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The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption

Henry H. Rossbacher* & Tracy W.
Young**

I. Introduction

In *King Henry VIII*, Cardinal Wolsey, in his final speech of expiation, urges Cromwell to act honorably, arguing: "corruption wins not more than honesty."¹ Hopefully, the radical nature of this sentiment did not cause the historic burning of the Globe Theatre during the inaugural performances of the play.² Just as Wolsey's recantation of his past sins and practices came a little too late with much too little, so American and, especially, international anti-corruption efforts have been either nonexistent or, at the least, largely admonitory.

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1. William Shakespeare, *KING HENRY VIII*, Act 3, Scene 2, Line 444 (New Cambridge Shakespeare 1996).

2. Introduction, *KING HENRY VIII*, *supra* at 1-4. Britain has hardly been a leader in anti-corruption efforts, as this headline shows: "Britain Spurns US Over Bribes." The article noted that

Britain has refused to join other government in immediate action against bribery and corruption in trade between developed and developing countries. An appeal by a senior United States official for Britain to adopt measures to prevent companies paying bribes to obtain contracts overseas has failed to change the Government's stance.

Britain Spurns U.S. Over Bribes, THE INDEPENDENT, Apr. 3, 1994.

Wolsey's adjuration is unreflected in the international business climate of today. Regrettably, bribery, and corruption, endemic to certain cultures and a mainstay of human greed, is now, as it has always been, a thorn in our righteous side. Corruption is as old as man. Yet throughout history good men have fought back. The Bible condemns corruption throughout, from the Old Testament's fire and brimstone threats of destruction after "God looked on the earth, and . . . [beheld], it was corrupt,"³ to the New Testament's more poetic approach, "[f]or oppression makes a wise man mad, and a bribe corrupts the heart."⁴

In addition to religious condemnation, man has also fought back with laws seeking to expose and punish various forms of corruption. This article will address primarily that insidious form of corruption known as bribery, as well as the international aspects of corruption by bribery within the context of the American response to domestic corruption.

Until the Watergate scandals and the Nixon debacle during the 1970s, there was no specific law curbing the practice of Americans and American businesses bribing *foreign* officials, and the Government did not express any official concern about such practices. The Watergate scandal and the resulting investigation of illegal domestic political contributions helped to focus attention on what America would soon learn was a shockingly prevalent practice—the bribery of foreign officials by American nationals.

When the magnitude of the problem was finally exposed, the public outcry was deafening. Public Congressional hearings revealed that numerous prominent corporations, including Lockheed, Exxon, and Gulf Oil, had engaged in bribery on a grand scale. The hearings resulted in a call for legislation. Corruption was seen as antithetical to the concept of "pure" competition which undergirds America's history of capitalism and free-market enterprise.⁵

The resulting legislation, the Foreign Corrupt Practices Act ("the Act"), signed into law by then-President Jimmy Carter on December 19, 1977, and passed by both houses of Congress without

3. See Genesis 6:12-13.

4. See Ecclesiastes 7:7.

5. Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 186-88 (1994) (hereinafter Pines); see Donald R. Cruver, *Complying with the Foreign Corrupt Practices Act, a Guide for U.S. Firms Doing Business in the International Market Place*, 1-5 (ABA 1994) (hereinafter Cruver). The Cruver pamphlet is an excellent treatment of the Act aimed at compliance issues.

a single dissenting vote. The Passage of the Act was sweeping, yet appeared to be relatively ineffective in curbing the problem it addresses. I will discuss the details of the Act in a moment, but suffice it to say, it has not been demonstrably effective in eradicating the problem in American corporations or, more tellingly, in enlisting foreign cooperation in joint efforts to reform international business practices. The Act does not, however, represent an imperialist extension of unprecedented prohibitions solely to foreigners but, instead, extends American domestic rules to the foreign activities of American economic participants.

II. The American Domestic Anti-Corruption Response

A. *The Law's Prohibitions*

America's shock was not confined to foreign sins of American corporations; increased scrutiny was primarily directed at domestic offenses. Throughout the years since the 1970s, the American response to domestic corruption has led to a sweeping series of laws attempting to constrain and punish politicians and Government bureaucrats and those who seek to corruptly influence them. Punishments, in fact, vary - some swift, some sure, some illusory - but all are aimed at eradication of domestic corruption. I include a brief sketch here of the domestic scene so that the American foreign anti-corruption initiative can be seen to fit relatively comfortably within the American domestic scheme.

The first set of prohibitions affects our federal appointed officials. These strictures are based on federal statutes, regulations and executive orders.⁶ The laws provide not only ethical rules but also severe criminal sanctions for illegal acceptance of bribes, gratuities, and salaries from private parties or from any source other than the Government. The laws penalize equally the payer

6. The most current and comprehensive compendium of these legal restrictions are contained in STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH U.S. OFFICE OF GOV'T ETHICS (1996). The publication cites and explains, with extensive discussion and examples, the rules and procedures. It also contains a comprehensive list of related statutes of Government-wide application. It does not cover statutes limited in application to a particular Government Department (e.g., Meat Inspection Act of 1907, Title 21, U.S.C. §§ 601-691, applicable to employees of the Department of Agriculture). A more limited guide is also published by the DO IT RIGHT UNITED STATES OFFICE OF GOVERNMENT ETHICS (1995). Both are available for modest sums from the United States Government Printing Office in Washington, D.C.

and the recipient of the proscribed payments.⁷ In brief, corruption is a crime, the rules are strict, and prosecution can be merciless.⁸

The second set of prohibitions affects Senators and Representatives. These rules, issued internally by the Senate and House of Representatives, have recently been tightened. In brief, they supplement the applicable criminal statutes, limiting and requiring the reporting of gifts to federal legislators.⁹

A third source of restraints is the federal laws governing and restricting both the giving and the reporting of campaign contributions. These laws require extensive reporting, enforced by civil and criminal penalties, and place restraints upon amounts and, in particular, corporate contributions, whether made directly or disguised through conduits. The laws have led to both civil proceedings brought by the Federal Election Commission and prosecutions brought by both the Department of Justice and various Independent Counsel.¹⁰

7. See Title 18, U.S.C. §§ 201-225. For the United States Department of Justice's views on public corruption laws and prosecutions, *see generally* THE DEPARTMENT OF JUSTICE MANUAL, Vol. 9A, Chapters 85 and 85A (PH Law & Business).

8. Violations of the United States' domestic laws can also have international consequences. Oliver North, the loyal foot soldier of the Iran-Contra mess, was convicted of taking an illegal gratuity in the form of a security system for his home in return for his covert work funding the Contras in El Salvador. Although that conviction was ultimately reversed on procedural grounds, it reflects the American approach to domestic corruption. *United States v. North*, 910 F.2d 843, *modified*, 920 F.2d 940 (D.C. Cir. 1990).

9. The Senate Gifts Rule, effective January 1, 1996, is contained in Rule XXXV (Gifts) of the Senate Rules. The Financial Disclosure Rule is Rule XXXIV (Financial Disclosure). The Rules are explained and interpreted in a March 27, 1996 Memorandum from the U.S. Senate Select Committee on Ethics dated Mar. 27, 1996.

The House Gifts Rule, Rule LII (52), is explained and interpreted in a Memorandum from the House's Committee on Standards of Official Conduct dated Dec. 7, 1995. Each Rule is enforced by the relevant Congressional committee and, ultimately, by action of the relevant House of Congress. The custom is for the concerned committee to hire an independent lawyer to conduct the investigation. A current example is the pending investigation of the Speaker of the House of Representatives, Newt Gingrich, by the House Committee and its retained independent counsel. Violations of criminal laws that are uncovered are referred to the Department of Justice; however, all discovered violations may form the basis for House or Senate discipline.

10. See Title 2, U.S.C. §§ 431-455, the Federal Election Campaign Act. The Act establishes a comprehensive set of restrictions and reporting requirements, enforced primarily by the Federal Election Commission (FECA). The Act provides for criminal prosecutions by the Department of Justice as well as extensive civil proceedings by the Commission. The force of these statutes is exemplified by the recent conviction of Sun Diamond Growers of California, a

A fourth source of domestic restrictions has been the United States Securities Laws. Publicly traded corporations in the United States are subject to a number of restrictions and requirements aimed at accurate and public disclosure of certain financial information. These laws also impose the requirement to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the corporations' transactions and the disposition of their assets. These laws have criminal penalties for their violation and have been applied to both illegal campaign contributions and to bribes.¹¹

The next general set of proscriptions typically involved includes requirements that communications with the federal government and its investigators be truthful. Aside from the specific reporting and disclosure requirements, prosecutions often deal with attempts through false statements and misrepresentations

mammoth agricultural cooperative in California with reported sales of \$670,000,000 annually, of, *inter alia*, one count of making a prohibited political contribution to former Secretary of Agriculture Michael Espy's brother Henry (a Congressional candidate) in violation of 2 U.S.C. § 441b(a), and four counts of violating 2 U.S.C. § 441f by making the contribution through four individuals in an attempt to conceal the source of the contributions. Other convictions include payment of prohibited gratuities (18 U.S.C. § 201(c)(1)(A)) and wire fraud (18 U.S.C. §§ 1343 and 1346). Total penalties on the conviction include a maximum fine of \$2,500,000. Criminal penalties for FECA violations are contained in 18 U.S.C. §§ 3571-3573. See *In re Secretary of Agriculture Espy*, United States v. Sun Diamond Growers of California, Cr. No. 96-0193 (D.C. 1996).

The case of Michael Goland is an excellent example of cases brought by the Department of Justice for violations of the election laws. The extensive litigation history is set forth in three separate opinions by the United States Court of Appeals for the Ninth Circuit. *United States v. Goland*, 859 F.2d 405, 959 F.2d 1449, 977 F.2d 1449 (9th Cir. 1990 & 1992). Goland was convicted of making an illegal campaign contribution to a candidate for the U.S. Senate in violation of 2 U.S.C. §§ 441a(a)(1)(A) and 437(d). His challenges to this criminal conviction as well as an attempt to have the Act declared unconstitutional, *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990), proved unavailing and he ultimately served a prison term.

11. Alleged domestic violations typically include keeping fake books and records (15 U.S.C. §§ 78m(b)(2)(A) and 78ff(a)), falsification of accounting records (15 U.S.C. § 78ff(a) and 17 C.F.R. § 240.13b2-1), false statements to the corporation's auditors (15 U.S.C. § 77ff(a)) and 17 C.F.R. § 240.13b2-2), and securities fraud (15 U.S.C. §§ 771(a) and 77x). An example is the indictment of Crop Growers Corporation, a publicly traded corporation engaged in marketing federal agricultural insurance on behalf of insurance companies together with its Chairman of the Board of Directors and Executive Vice President. *United States v. Crop Growers Corporation, Hemmingson & Black*, No. 96-0181 (D.D.C. 1996). The gist of the securities charges were that Crop Growers Corporation and its executives funneled illegal campaign contributions to Henry Espy, the Secretary of Agriculture's brother, for his Congressional campaign. The prosecution was brought by the Independent Counsel in re Secretary of Agriculture Espy.

to conceal the wrongful conduct and deflect the investigation. Federal criminal law penalizes false statements to a federal agency.¹²

Finally, the federal criminal laws penalize separately conspiracies to violate the law or to defraud the United States. Thus, both the substantive offenses and the conspiracy to commit them in concert are criminally proscribed.¹³

The American response to corruption committed in the domestic economy and polity is to criminalize not merely the bribe itself but also all of the indicia of the illegal conduct. The laws are constructed deliberately to attempt to deter illegal conduct by forcing the participants to violate multiple laws in the process of committing the corrupt act. This approach, as we will see eventually in this paper, is precisely the approach of the Foreign Corrupt Practices Act.

America, however, has not limited itself to enacting comprehensive laws; it has attempted to insulate the prosecution in politically sensitive cases through the use of "Independent Counsel." The American experience has justified enactment of extraordinary protections against conflicts of interest and undue influence being brought to bear in situations where investigations implicate officials of the Government.¹⁴ No explanation of America's

12. Title 18, U.S.C. § 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

13. Naturally, both a conspiracy to violate any federal criminal law and a conspiracy to defraud the United States by impairing and impeding the lawful functioning of its government and agencies are separate crimes carrying additional criminal penalties. 18 U.S.C. § 371. Not unnaturally, these charges are often present in corruption cases. A prime example is the Crop Growers Corporation indictment, *see supra* note 11, which alleged, a conspiracy both to violate the securities and other federal laws as well as to impede the lawful functioning of the Federal Election Commission and false statements. Further, failure to report bribes or gratuities would subject the recipient to potential liability for criminal and civil violations of the Internal Revenue laws: 25 U.S.C. §§ 7203, 7206, etc. An example is the recent prosecution in Los Angeles, California, of now-former Congressman Walter Tucker for extorting \$30,000 in bribes while Mayor of Compton, California. The charges on which he was convicted included tax evasion charges.

14. An excellent treatment of the historical record from the Bible to the present is Professor Noonan's scholarly exegesis on the subject: JOHN T. NOONAN,

attempts to battle corruption, thus, would be complete without a brief description of this somewhat unusual feature of American law. The Independent Counsel mechanism may also prove to be a helpful model for other nations seeking to both combat corruption and to insure that their anti-corruption efforts are perceived as unbiased by political influence. A brief explanation follows.

B. Independent Counsel Law

1. *Its Use in Domestic Corruption Prosecutions.*—Where an investigation focuses on an individual who is also a member of the Executive Branch of the United States Government such as the President, the various Cabinets, and the Department of Justice, the prosecution of that individual may create a conflict of interest. In those situations where the Executive Branch is incapable of investigating itself, upon a request by the Attorney General, an Independent Counsel is appointed by the Judicial Branch to conduct an unbiased investigation and potential prosecution of criminal violations by Government officials.¹⁵ Unlike the British system, private lawyers in the United States normally cannot and do not act as defense counsel one day and prosecutors the next. American prosecutors are appointed by the federal or local state governments exclusively to prosecute violations of the criminal laws.

The Independent Counsel statute was invoked to appoint Lawrence E. Walsh to investigate the involvement of members of the Reagan White House and Cabinet in the Iran-Contra debacle.¹⁶ It was also recently invoked to appoint an Independent Counsel to investigate President Clinton's and his wife, Hillary's, alleged involvement in the Whitewater investment scandal while President Clinton was Governor of Arkansas. At present, there are three Independent Counsel actively conducting investigations.¹⁷

2. *Brief History.*—The Independent Counsel statute was promulgated as part of the Ethics in Government Act (the "Ethics

JR., *BRIBES* (McMillan 1984). Chapters 15 through 20 chronicle America's extensive and admitted familiarity both with the conduct and its prosecution.

15. See 28 U.S.C. §§ 591-599 (1994).

16. See *Secord v. Cockburn*, 747 F. Supp. 779 (D.C. Cir. 1990).

17. In addition to the Whitewater investigation, Independent Counsel actively investigated the former Secretary of Agriculture Michael Espy and Secretary of Housing and Urban Development Henry Cisneros. The investigation of Secretary of Commerce Ron Brown was discontinued due to his death. The investigation of the former Secretary of Housing and Urban Development, Samuel Pierce, is finalizing its report.

Act") passed in 1978.¹⁸ The Ethics Act was passed by Congress to "create and reorganize certain agencies of the federal Government and to enhance the probity of public officials and institutions."¹⁹ The Ethics Act creating the Independent Counsel provisions was intended to eradicate further abuses of presidential power such as that displayed by then-President Nixon during the Watergate affair.

At that time, "special prosecutors" appointed to investigate the Executive Branch were not fully independent. After the burglary at the Watergate Hotel in Washington led to allegations of espionage and sabotage involving the Nixon administration, Nixon ordered then Attorney General Elliot Richardson to appoint Archibald Cox as the special prosecutor to investigate members of the Executive Branch. After Cox demanded the production of tapes and documents from the President, Nixon ordered the Attorney General to dismiss Cox as special prosecutor. Both the Attorney General and his deputy refused to carry out Nixon's order, then resigned. Ultimately, then-Solicitor General Robert Bork carried out Nixon's order and fired Cox.²⁰

Independent Counsel and the Ethics Act have since had a rocky road. The Iran-Contra investigation, which took five years and cost \$32,000,000, was roundly criticized by Congress. Additionally, both the Iran-Contra investigation and the subsequent debacle over reported loans by the United States to Iraq used by Saddam Hussein to obtain weapons just before the invasion of Kuwait, exposed weaknesses in the statute. Independent Counsel Walsh was unable to obtain classified information held by the Attorney General that was necessary for prosecutions of Iran-Contra defendants. As for Iraq, the Attorney General refused to request the appointment of an Independent Counsel, revealing the inherent weakness of the statute which gives the Attorney General sole discretion in this regard.²¹ Further problems have arisen over disputes as to the extent of the grants of investigative jurisdiction by the Attorney General and whether or not newly discovered

18. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, 18, 26, and 28 U.S.C.).

19. See John M. Kelly, Janet P. McEntee, Note, *The Independent Counsel Law: Is There Life After Death?*, 8 ST. JOHN'S J. LEGAL COMMENT 561 (1993).

20. *Id.* Bork's nomination as a Supreme Court Justice was eventually defeated by the United States Senate. Many consider his role in firing Cox to have been a significant factor in his rejection.

21. *Id.* at 574-79; see also 28 U.S.C. §§ 591-592.

matters are, or should be, within the purview of the Independent Counsel.²²

Congress failed to reauthorize the Independent Counsel provisions of the Ethics Act in 1992.²³ The provisions were, however, reenacted in 1994.²⁴

III. The United States and Foreign Corruption Before the Act

A. *The Reach of the Law*

Domestic bribery, defined generically as the "offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties,"²⁵ had long been prosecuted as a crime by both federal and state authorities in the United States, resulting in extensive prison terms and fines. For example, the federal offense of bribing a United States Government official can result in a maximum sentence of fifteen years in prison.²⁶ Before the enactment of the Act in 1977, however, American corporations and individuals caught bribing foreign officials could only be prosecuted indirectly.²⁷ Domestic bribery statutes did not directly reach foreign activity.

The Securities and Exchange Commission, known colloquially as the SEC, responded to revelations of foreign misconduct by American entities by taking the position that United States corporations were obligated to disclose payments to foreign officials as part of the securities laws.²⁸ The SEC has jurisdiction to regulate transactions in securities conducted on securities exchanges and over-the-counter markets in the United States.²⁹ Additionally, federal prosecutors with the Department of Justice sought to

22. See *In re Espy*, 80 F.3d 501 (D.C. Cir. 1996); *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987). As these cases show, these matters have not been without controversy.

23. See *supra*, note 19, at 581-82.

24. See Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 108 Stat. 732 (1994).

25. BLACK'S LAW DICTIONARY 191 (6th Ed. 1990).

26. 18 U.S.C. § 201.

27. See Pines, *supra* note 5, at 185-88; see *Defending Corporations and Their Officers in Parallel Administrative and Criminal Proceedings and Their Avoidance Through Preventive and Compliance Programs*, American Bar Association National Institute (hereinafter *Defending Corporations*) (1980); see Cruver, *supra* note 5, at 1-5.

28. Pines, *supra* note 5, at 186-88.

29. 15 U.S.C. § 78b.

invoke the Bank Secrecy as well as the Mail and Wire Fraud statutes.³⁰

The Bank Secrecy Act requires banks and other financial institutions to submit reports to the Internal Revenue Service disclosing transactions involving more than \$10,000 in cash, or other bearer negotiable instruments and to submit similar reports to the United States Customs Service whenever transporting more than \$5,000 across the border.³¹ The Mail and Wire Fraud statutes, which prohibit the use of the United States mails and wire communications to engage in a fraudulent scheme, are limited to use of the United States mails and wire communications and thus are not designed to deal with acts undertaken exclusively abroad. Use of these laws to curb the particular practice of bribing foreign officials has proven to be inadequate.³²

B. The Extent of the Problem

A voluntary disclosure program implemented by the SEC during the first half of the 1970s revealed that more than 450 companies had made collectively over \$400,000,000 in questionable payments to foreign concerns. Over 117 of these companies were ranked in the Fortune 500 listing. The corrupting activities engaged in by these companies included bribery of high foreign officials to secure favorable foreign government action, as well as facilitating or "grease" payments made to ensure that lower level Government employees performed desired ministerial functions.³³

The American public was shocked to learn that companies such as Bell Helicopter, Gulf Oil, General Tire and Rubber, Exxon, Occidental Petroleum, Lockheed, Mobil Oil and other prominent corporations had engaged in such activities. For example, it was disclosed that Lockheed paid \$1,000,000 to Prince Bernhardt of the Netherlands, who was forced to resign as a result of an inquiry into the allegation. Gulf Oil reported spending \$10,300,000 on gifts and gratuities related to political activity in the United States and abroad, including \$4,000,000 given to the political party of South Korean President Park Chung Hee.³⁴

30. See The Bank Records and Foreign Transactions Act, 12 U.S.C. §§ 1951-1959; The Mail and Wire Fraud Act, 18 U.S.C. §§ 1341, 1343.

31. See ECONOMIC CRIME WORKSHOP, INTERNATIONAL TRADE - THE FRAUD RISKS, Chapter 2 (January 1987).

32. See generally, Pines, *supra* note 5.

33. Cruver, *supra* note 5, at 2-4.

34. *Id.*

C. *The American Response*

The public outcry resulted in passage of the Foreign Corrupt Practices Act on December 19, 1977.³⁵ As President Carter noted,

“[B]ribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries”³⁶

Most importantly, the Act upholds a valued moral standard underlying the history and culture of the United States. As noted in the Report issued by the House of Representatives on the Act,

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties and candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public [I]t rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.³⁷

The Act was amended in 1988 to clarify and strengthen its provisions in response to the business community’s expressed concern that, as originally drafted, the Act inhibited the ability of United States companies to compete abroad.³⁸

IV. Breakdown of the Act’s Provisions

The Act prohibits American companies and their agents, as well as individuals, from using the mails or other means of interstate commerce to make a payment “corruptly,” either directly or indirectly through an intermediary, to a foreign official or politician to use his or her power or influence to help the American firm or individual to obtain or retain business.³⁹ The Act is broad-reaching in defining potential targets, curbing illicit practices of corporations under the auspices of the SEC, otherwise known as

35. 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78ff (1988), originally enacted as Pub. L. No. 95-213, 91 Stat. 1494 (1977); see ARTHUR ARONOFF, *ANTIBRIBERY PROVISIONS OF THE FOREIGN CORRUPT PRACTICES ACT* (June 30, 1994).

36. See generally, Pines, *supra* note 5.

37. See generally, Pines, *supra* note 5, at 212, quoting H.R. Rep. No. 640, 95th Cong., First Sess. 4-5 (1977).

38. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title V, Subtitle A, Part I, 102 Stat. 1107, 1415-25 (1988).

39. Pines, *supra* note 5, at 188-89.

"issuers," as well as the practices of all "domestic concerns," that is any other corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship principally doing business in the United States or organized under United States laws or the laws of any United States territory, possession, or commonwealth.

The Act also reaches illicit practices of any United States citizen, national or resident.⁴⁰ Although other countries prohibit the bribing of their own officials, the United States is the only nation in the world that I know of which punishes criminally its business community for bribing another country's public servants.⁴¹

A. *Accounting Provisions*

The Act's use of comprehensive accounting standards is particularly American in its approach to the detection and ultimate prosecution of financial crime through the use of disclosure requirements and regulatory oversight. Section 102 of the Act requires corporations subject to the jurisdiction of the SEC (1) to make and keep accurate books, records and accounts which properly detail the corporation's business activities, and (2) to create and maintain a system of internal accounting controls.⁴² These provisions were intended to clarify that corporations' books and records should reflect transactions that conform to accepted accounting standards, should be designed to prevent off the books transactions such as bribes, and should increase corporate accountability.⁴³

The accounting controls required by the Act are not limited to quantitative accuracy and fairness but also include a requirement of qualitative disclosure. Under the Act, corporations' books must correctly record all information which may be necessary to call an auditor's attention to any possible qualitative illegality or impropriety. The financial details of a particular transaction may not tell the whole story. If the transaction is being entered into as a result of a "suggestion" by a foreign official, if the sums being disbursed exceed sums paid in comparable transactions, or if there are apparent conflicts of interest between the foreign parties engaging

40. 15 U.S.C. § 78dd-2(h)(1).

41. Pines, *supra* note 5, at 205-06, 227 n.147.

42. 15 U.S.C. § 78m(b)(2).

43. Cruver, *supra* note 5, at 20-22.

in the transaction and the foreign official from whom a particular entity wishes action, all this information must be disclosed.⁴⁴

Criminal liability for violations of the accounting standards requires that the accused have knowingly circumvented a system of internal accounting controls or have knowingly falsified records or books maintained under the accounting requirements of the Act.⁴⁵

B. Bribery and "Grease" Payments

Sections 103 and 104 create a new criminal offense intended to reduce bribery of foreign government officials by United States-based businesses.⁴⁶ The "foreign corrupt practices" prohibited by the Act include five separate elements:

1. the use of an instrumentality of interstate commerce (such as the telephone, telex, telecopies, air transportation, or the mails) in furtherance of
2. a payment of, or even an offer to pay, "anything of value," directly or indirectly
3. to any foreign official, foreign political party, or foreign political candidate,
4. if the purpose of the payment is the "corrupt" one of getting the recipient to act (or to refrain from acting)
5. in such a way as to assist the company in obtaining or retaining business or in directing business to any particular person.⁴⁷

These provisions apply to both businesses subject to the SEC's jurisdiction, that is "issuers," and to all individuals and other entities coming under the Act. The accounting provisions differ in their reach, covering only the activities of "issuers."

Prosecutions can be brought not only for direct corrupt payments but also for indirect corrupt payments made by third parties if there is actual knowledge of the intended results or if there is a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert the offender to the high probability of violation of the Act.⁴⁸

44. *Id.* at 22-23.

45. 15 U.S.C. §§ 78m(b)(4) and (5).

46. 15 U.S.C. §§ 78dd-1 and -2; *supra* note 8, see *Defending Corporations*, *supra* note 27, at 197-98.

47. Cruver, *supra* note 5, at 15.

48. 15 U.S.C. §§ 78dd-2(a)(3), (h)(A) and (B); Aronoff, *supra*, n.17, § III E.

As amended in 1988, the Act provides an explicit exception to the bribery prohibition for small payments made to foreign officials to ensure their performance of customary duties, known as "grease" payments, or more specifically,

any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by foreign official, political party, or party official.⁴⁹

"Routine governmental action" does not include a decision by a foreign official to award new business or to continue business with a particular party or any action taken by a foreign official involved in the decision making process to encourage a decision to award new business to, or to continue business with, a particular party.⁵⁰ Rather, "routine governmental action" is understood to mean commonly performed official actions, such as:

- obtaining documents or permits to qualify to do business in a foreign country;
- processing government papers, such as visas or work permits;
- providing for police protection, delivery, or scheduling inspections in connection with contract performance or transit of goods through the country;
- providing phone service, power and water supply, cargo-handling services, or protection for perishable commodities; and
- actions of a similar nature.⁵¹

C. *Affirmative Defenses*

There are also a variety of affirmative defenses under the Act as amended in 1988. These defenses include:

- (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written law and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- (2) that the payment . . . was a . . . reasonable and bona fide business expenditure . . . related to-

49. 15 U.S.C. § 78dd-2(b).

50. 15 U.S.C. § 78dd-2(h)(4)(B).

51. Cruver, *supra* note 5, at 16.

(A) the promotion, demonstration, or explanation of products or services;

(B) the execution or performance of a contract with a foreign government or agency thereof.⁵²

The accounting requirements of the Act should serve to flush out bribes that are concealed as business expenses. Nor can American businesses avoid criminal and civil enforcement by arguing that bribery and graft are customary in a foreign country, as opposed to legally authorized, no matter how much the custom permeates the fabric of business in that country.

D. Penalties

The maximum amount of the potential fines to firms violating the Act is \$2,000,000 and \$100,000 for individuals and for officers, directors and stockholders acting on behalf of the firm, as well as imprisonment for up to five years, or both.⁵³ The Department of Justice and the SEC can also bring civil actions and seek substantial civil fines, as well as injunctive relief.⁵⁴

E. Advisory Opinions

An extraordinary provision of the Act creates a review procedure by the Department of Justice in which the Attorney General is required to issue an opinion in response to a specific inquiry from a person or firm. The opinion is meant to enable companies to obtain a "before the fact" opinion as to whether prospective conduct will conform to the Department of Justice's current enforcement policy regarding the antibribery provisions of the Act. Such an opinion creates a rebuttable presumption of compliance with the Act, yet it is not binding on the SEC.⁵⁵ In spite of this governmental effort to be helpful, businesses have not displayed much interest in the opinion procedure, relying more on the advice of private counsel. There were only twenty opinions released between 1980 and 1989.⁵⁶ The Department of Justice,

52. 15 U.S.C. § 78dd-2(c).

53. 15 U.S.C. §§ 78ff(c) and 78dd-2(g).

54. 15 U.S.C. §§ 78dd-2(d), 78dd-2(g)(1)(B), 78dd-2(g)(2)(C), 78ff(c)(1)(B), 78ff(c)(2)(C).

55. 15 U.S.C. §§ 78dd-1(e), 78dd-2(f), 78m(b)(2) and (3); see Department of Justice Manual 1993-1 Supplement, §§ 9-47:140 and 9-47:140A, Part 80, § 80.13.

56. See Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 220-21 (1996).

pursuant to the 1988 amendments to the Act, has adopted new procedures which make supporting documents unreachable through a Freedom of Information Act ("FOIA") request.⁵⁷

F. Enforcement

The SEC is responsible for civil enforcement of the accounting provisions of the Act and the antibribery provisions with respect to issuers. The Department of Justice is responsible for all criminal enforcement, for civil enforcement against individuals, and against entities that are not under the SEC's jurisdiction.⁵⁸

V. Problems Remaining with the Act

Despite amendments, the Act still has a variety of problems that prevent it from fully achieving its goals. One of these problems is limited enforcement by the agencies entrusted with enforcement jurisdiction, the SEC and the Department of Justice. Only sixteen separate bribery allegations have been prosecuted under the Act.⁵⁹ Many factors can contribute to limited enforcement. Initially, Congress has expressed concern about the effectiveness of the agencies entrusted with the Act's enforcement, the SEC and the Department of Justice. Neither agency has complete control over enforcement of the Act, instead sharing that responsibility. Some believe the agencies have displayed an inability to cooperate effectively.⁶⁰ In addition, both agencies have of late been overwhelmed by ever-expanding demands on resources that have not been commensurately increased. Further, changing priorities (as in the Department's recent offensive against "deadbeat dads" for delinquent child support payments) can reduce the resources brought to the anti-corruption fight.

Other factors impeding enforcement under the Act include exceptionally high standards for the initiation of prosecution, as well as the obvious difficulties in investigating and prosecuting sophisticated and complex international commercial transactions. Investigation and prosecution under the Act require interviews with witnesses and the obtaining of documents from individuals and

57. *Id.*

58. Pines, *supra* note 5, at 189; ARONOFF, *supra* note 35, at §§ III C.

59. See Pendergast, *Foreign Corrupt Practices Act: an Overview of Almost Twenty Years of Foreign Bribery Prosecution*, 7 INT'L Q. 187 (1995).

60. Pines, *supra*, note 5, at 192-95.

entities in foreign countries, a task complicated by financial, diplomatic and political concerns.⁶¹

The United States has entered into mutual assistance treaties with other countries, including the Netherlands, Switzerland, Greece, Nigeria and Colombia, which oblige a signatory nation to assist in locating witnesses, in compelling persons to appear and testify, and in producing documents and records. Where these treaties are limited to the investigation and prosecution of crimes recognized by the laws of both the United States and the other nation, they would not include investigations of criminal violations of the Act. There are also bilateral agreements governing the transfer of information between the Department of Justice and foreign law enforcement agencies, which are limited to the activities of specified companies in the host countries.⁶²

The Act also continues to suffer from vagueness that hinders its effectiveness. The scarcity of judicial decisions emanating from prosecutions and civil actions has cut down on judicial clarification of the gray areas in the Act. This is unfortunate in that lack of clarity can have a chilling effect on business activities abroad. It is not precisely clear what is meant by the Act's prohibition against corporate use of the mails "corruptly" in furtherance of payments to foreign officials. It is also unclear what constitutes a "payment," what is meant by the "knowing" standard in relation to liability for intermediaries' illegal acts of bribery, when a foreign official is engaged in an "official capacity" or a "legal duty," and what constitutes a "routine governmental action."⁶³

For example, businesses, of necessity, often use foreign consultants. It is unclear under what circumstances a United States business and the people who work for and invest in that business can be held responsible for the corrupting practices of such a consultant. It can also be problematic to distinguish between a foreign official's "official" conduct and conduct undertaken for personal or business reasons, a problem exacerbated by the lack of substantive and administrative law in the countries involved.⁶⁴

Some commentators have argued that the Act should be amended to allow a restricted private right of action in order to facilitate fair competition.⁶⁵ In short, give a competitor harmed

61. *Id.*

62. Cruver, *supra* note 5, at 65-68.

63. Pines, *supra* note 5, at 200-03.

64. *Id.* at 200-02.

65. *Id.* at 215-27.

by violations of the Act a right to sue. This would supplement scarce Government resources with motivated, well-financed private litigants. Although this approach would seem logical and appropriate, there does not appear to be any domestic political support for further "tilting the playing field" against American competitors, given the lack of foreign action to crack down on foreign corrupters of public officials.

Perhaps the lack of enthusiasm reflects the disinclination of Government officials and businessmen to equip private parties with an economic incentive and the legal right to challenge their actions, either domestic or foreign. In addition, it is doubtful if American or transnational businesses are interested in supplementing the scarce Government resources now available to enforce the Act. Similarly, salutary attempts by the private securities bar to imply a right of action for violation of the Act and bring litigation against corporate managements have been disallowed by the courts.⁶⁶ Enactment of both would revitalize anti-corruption efforts in the United States.

VI. International Response to the Act and to Bribery

A. *International Reaction to the Act*

The fall-out from this American condemnation of American concerns engaging in "business as usual" overseas has been harsh, with some critics calling the Act a form of "cultural imperialism."⁶⁷ The foreign criticism may have been particularly vitriolic because the Act was partially motivated by an endemic, expressed American fear that the contagion of corruption, supposedly caught abroad, would emigrate to the United States, corrupting otherwise law-abiding domestic business. The Act was conceived as a vigorous inoculation against this disease.

There is also overwhelming evidence that the exportation of corruption by transnational companies, including American companies, has had disastrous effects on foreign nations, destabilizing their governments, causing existing corrupt governments to retain

66. See *Lamb v. Philip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991); *Citicorp Int'l Trading Co. v. Western Oil & Ref. Co.*, 771 F. Supp. 660 (S.D. N.Y. 1991); *Shields ex rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686, 688 (N.D. Ill. 1989); *Lewis ex rel. National Semiconductor Corp. v. Spork*, 612 F. Supp. 1316, 1328-34 (N.D. Cal. 1985).

67. Pines, *supra* note 5, at 204.

power at any cost, all resulting in poor economic development.⁶⁸ Payments of bribes by United States corporations to foreign officials and exposure of the practice figured significantly in the fall of governments in Japan, Bolivia, Honduras, the Cook Islands, Italy and the Netherlands.⁶⁹ The United States Congress cited the "world-wide outcry against the corrupting influence of some United States-based multinationals on foreign governments" in passing the original Act.⁷⁰ Yet no one is so naive as to believe that only American corporations' activities have had these effects. Other national governments have been slow, however, to decry their own corporations' illicit overseas activities.

B. International Action

Prior to passage of the Act in late 1977, certain international agencies and organizations had expressed concern over the growing problem of foreign bribes. Since passage of the Act and under sustained lobbying efforts by the United States, these organizations have increased their efforts to take concrete actions curbing such illicit activities. To date, however, the United States is the only nation to have criminalized overseas bribery.

In 1975, the United States obtained a resolution from the General Assembly of the United Nations condemning bribery and other corrupt practices in international commerce. Section five of that resolution called for nations' cooperation to prevent such practices. Thereafter, in 1979, the United Nations' Committee on an International Agreement on Illicit Payments presented the United Nations Economic and Social Council ("ECOSOC") with a treaty outlawing overseas bribery that was heavily supported by the United States. It was never adopted.⁷¹

The Act, as amended in 1988, directed the President to pursue an international agreement among the members of the Organization for Economic Cooperation and Development ("OECD") to create legislation in their own countries aimed at attacking the problem of international corruption.⁷² On May 27, 1994, the OECD Council approved a Recommendation in which the

68. Earle, *supra* note 56, at 221-23.

69. *Id.*

70. *Id.* at 206-07.

71. See Stephen Muffler, *Proposing a Treaty on the Prevention of International Corrupt Payments: Cloning the Foreign Corrupt Practices Act is not the Answer*, 1 ILSA J. INT'L & COMP. L. 3, 8-13 (1995).

72. 15 U.S.C. § 78dd-1 note.

members agreed that bribery distorts international competitive conditions, that all countries share a responsibility to combat bribery in international business transactions, and urging member countries to criminalize overseas bribery. The OECD's Committee on Investment and Multinational Enterprises established a working group to follow up on the recommendations.⁷³ Most recently, on April 11, 1996, the OECD "[u]nder intense pressure from the United States," agreed that bribes paid to foreign officials should no longer be tax-deductible, and committed its 26 member nations to rewrite their tax codes.⁷⁴ Efforts by the United States to forge a binding agreement among member nations of the OECD criminalizing overseas bribery had failed, in large part due to the efforts of a coalition led by Britain.⁷⁵ However, the United States appears to have succeeded partially in its lobbying efforts to forge an OECD agreement making foreign bribery a crime.⁷⁶

In March 1996, the Organization of American States ("OAS") adopted the Inter-American Convention Against Corruption. The Convention calls for the criminalizing of transnational bribery by member states, makes such acts of corruption extraditable offenses, and calls for increased cooperation among member states, including the establishment of "Central Authorities" to facilitate such cooperation.⁷⁷ On June 15, 1994, Justice Ministers from the Council of Europe adopted a program to combat corruption at the close of the Council's Nineteenth Conference. The United Nations, through its Commission on International Trade Law, has also adopted model laws for the procurement of goods and services which challenge corruption in host countries.⁷⁸

In March 1996, the International Chamber of Commerce ("ICC") announced a revised set of "Rules of Conduct to Combat Extortion and Bribery in International Business Transactions," which prohibit extortion or bribery for any purpose. These rules

73. See ARONOFF, *supra* note 35, at § VII D; Earle, *supra* note 56, at 224-25.

74. See Marlise Simons, *United States Enlists Other Rich Countries in a Move to End Business Bribes to Foreign Officials*, N.Y. TIMES, Apr. 12, 1996, at A7.

75. Earle, *supra* note 56, at 224-25; Muffler, *supra*, note 71, at 13-14, notes 60-61.

76. Simons, *supra* note 74. David E. Sanger, *29 Nations Agree to a Bribery Ban*, N.Y. TIMES, May 23, 1997, at A1. Implementation could not be until 1999 at the earliest.

77. See Inter-American Convention Against Corruption, adopted Mar. 29, 1996, Organization of American States, OEA/Ser.K/XXXIV.1CICOR/doc.14/96 rev.2.

78. See Jay M. Vogel, *Corrupt Practices in the Conduct of International Business*, 30 INT'L LAW 193, 196-98 (1996).

are non-binding and self-regulating. In 1977, the ICC had passed an earlier set of rules which prohibited extortion and bribery only in connection with obtaining or retaining business. In its corresponding March 1996 Report, the ICC recommends that all governments implement the May 1994 OECD Recommendation on Bribery in International Business Transactions.⁷⁹

A private organization named Transparency International ("TI"), modeled on the structure and tactics of Amnesty International, was formed in 1993 to tackle the ethical dilemmas faced in international business, which its supporters believe neither governments nor corporations can successfully address. Based in Berlin with offices around the world, TI receives financial support from United States corporations and European aid agencies. Through the use of public exposure, introduction of legislation in other nations similar to the Act, and other tactics, TI is dedicated to ending international kickbacks, bribes and corruption.⁸⁰

VII. The Act's Record

Has the Act been successful? No one really knows, or even agrees on the criteria for success: stopping American participation in foreign corruption *or* assisting American firms to be competitive? Enactment certainly galvanized the United States to press for international action. Yet, as shown above, progress has been slow or nonexistent. United States Trade Representative Mickey Kantor has bitterly protested foreign indifference: "Last year from April 1994 to May 1995 the U.S. Government learned of almost 100 cases in which foreign bribes undercut U.S. firms' ability to win contracts valued at \$45 billion."⁸¹ Secretary of State Warren M. Christopher claims that the Act's effectiveness has had a deleterious economic impact on American business abroad.⁸² While there is, as yet, to my knowledge no official study confirming these claimed effects,⁸³ it appears reasonable to assume they exist.

There are also concrete examples of American businesses invoking the Act to avoid the continuous blackmail and extortionate relationships which an initial bribe or gift can yield, significantly driving up the cost of doing business abroad. Colgate-Palmolive

79. See *Report and Revised Rules on Corruption and Bribery in International Business Transactions*, International Chamber of Commerce (March 1996).

80. Earle, *supra* note 56, at 232; Muffler, *supra* note 71, at 12-13.

81. See Simons, *supra* note 74.

82. Pines, *supra* note 5, at 207-14; Earle, *supra* note 56, at 226.

83. Pines, *supra* note 5, at 207-14.

successfully deflected demands for bribes from Chinese officials by citing the Act's prohibitions against such payments. Colgate-Palmolive ultimately opened a \$20,000,000 factory in Guang Dong in January of 1992 without the use of bribes.⁸⁴

There is also a record of sixteen successful prosecutions. Seventeen companies and thirty-three individuals have been charged with violating the Act through the use of foreign bribes. Fines on the corporate entities have ranged from \$10,000 to \$3,450,000. Yet few executives have gone to jail. A brief discussion of a few of these prosecutions shows the magnitude of the commercial transactions and the bribes involved, the latter representing sometimes up to twenty percent of the business obtained. In July 1992, the General Electric Company, in the *Dotan* case, admitted it had conspired with an Israeli general and others to create bogus bills for fictitious Israeli Air Force projects. General Electric pled guilty to four federal charges, including violation of the Act, and agreed to pay \$69,000,000 in fines and settlement.⁸⁵

The SEC filed a civil injunctive action against Ashland Oil Company and its former Chief Executive Officer, alleging that in 1980 they agreed to pay an entity controlled by an Omani government official approximately \$29,000,000 for a majority interest in Midlands Chrome Inc., a Zimbabwean mining operation, in order to obtain crude oil at a highly favorable price. The mining claims were not profitable and in 1982 Ashland wrote off its investment. In December 1982, Ashland was awarded a crude oil contract by the Omani government for 20,000 barrels a day for one year at a \$3-per-barrel discount from the "selling price."⁸⁶

In a criminal proceeding against Crawford Enterprises, the Department of Justice alleged a scheme to bribe officials of Pemex, the Mexican national oil company, to obtain orders for compression equipment systems for use in Mexico's oil and natural gas industry. The main defendants were convicted following a trial. Thereafter, Pemex itself filed a major civil action against eighteen known defendants and other unknown conspirators seeking more than \$45,000,000 in direct damages.⁸⁷

The multiple actions against Lockheed exemplify the tenacity of corruption in the international marketplace and how some

84. *Id.*

85. Cruver, *supra* note 5, at 56; Pendergast, *supra* note 59, at 10-29.

86. Cruver, *supra* note 5, at 52.

87. *Id.* at 54-55.

companies treat financial sanctions as a cost (albeit substantial) of doing business abroad. In June 1979, after Lockheed admitted to bribing Prince Bernhard of the Netherlands, Lockheed entered a plea of guilty based on its disclosure to the SEC of payments to Japanese Prime Minister Tanaka. Thereafter, in June 1994, Lockheed was indicted yet again for violations of the anti-bribery provisions of the Act based on allegations of payments to an Egyptian Parliament member, a Dr. Takla, who served as Lockheed's consultant in Egypt between 1980 and 1990. The indictment alleged that Lockheed agreed to pay Dr. Takla \$600,000 for each C-130 aircraft sold to Egypt under an FMS program. After auditors discovered the arrangement, Lockheed told the Pentagon it would not pay the fee. It then paid Takla \$1,000,000 into a Swiss bank account as a "termination fee."⁸⁸ A Lockheed executive pled guilty, and Lockheed was also convicted. A Lockheed regional vice-president is a fugitive in Syria. Lockheed paid a fine of \$28,100,000 and \$3,000,000 in civil false claims damages.⁸⁹

It also appears clear that the Act may only have succeeded in causing firms to be more circumspect. Most recently, allegations have surfaced in the press regarding IBM's payment of \$20,000,000 to a subcontractor in connection with a \$250,000,000 contract awarded to IBM in 1994 to computerize Banco de la Nacion in Argentina. As reported in the news, the contract, although beneficial to IBM, is allegedly damaging to the Argentine state. On July 31, 1996, a magistrate in Argentina charged 18 suspects, including IBM executives and provincial bankers, with plotting to defraud the Argentine government and inflating the price of the computer contract with unnecessary costs and services. The investigation focused on a \$37,000,000 subcontract awarded to CCR, a small software company linked to Juan Carlos Cattaneo, alleged to be a power broker of Argentina's ruling party. The money disappeared and was allegedly diverted to bank accounts in Switzerland, Uruguay and the United States. The company apparently performed no identifiable services in exchange for the money. American prosecutors are looking into whether violations

88. Pendergast, *supra* note 59, at 28-29; Earle, *supra* note 56, at 211-13.

89. See Evan Jay Cutting, *Foreign Corrupt Practices Act: ABA-CLE White Collar Crime 1996, Representing Corporations, Financial Institutions and their Directors, Officers and Employees*, I-17-21 (1996).

of the Act have occurred and if they have, enforcement and prosecution should be forthcoming.⁹⁰

The uncomfortable fact, however, is that these few are the only prosecutions in almost twenty years. And many were uncovered not by the SEC or Department but almost adventitiously by the press. It beggars the imagination to believe that corporations which reported \$400,000,000 in bribes so few years ago have been reformed so totally. Without comprehensive international investigations, no one will ever know.

VIII. Conclusion

The Foreign Corrupt Practices Act is a good-faith effort by the United States to combat the use of bribery abroad by United States companies that degrades and harms other nations' economic development and our own moral welfare. The Department of Justice and the SEC have tried to enforce the Act. Yet the problems experienced by the United States in creating a workable enforcement structure, solving investigatory needs, and clarifying the activities outlawed under the Act, have hindered and will continue to hinder its use. In fact, the most promising change to spur legal action and enforcement, the addition of private rights of action, have not to date been enacted, although such changes might well result in an explosion of private enforcement. In spite of these problems, the United States has had some success in prosecuting a few egregious violations.

The United States has also tried to negotiate international cooperation in fighting corruption. It has attempted to lead the way both by criminalizing directly not merely the conduct involved but also the corporate shenanigans necessary to conceal the corruption. Although efforts by the United States to forge effective international agreements criminalizing such practices have failed to date, there has been significant movement and dialogue about the issue resulting from the United States' repeated calls for international enforcement and an apparent realization in some foreign climes that corruption is a real threat to their own national security. Yet, the entrenched nature of "influence peddling," "competition" as a pernicious form of nationalism and other unethical practices in many parts of the world may render them immune from effective international condemnation. We can only hope that is not the case.

90. See Sebastian Rotella, *IBM Scandal is Equal Parts Spectator Sport and Lesson*, L.A. TIMES, Aug. 11, 1996, at D1.