inquiry into sovereign acts that would result in embarrassment to the sovereign, or would constitute interference in U.S. foreign policy. It is not construed as a rule of abstention; rather it is a rule of decision that the acts of foreign sovereigns within their own jurisdictions are deemed valid. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Riaud v. American Metal Co., 246 U.S. 304 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).
effect of official action by a foreign sovereign.""109 In other words, the question of the legality of the Nigerian contract is simply not the issue before the U.S. courts and so there was "no occasion to apply the rule of decision that the act of state doctrine requires.""110

The above mentioned cases illustrate that the FCPA is still very much alive and can cause difficulty even where businessmen believe that none exist. Whether in trying to secure payment for goods already delivered, or simply making "gifts" of airline tickets, unwary businesspeople need to be forewarned.

D. Opinion Procedure

In 1992, the U.S. Justice Department adopted rules for the FCPA opinion procedure which replaced the FCPA review procedure in place since 1980.111 The new procedures are in accord with the 1988 changes in the FCPA brought about by the OTCA.112 The purpose of the opinion procedure is to enable companies to obtain a before the fact opinion from the Attorney General as to whether certain conduct conforms with current policy regarding the antibribery provisions of the FCPA.113 There were twenty opinions released between 1980 and 1989.114 Under the new procedures, it is now clear that supporting documents are unreachable by a Freedom of Information Act (FOIA) request, and that the U.S. Attorney General must issue an opinion within 30 days.115

One of the recent FOIA releases involved a joint venture with the Government of Pakistan for petroleum exploration and production. The company wanted to spend money on training for government officials as required by Pakistani law.116 The company sought review for the payment of training expenses that

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110. Id.
112. See supra note 3.
114. See 3 FCPA Rep. at 700.02.
amounted to over $250,000. The Department took no enforce-
ment action.

In another release, the Department considered a joint venture
between a U.S. company and an entity wholly owned and super-
vised by a former Eastern bloc country. The agreement placed
foreign officials on the board of directors of the joint venture. The
officials were to be paid a Director's fee of approximately $1,000
per month. The fees were ultimately to be reimbursed from
the foreign partner's share of profits. This transaction was
deemed acceptable, and no enforcement action was taken.

In yet another instance, a company wished to sell military
equipment to a foreign government-owned entity. The U.S.
company represented that it would pay commissions directly to the
foreign country's treasury. Thus, the company would not be
making payments to government owned businesses or to foreign
officials. The department took no enforcement action.

Despite improvements in the opinion procedure, businesses
seem to prefer relying on the advice of private counsel to negotiate
the maze of permissible and impermissible payments. This proce-
dure is reminiscent of the “don't ask, don't tell” policy on homo-
sexuals in the military. Lack of requests may also signal a deep
distrust of governmental efforts to be helpful.

III. The Economics of Bribery or “Bribonomics”

Many Americans think that the only way to do business
overseas is to bribe. While it is clearly illegal in the United
States to bribe domestic officials in order to be selected for a

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117. Id.
118. Id. at 726.
20, 1993).
120. Id.
121. Id.
11, 1993).
123. Id.
Def. Dir. 1332.14 (1994); Jerry Seper, U.S. Will Appeal ‘Don’t Ask’ Ruling; Judge
125. This is a belief held by many but not easily documented, because business
people do not want to acknowledge violating the law. However, it is interesting
to note that one hotelier, requesting anonymity, stated that he would not invest
in certain areas of the world because of his distaste for the endemic practice of
bribery.
contract, some businessmen believe in the old adage "when in Rome, do as the Romans do." Thus, many Americans assume that anything goes overseas. This is not bad advice if it means following local custom, but it is seriously off the mark if it means ignoring the law. Assuming that the host country expects these payments, and they do no harm, is not entirely true. The "don't ask, don't tell" policy will not be a successful corporate strategy, as Lockheed found out recently.\textsuperscript{126}

The perception that bribery is acceptable in many countries is not accurate. Attitudes overseas are changing.\textsuperscript{127} Gary Edwards, a consultant, notes that "some Asian nationals are telling us that in many of their markets, that (bribery) is not necessary. The practice is increasingly viewed as unacceptable and destructive to their economies."\textsuperscript{128} The reason corruption is costly to economic development is twofold. First, with a weak central government, bribes will drive the cumulative burden on private agents into infinity. Second, there are "distortions entailed by the necessary secrecy of corruption."\textsuperscript{129} Corruption shifts the resources of a country from "highest value" projects like clean water, etc., to potentially useless projects wherein the individual may secretly profit.\textsuperscript{130} "The demands of secrecy can also cause leaders of a country to maintain monopolies to prevent entry, and to discourage innovation by outsiders if expanding the ranks of the elite can expose existing corruption practices."\textsuperscript{131} The reason that bribery encourages larger projects is, as one writer said, "[t]he bigger the cake, the less a few stolen crumbs matter."\textsuperscript{132}

A recent study appearing in The Economist magazine correlates the incidence of corruption, with the growth of the nation's gross domestic product (GDP):
### Annual Average Growth of GDP (1984-1993)

<table>
<thead>
<tr>
<th>High Corruption</th>
<th>Nigeria</th>
<th>4%</th>
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</thead>
<tbody>
<tr>
<td>Venezuela</td>
<td>3%</td>
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<tr>
<td>Philippines</td>
<td>1%</td>
<td></td>
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<tr>
<td>Russia</td>
<td>-4%</td>
<td></td>
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<tr>
<td>Middle Corruption</td>
<td></td>
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<tr>
<td>China</td>
<td>10%</td>
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<tr>
<td>Malaysia</td>
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<td>Japan</td>
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<tr>
<td>Brazil</td>
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<tr>
<td>Low Corruption</td>
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<tr>
<td>Taiwan</td>
<td>8%</td>
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<td>Singapore</td>
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<tr>
<td>United States</td>
<td>3%</td>
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<tr>
<td>Germany</td>
<td>3%(^{133})</td>
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</tbody>
</table>

Note that low corruption does not necessarily tie into highest GDP growth, but high corruption precludes high growth. The anomaly of China, which ranked with middle corruption but high growth, may be explained by several factors. One factor is the dramatic transformation of China’s economy and its high degree of control, thus, China has avoided problems that have occurred in Russia.\(^{134}\)

Bribery is anti-democratic in that, when unchecked, it may destabilize a society and actually encourage a return to dictatorship as a method of controlling corruption.\(^{135}\) If capitalism and bribery are viewed as handmaidens, then economic democracy may be endangered, and likewise, political democracy.

The research linking bribery with poor economic development may be the best argument for those countries which, heretofore, have campaigned for an end to bribery. However, the question remains whether those countries will be able to end the entrenched practice by themselves. For, if a company is willing to offer a large sum of money to secure a contract, there may be only a handful of officials who are not tempted by such payment as a kind of pension or government contingency plan. Thus, individual or national strength to resist accepting bribes will not be sufficient. Companies must stop offering if bribery is ever to end.

\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.
IV. International Response

A. Call to Universalize the FCPA

When the FCPA was passed in 1977, many people in the United States thought that other countries would enact similar legislation. Other countries did not follow suit for a host of reasons. Moral and ethical arguments did not persuade them to abandon their apparent tolerance of the practice. The U.S. interest in this legislation, fueled in part by moral indignation growing out of the Watergate revelations of international slush funds, was also driven by the practical concern of promoting competition. Competition is distorted when two U.S. companies bid on a project, and a bribing company is selected over a non-bribe offering company.

The FCPA's 1988 amendments addressed Congress' concern that it needed to monitor whether foreign countries were committed to the eradication of bribery, and whether American businesses were being hindered by the FCPA requirements. Many people assumed that because the 1988 amendments made it easier for business to operate by clarifying that some payments were acceptable, the next step could be a complete repeal of the FCPA. However, that has not occurred.

The International Agreement Negotiations Report to Congress included in the OTCA stated in part:

[i]t is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such

137. See Eric L. Hirschhorn, Foreign Corrupt Practices Act Narrowed, Significantly Clarified, NAT'L L.J., Dec. 26, 1988-Jan. 2, 1989, at 16 (asserting that FCPA was enacted in post-Watergate atmosphere and following disclosure of large-scale payments by U.S. firms to foreign officials); Stephen Kurkjian & John Kelly, The Meese Case and A Little-Used Law on Bribes Abroad, BOSTON GLOBE, Apr. 3, 1988, at 3 (noting that "in the decade since the statute was passed only 10 cases have been prosecuted against companies charged with bribing foreign officials.").
138. Hirschhorn, supra note 137.
139. See supra notes 27-111 and accompanying text (discussing FCPA cases).
international agreement should include a process by which problems and conflicts associated with such acts could be resolved.\textsuperscript{140}

There is no evidence or report of any agreement on this issue.\textsuperscript{141} In 1994, under a different U.S. President, the OECD adopted an international Anti-bribery Recommendation by member states, who are in turn urged to implement the recommendation into their own national law.\textsuperscript{142}

**B. OECD Anti-Bribery Recommendation**

The OECD was founded to rebuild the economies of Europe. The OECD expanded in 1961 beyond Europe to become a forum for coordinating assistance to developing countries.\textsuperscript{143} Its commitment to the creation and support of market economies has enhanced the security ties between many of its members.\textsuperscript{144}

In 1994, the OECD Council adopted a recommendation on bribery for international business transactions that may be found in Appendix A. The Council defined bribery as "the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public official, in violation of the official's legal duties, in order to obtain or retain business."\textsuperscript{145}

Note the use of the word "undue." This is, seemingly, a recognition of gift-giving and other courtesies between business partners that is not addressed by U.S. law.\textsuperscript{146}

The OECD's Anti-bribery Recommendations, which are not legally binding, encourage member countries to criminalize the making of bribes to foreign public officials.\textsuperscript{147} Japan, with the backing of its European colleagues, objected to U.S. efforts to make the recommendation legally binding.\textsuperscript{148} One reporter noted that, "[a]lthough Japan is unlikely to amend its criminal laws, the OECD's recommendations will force the Japanese government to

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141. \textit{See} Telephone Interview with Peter B. Clark, \textit{supra} note 7.
142. \textit{See infra} notes 143-153 and accompanying text.
144. \textit{Id.}
145. \textit{See supra} note 4 and accompanying text.
146. \textit{See generally} 15 U.S.C. §§ 78a, 78m, 78n, 78t, 78dd-1, dd-2, 78ff.
148. \textit{Id.}
bear moral responsibilities for overseeing the conduct of Japanese companies operating overseas.\textsuperscript{149}

An antibribery working group within the OECD has been established to follow up on the Antibribery Recommendation.\textsuperscript{150} The group met in the autumn of 1994, which led to a symposium in March, 1995.\textsuperscript{151} The group prepared a list of questions for which the member countries were to respond. Several have done so. Another working group was scheduled for June, 1995.\textsuperscript{152}

The U.S. Secretary of State, Warren M. Christopher, has complained that U.S. companies are losing hundreds of millions of dollars in contracts every year because they are unable to bribe.\textsuperscript{153} Yet, this is not prompting for calls of repeal of the FCPA.

\textbf{C. Europeans Acknowledge The Threat of Bribery}

Until recently, European governments were no more receptive to acceptance of laws such as those modeled on the FCPA than were many nationals from developing countries.\textsuperscript{154} One reason for this posture is, perhaps, nationalism. There were rarely two French or two German companies bidding against each other on the same foreign contract. Therefore, a bribe might have meant the difference between whether the French or the German firm secured the contract.

However, recent events reflected in the headline "Europe in the Grip of Corruption Plague" suggest a continent confronting the economic consequences of bribery.\textsuperscript{155} Today, there is more talk of the issue because firms and governments are beginning to realize that market corruption may be costly to economic development.\textsuperscript{156} Perhaps the nascence of capitalism and the spread of corruption on such a large scale in Russia and newly independent states are forcing many countries to take a serious look at a bribery practices previously ignored.\textsuperscript{157}

\textsuperscript{149} Id.
\textsuperscript{150} See Telephone Interview with Peter B. Clark, supra note 7.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Graham, supra note 6, at 6.
\textsuperscript{154} See generally Buchan & Graham, supra note 6, at 2.
\textsuperscript{155} See Stüdemann, supra note 12 (editorial heading in news article). See generally Bribonomics, supra note 8.
\textsuperscript{156} See Schleifer & Vishny, supra note 8, at 605, 609-10, 615-16.
\textsuperscript{157} Rosie Waterhouse, War Declared on Corruption, INDEP. (London), June 5, 1994, at 7.
Twenty billion U.S. dollars are reportedly held in Swiss bank accounts for leaders of African states. This is a reflection of the costs of bribery and who benefits. The clear loser is the firm who bid unsuccessfully and the country and citizens in which the firm is based.

The thirty-two-member Council of Europe met in June 1994 to discuss ways to fight corruption. Mr. Roberto Lamponi, a Council Legal affairs expert, stated:

Up until recently people knew corruption existed but didn't see it as a problem of society. Now it is obvious there's a major problem with clear international implications... With the collapse of communism, the great presence of the state has vanished in the east, leaving every little official who holds a portion of power tempted to exploit it for his own personal gain.

This evidence of the changing climate in Europe sends a positive signal that the continent may be ready to embrace some of the changes proposed by the OECD.

D. Governmental Codes

On March 27, 1995, the Clinton Administration released its Model Business Principles designed to be a voluntary guide for corporations doing business abroad. One newspaper noted the curious circumstances of the Code's release because:

the code was unveiled with little apparent pride of authorship. It was released to a small group of reporters on Friday afternoon before the holiday weekend by three mid-level officials who insisted their names not be used. The release took place at the Commerce Department, at a safe distance from the

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158. Id.
161. Robert Greenberger, Administration's New Business Code Timed to Renewal of China Trade Status, WALL ST. J., May 30, 1995, at A3. At the time these principles were announced it was impossible to find anyone in the Commerce Department who knew anything about them or would speak about them. To say they were played in a "low key" way by the administration, is an understatement.
White House, and was printed on a plain piece of paper without any U.S. government identification.\textsuperscript{162}

There is no enforcement mechanism, only a "best practices award" for companies, nor is there any legislative monitoring. The Code itself is based upon 5 principles:

1. provision of a safe and healthy workplace;
2. fair employment practices including avoidance of child and forced labor, avoidance of discrimination based on race, gender, national origin or religious beliefs, respect for the right of association, and the right to organize and bargain collectively;
3. responsible environmental protection and environmental practices;
4. compliance with U.S. and local laws promoting good business practices including laws prohibiting illicit payments and ensuring fair competition;
5. maintenance through leadership at all levels of a corporate culture that respects free expression consistent with legitimate business concerns and does not condone political coercion in the workplace that encourages good corporate citizenship and makes a positive contribution to the communities in which the company operates and where ethical conduct is recognized, valued, and exemplified by all employees.\textsuperscript{163}

Most significantly, this statement of principles is not intended for legislation.

This voluntary code of conduct is an attempt by the Clinton administration to follow up on its promise of 1994. After separating the issues of human rights from that of most favored nation trading status in June 1994, the U.S. promised to announce a business code that would apply to businesses not just in China.\textsuperscript{164} President Clinton had argued that China had been unfairly targeted by human rights groups and that a more evenhanded policy would...
China is not the only country with a problematic human rights record and, thus, should not be singled out for negative economic treatment.

The principles make reference to bribery, as well as environmental sensitivity and compliance with labor standards. However, it is a toothless, clawless, and, arguably, a comatose tiger. The code will no doubt anger many activists. It will not serve as a palliative for China watchers. It will serve only business interests, which are pleased that they do not have another government agency to contend with in competing for overseas business.

The principles are deliberately vague. Is there a commitment to first-world environmental standards even though they may not be required? Free expression? Does that mean cooperation with the enforcement of China’s one child policy? Avoidance of forced or child labor? What does “child” mean? Both the Amnesty International and Human Rights Watch groups expressed disappointment in the principles.

One might draw a parallel to the Sullivan Principles for doing business in South Africa. Within apartheid, companies that adopted the Principles committed to equal opportunity and affirmative action, and so recruited and trained minorities. Nonetheless, when apartheid had not ended, other groups called for corporate withdrawal from South Africa to economically force a more rapid transformation to a democratic country. Many

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165. See Rosenthal, supra note 163.
166. See supra note 163 and accompanying text.
167. See Finefrock, supra note 163.
169. Mr. Leon H. Sullivan, formerly a minister, and General Motors Director, is an international business diplomat and widely known for authoring the Principles in 1977. They are voluntary guidelines for U.S. trade with the apartheid-era South Africa and encourage the fair treatment of black employees.
171. Id.; see infra note 172 and accompanying text.
companies, for both ethical and business reasons (fearing negative publicity and consumer boycott), did leave South Africa until apartheid was dismantled. These same companies are now returning—hoping to help and to profit from the momentous task of rebuilding South Africa and implementing democracy. Unfortunately, the dismantling of apartheid only signalled the need to begin tackling the resulting social problems. The immediate short term problems are very real—providing housing and food, education and a job for the blacks whose expectations are raised by Mandela’s election. Failure to deliver could be catastrophic. Just as the Sullivan Principles encouraged companies to do that which they were not required to do in South Africa, so, too, do the model principles exhort businesses to do more than they are legally required to do.

The Principles also reiterate that businesses will comply with laws and abstain from illicit payments. This is simply a restatement of existing FCPA law and an admonishment to obey the law. An easier task certainly if other companies around the world played by the same rules. The Principles alone will not alter behavior that the law has not already changed.

E. Individual Company Codes

The Principles may encourage companies to articulate their own codes for several reasons. First, they may be useful from a public relations perspective. Second, an individual code may be more palatable than a code drawn by an environmental group or human rights group. Third, a code may be helpful in showing efforts by the company to dissuade employees from breaking the law and could be used by the company to lessen a fine should it be convicted, then sentenced, under the Federal Sentencing Guidelines. Levi Strauss is a good example. The company has recently announced a Code entitled “Business Partner Terms of Engagement.” The Code prohibits the use of child labor for its prod-

173. See supra note 163 and accompanying text.
174. Ethical Shopping: Human Rights, ECONOMIST, June 3, 1995, at 58-59. As a result of this discovery, Levi Strauss fired 5% of its 600 suppliers. Id. at 58.
175. See Appendix B.
The money argument

ucts by any of its business partners or sub-contractors. Levi Strauss attempts to deal with the difficult issue of workplace apprenticeship. While it allows for apprenticeship, it can not be used as a subterfuge to get around the minimum age of fourteen.

The Code was prompted in part by the embarrassment of the company, when it was discovered to be bringing clothes from factories in Saipan, where the workers were living in appalling conditions. Peter Jacobi, now President of Levi's international operations, stated, "If you don't contradict yourself, eventually most employees — and contractors — will know what to do because it just feels right." However, Jacobi may have realized that it is easier to talk about implementing ethical policies than achieving them. In December 1994, Levi Strauss was reportedly employing fourteen year old girls for sixteen-hour work shifts in Bangladesh. Of course the dilemma exists that, if the children are fired, where will they go? In most cases they do not return to their parents and a comfortable carefree life. Rather they may go on to a life of prostitution, or to jobs which pose even greater health risks than the ones from which they were fired.

The Levi Strauss code points to the clear deficiencies in the U.S. Principles discussed previously. Nonetheless, a legitimate question exists as to whether this should be the province of the government, or left to the private initiative of companies such as Levi Strauss. Remember, too, that the law as reflected in the FCPA, reflects the legal minimum required. Levi Strauss is but one example and many other companies have also announced Codes of Conduct. It is also important to note that neither individual codes nor the U.S. Principles contain any enforcement mechanism or external oversight.

176. Id.
177. Id.
178. Id.
179. Id.
180. See Appendix B. See also BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN AMERICAN IMPORTS, (Dep't Labor, July 15, 1994).
181. For examples of codes from Smithkline Beckman, Rohm and Haas, Midsize Oilfield Services, Bethlehem, Martin Marietta, Hoecht Celanese and United Technology, see 3 FCPA Rep. at 1500.001-1584.
F. The New Non-Governmental Organization (NGO) —

Transparency International (TI)

Many individuals believed that neither governments nor corporations alone could successfully grapple with the ethical dilemmas faced in international business. Transparency International is a new (formed in 1993) NGO which is modeled on the successful Amnesty International.\footnote{183} It is based in Berlin, Germany, with other offices around the world, including Washington, D.C.\footnote{184} It is a grass roots organization with a mission to:

... curb corruption ... to establish and implement effective laws, policies and anti-corruption programs ... to strengthen public support and understanding for anti-corruption programs and enhance public transparency and accountability in international business transactions and in the administration of public procurement.\footnote{185}

Ecuador has agreed to become a laboratory of sorts for TI because of a recent problem with bribery which highlighted its inefficiency and cost. Ecuador had selected a European contractor to supply the country with locomotives.\footnote{186} However, those that were purchased as a result of a bribe were too heavy, and did not run on the rail lines.\footnote{187} As a result of the shocking revelation of the cost of bribery to the country, the Vice President of Ecuador, Alberto Dahik, has signed on to the Board of TI.\footnote{188} Dr. Dahik stated, "we will require chairmen or presidents of foreign companies which want to do business here — and our own people — to sign written statements promising that there will be no bribes."

TI reports that developing countries are asking for help in eradicating bribery. If bribes are offered, many people who work in government may not be able to resist given the uncertainty of their own careers and governments. However, if companies were not willing to offer bribes, then the corruption cycle would end. Thus, TI hopes to encourage OECD efforts, private efforts and government law revisions.

\begin{itemize}
  \item \footnote{183} Id.
  \item \footnote{184} Id.
  \item \footnote{185} Valeria Merino Dirani, \textit{Building Islands of Integrity-The Ecuador Model After One Year}, TI NEWSL., Mar. 1995, at 3-4.
  \item \footnote{186} Id.
  \item \footnote{187} Id.
\end{itemize}
A March 1995 editorial in the TI Newsletter stated:

The German public woke up in January to find that they had at home a situation which many believed could only exist elsewhere: One of systemic corruption, of kickbacks on public contracts or public servants, and the whole exercise being underwritten by the taxpayer through tax deductible bribes. It is a situation that should not have surprised them. We have noted previously that countries of the North can no longer preach against corruption to the rest of the world from a position of presumed superiority. Rather the very society will be as corrupt as its institutions and practices allow. This practice is fortified and sustained by apologists who claim that if the state seeks to tax illegal income it must also allow the offsetting of illegal expenditures. This simply does not stand scrutiny... Perhaps then there is a more compelling case than had been realized in favor of the industrialized countries tackling corruption in international business transactions — straightforward self-interest.189

Identification of self-interest is a motivation to stop corruption, rather than just a moral or ethical argument. The identification offers some hope that the rest of the world may now be concerned about this spreading cancer.

George Moody-Stuart, who formerly worked in agri-business in Africa and now works for TI, details the mechanics of grand corruption and its pervasiveness in the 1990s. He found a correlation between the size of a project and the corruption that ensues.190 Mr. Moody-Stuart has identified a matrix of attractiveness of types of contracts from the point of view of the person soliciting a bribe based upon size, immediacy and mystification. The larger the project and the more technical and obscure it is, the easier it is to obfuscate the payment of bribes.

190. Id. at 8. See supra notes 129-34 and accompanying text (discussing similar findings reported in THE ECONOMIST).
TI has received support from the Ford Foundation and now has chapters formed or forming in forty countries.191 The World Bank has also joined in these efforts because many countries rely on it for external aid.192 For example, it was reported that 90% of the Mozambique budget was paid in bribes to civil servants, even though 98% of GNP comes from foreign aid.193 Thus, external funding sources should care about how their money is spent and what effect they are having on the development of the country.194

H. Resistance to Change

All the developments at the private, government and NGO level still have not resulted in any universal agreement or movement on legislation nationally or internationally. In Germany, bribes are listed as a business expense so long as the person paid is named.195 Joachim Grunewald, Germany’s State Secretary of Finance, stated that the prohibition of payments, “would damage German firms in the international market and threaten jobs . . . payments should even be considered corrupt.” They are not

194. See Stüdemann, supra note 12, at 3.
195. Id.
bribes at all, a spokesman maintained, described them rather quaintly as "marketing costs." 196

Japan, likewise, seems uninterested in moving to criminalize payments outside of Japan. 197 There is a reluctance to borrow too heavily from an American legal system which is perceived as exaggerated, costly and burdensome to business.

V. Conclusion

The historic approach of dealing with bribery and corruption from a moral perspective has not been effective in either generating an international dialogue or effecting international change. Although as Frank Vogl, a TI executive and head of Vogl Communications noted, "The corruption issue is human rights and, very secondarily, business costs." 198 Mr. Vogl added that "[m]ajor multinationals have not understood that the whole value system of dealing with developing countries is changing radically and rapidly. These countries are becoming more open societies. The colonial mind set of bribery-as-usual is coming under greater risk for bribers." However, the business cost issue is one that may capture the world's attention.

Bribery seemed to be an entrenched practice in the third world. Yet, as the economics of bribery are explored and the costs are exposed, not just moral indignation, but rather international attention will begin to focus on the problem. If bribery is brought home to the northern hemisphere countries, where the costs of corruption may be felt domestically and deemed intolerable in a free society, change may be possible.

The OECD Antibribery Recommendation is a first step. NGO pressure by the World Bank and TI may help, as well as countries such as Ecuador, taking the lead to establish islands of integrity. Requiring declarations of conformity with a no bribes policy places all parties on notice of the requirement. Nations must move beyond voluntary measures towards legislation that amends or creates new laws prohibiting bribery. If they do not, it will send a clear signal that they intend to approve of the graft business as usual.

Adoption of company codes with internal monitoring and compliance checks will also help to change company culture.

196. Id.
197. See supra note 147 and accompanying text.
198. See supra notes 27-111 and accompanying text (discussing FCPA cases).
Employees have to know a company is seriously committed to the eradication of bribery. Otherwise, employees might assume that the boss does not want the details, and just wants the mission accomplished, whatever the means to the end.

In this climate of increased awareness of the costs of bribery, its impact on the structure of government and the values of democracy and freedom offers hope to those who have sought to change the international environment of business. In the meantime, companies like Vitusa will be in a legal dilemma. Failure to receive payment may place a small company perilously close to, or into, bankruptcy. Paying a fee may seem like the easy way to secure payment. Decisions are never simple with costs like that weighing in the balance.

If OECD, TI and individual countries like Germany make no headway in terms of reform in this area within the next two years, then it is unlikely that these efforts will ever achieve any results. Careful monitoring of developments will reveal whether change is only a chimera. But for the first time in eighteen years, there is a glimmer of momentum — a shard of hope for reform.
APPENDIX A

Recommendation of the Council of the OECD
on Bribery in International Transactions

The Council,
Having regard to Article 5 b) of the Convention on the Organization for Economic Co-operation and Development of 14th December 1960;
Having regard to the OECD Guidelines for Multinational Enterprises which exhort enterprises to refrain from bribery of public servants and holders of public office in their operations;
Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;
Considering further that all countries share a responsibility to combat bribery in international business transactions, however their nationals might be involved;
Recognizing that all OECD Member countries have legislation that makes the bribing of their public officials and the taking of bribes by these officials a criminal offence while only a few Member countries have specific laws making the bribing of foreign officials a punishable offence;
Convinced that further action is needed on both the national and international level to dissuade both enterprises and public officials from resorting to bribery when negotiating international business transactions and that an OECD initiative in this area could act as a catalyst for global action;
Considering that such action should take fully into account the differences that exist in the jurisdictional and other legal principles and practices in this area;
Considering that a review mechanism would assist Member countries in implementing this Recommendation and in evaluating the steps taken and the results achieved;
On the proposal of the Committee on International Investment and Multinational Enterprises;

General
I. Recommends that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.
II. Considers that, for the purposes of this Recommendation, bribery can involve the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public
official, in violation of the official's legal duties, in order to obtain or retain business.

Domestic Action

III. Recommends that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. These steps may include:

(i) criminal laws, or their application, in respect of bribery of foreign public officials;
(ii) civil, commercial, administrative laws and regulations so that bribery would be illegal;
(iii) tax legislation, regulations and practices, insofar as they may indirectly favor bribery;
(iv) company and business accounting requirements and practices in order to secure adequate recording of relevant payments;
(v) banking, financial and other relevant provisions so that adequate records would be kept and made available for inspection or investigation; and
(vi) laws and regulations relating to public subsidies, licenses, government procurement contracts, or other public advantages so that advantages could be denied as a sanction for bribery in appropriate cases.

International Co-operation

IV. Recommends that Member countries in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

(i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneous or "upon request"), provision of evidence, and extradition;
(ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
(iii) ensure that their national laws afford an adequate basis for this co-operation.

Relations with Non-Members and International Organizations
V. Appeals to non-Member countries to join with OECD Members in combating bribery in international business transactions and to take full account of the terms of this Recommendation.

VI. Requests the Secretariat to consult with international organizations and international financial institutions on effective means to combat bribery as an aid to promote the policy of good governance.

VII. Invites Member countries to promote anti-corruption policies within and beyond the OECD area and, in their dealings with non-Member countries, to encourage them to join in the effort to combat such bribery in accordance with this Recommendation.

Follow-up Procedures

VIII. Instructs the Committee on International Investment and Multinational Enterprises to monitor the implementation and follow-up of this Recommendation. For this purpose, the Committee is invited to establish a Working Group on Bribery in International Business Transactions and in particular:

(i) to carry out regular reviews of steps taken by Member countries to implement this Recommendation, and to make proposals as appropriate to assist Member countries in its implementation;

(ii) to examine specific issues relating to bribery in international business transactions;

(iii) to provide a forum for consultations;

(iv) to explore the possibility of associating with non-Members with this work; and

(v) in close co-operation with the Committee on Fiscal Affairs, to examine the fiscal treatment of bribery, including the issue of tax deductibility of bribes.

IX. Instructs the Committee to report to the Council after the first regular review and as appropriate thereafter, and to review this Recommendation within three years after its adoption.
APPENDIX B
LEVI STRAUSS & CO.
GUIDELINES FOR COUNTRY SELECTION

The following country selection criteria address issues which we believe are beyond the ability of the individual business partner to control.

1. BRAND IMAGE
   We will not initiate or renew contractual relationships in countries where sourcing would have an adverse effect on our global brand image.

2. HEALTH & SAFETY
   We will not initiate or renew contractual relationships in locations where there is evidence that Company employees or representatives would be exposed to unreasonable risk.

3. HUMAN RIGHTS
   We should not initiate or renew contractual relationships in countries where there are pervasive violations of basic human rights.

4. LEGAL REQUIREMENTS
   We will not initiate or renew contractual relationships in countries where the legal environment creates unreasonable risk to our trademarks to other important commercial interest or seriously impedes our ability to implement these guidelines.

5. POLITICAL OR SOCIAL STABILITY
   We will not initiate or renew contractual relationships in countries where political or social turmoil unreasonably threatens our commercial interests.
BUSINESS PARTNER TERMS OF ENGAGEMENT

Terms of Engagement address issues that are substantially controllable by our individual business partners. We have defined business partners as contractors and subcontractors who manufacture or finish our products and suppliers who provide material (including fabric, sundries, chemicals and/or stones) utilized in the manufacture and finishing of our products.*

1. ENVIRONMENTAL REQUIREMENTS
   We will only do business with partners who share our commitment to the environment and who conduct their business in a way that is consistent with Levi Strauss & Co.'s Environmental Philosophy and Guiding Principles.

2. ETHICAL STANDARDS
   We will seek to identify and utilize business partners who aspire as individuals and in the conduct of all their businesses to a set of ethical standards not incompatible with our own.

3. HEALTH & SAFETY
   We will only utilize business partners who provide workers with a safe and healthy work environment. Business partners who provide residential facilities for their workers must provide safe and healthy facilities.

4. LEGAL REQUIREMENTS
   We expect our business partners to be law abiding as individuals (sic) and to comply with legal requirements relevant to the conduct of all their businesses.

5. EMPLOYMENT PRACTICES
   We only do business with partners whose workers are in all cases present voluntarily, not put at risk of physical harm, fairly compensated, allowed the right of free association and not exploited in any way. In addition, the following specific guidelines will be followed.
   - WAGES AND BENEFITS
     We will only do business with partners who provide wages and benefits that comply with any applicable law and match the prevailing local manufacturing or finishing industry practices.
   - WORKING HOURS
     While permitting flexibility in scheduling, we will identify prevailing local work hours and seek business partners who do not exceed them except for appropriately compensated overtime. While we favor partners who utilize less than sixty-hour work weeks, we will not use contractors who, on
a regular basis, require in excess of a sixty-hour week. Employees should be allowed at least one day off in seven.

- **CHILD LABOR**
  Use of child labor is not permissible. Workers can be no less than 14 years of age and not younger than the compulsory age to be in school. We will not utilize partners who use child labor in any of their facilities. We support the development of legitimate workplace apprenticeship programs for the educational benefit of younger people.

- **PRISON LABOR/FORCED LABOR**
  We will not utilize prison or forced labor in contracting relationships in the manufacture and finishing of our products. We will not utilize or purchase materials from business partners utilizing prison or forced labor.

- **DISCRIMINATION**
  While we recognize and respect cultural differences, we believe that workers should be employed on the basis of personal characteristics or beliefs. We will favor business partners who share this value.

- **DISCIPLINARY PRACTICES**
  We will not utilize business partners who use corporal punishment or other forms of mental or physical coercion.

6. **COMMUNITY BETTERMENT**
   We will favor business partners who share our commitment to contribute to the betterment of community conditions.

*We will begin to apply the Terms of Engagement by enforcing them with business partners involved in the manufacture or finishing of our products and are extending them to all suppliers to our Levi Strauss North America business.*^A