Curbing Corruption - The Efficacy of the Foreign Corrupt Practice Act

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Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act

Tor Krever†

ABSTRACT

Corruption of public officials, in particular bribery, has long been recognized as a potentially serious problem in every polity. Large foreign corporations, based in developed jurisdictions, are identified as common culprits. The first legislation in the world to recognize and seek to curb the contribution of domestically based corporations to foreign corruption was the U.S. Foreign Corrupt Practices Act of 1977. The Act criminalizes the payment of bribes to foreign officials for the purpose of obtaining or retaining business. I analyze the efficacy of the Act, and argue that it has had only limited success in curbing foreign bribery. This article contributes to the existing literature by considering what impact recent domestic and international developments will have on the Act’s likely future effectiveness. Specifically, it suggests that the internationalization of anti-corruption efforts and recent increased and expanded domestic enforcement reduce the potential costs to business competitiveness and add new momentum to the Act’s effectiveness. The ultimate impact of these developments will depend on the ongoing commitment of all parties to curb supply-side corruption.

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† Research Fellow, Taxation Law and Policy Research Institute, Monash University. I am grateful to Barry Rider for the discussions he provided in the process of writing the article. I also benefited from valuable comments and suggestions from Rick Krever and the editors; the usual caveat applies.
Corruption of public officials, and bribery in particular, has long been recognized as a potentially serious problem in every polity. The gods themselves are moved by gifts, wrote Euripides; experience shows, elected and appointed officials whose positions carry with them privilege or influence are often moved by gifts too. Recent scandals embroiling numerous elected representatives of the Republican Party in the United States and members of the Labour government in the United Kingdom suggest corruption remains prevalent in even the most developed nations. Bribery is also gaining increasing attention as a potential impediment to economic development in less developed countries.

Much of the literature on the causes and consequences of bribery focus on the demand side: the officials who request and accept bribe payments in exchange for favor and influence. Slowly, however, the literature has begun to address the supply-side of bribery. Large foreign corporations, based in developed jurisdictions, are identified as common culprits of supply-side bribery.

The first legislation in the world to recognize and seek to curb the contribution of domestically based corporations to foreign corruption was the U.S. Foreign Corrupt Practices Act of 1977 (FCPA). This Act criminalizes the payment of bribes to foreign officials for the purpose of obtaining or retaining business.

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A large body of literature seeks to assess the effects of the FCPA. It concerns itself, in particular, with two questions: has the FCPA discouraged U.S. corporations from making corrupt foreign payments, and at what cost to U.S. corporations’ competitiveness in overseas markets has any deterrent effect been achieved? In this article, I analyze the efficacy of the FCPA by addressing both questions. The existing literature, I argue, provides no consensus but supports the view that the Act has had only limited success in curbing foreign bribery. The article contributes to the existing literature by considering what impact recent domestic and international developments will have on the Act’s likely future effectiveness. Specifically, it suggests that the internationalization of anti-corruption efforts and recent increased and expanded domestic enforcement reduce the potential costs to business competitiveness and add new momentum to the Act’s effectiveness. While concluding on an optimistic note, I argue that the ultimate impact of these developments will depend on the ongoing commitment of all parties to curb supply-side corruption.

A. Consequences of Bribery

Foreign bribery, and corruption more generally, have several pernicious consequences for the receiving jurisdictions. A substantial body of literature supports the observation that corruption inhibits economic growth and identifies two primary reasons for this outcome: economic inefficiency and reduced investment.

Where there are no bribes, buyers will purchase from the seller that offers the best in terms of both price and quality. But a public official accepting a bribe does not benefit directly from the product or service whose purchase she authorizes. She may therefore make decisions based on a calculus of personal income maximization (from the bribe) rather than national welfare maximization (from the purchase of the best product or service at the lowest price).

This agency problem presents three principal consequences. First, government funds may be misallocated towards inefficient and overpriced contractors offering not the best supply at the lowest cost, but instead the largest bribe. \(^3\) Put crudely, the state no

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\(^3\) Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private*
longer gets the biggest bang for its buck. Second, funds may be misallocated toward marginal projects. Officials may prioritize projects based on their potential to yield bribe payments rather than public need.\textsuperscript{4} Third, if bribery is commonplace and firms must regularly proffer bribes to win contracts, the private sector as a whole may become less efficient as firms shift the focus of expenditures away from investments to increase competitiveness toward corrupt payments.\textsuperscript{5}

Corruption may also impede economic growth due to decreased investment. Foreign companies may be less willing to invest capital in a market with endemic corruption. While some studies find little evidence of a negative correlation between corruption and investment,\textsuperscript{6} the majority of empirical studies come to the opposite conclusion. For example, Graf Lambsdorf finds that a reduction in corruption from the level of Tanzania to that of the U.K. would see net annual capital inflows increase by 3\% of Gross Domestic Product.\textsuperscript{7} Scholars Shang-Jin Wei, Moshin Habib, and Leon Zurawicki reach similar conclusions.\textsuperscript{8}

Foreign bribery can hurt those foreign corporations engaging in the practice, and even those abstaining. Once a business has paid a bribe, they are likely to have difficulty resisting demands for further bribes in the future.\textsuperscript{9} Companies with a reputation for


paying bribes may be approached by officials for services that would normally not attract payment. Moreover, an official who knows payments have been made in the past can increase bureaucratic interference to engender further bribes. Empirical studies provide evidence of such flow on effects: Kaufmann and Wei find that firms that pay more bribes face more bureaucratic red tape.

II. The U.S. Response: the FCPA

The FCPA was passed by the U.S. Congress in December 1977 as a response to the Watergate scandal and to a Securities and Exchange Commission (SEC) investigation that uncovered over $300 million of questionable payments by U.S. firms to foreign government officials. An SEC report listed some 527 companies which had disclosed such payments, including major U.S. corporations such as Exxon Mobil, Boeing, Northrop Grumman, Lockheed Martin, and Gulf Oil.

While analysis of the causes of corruption had previously focused on the demand-side, specifically on problems of agency and the motives for public officials to accept or exact bribe payments, the SEC investigation revealed that supply-side actors, particularly large foreign corporations, may be equally important in explaining the promulgation of the practice. The resulting legislation was the first in the world to recognize and seek to curb the contribution of foreign firms.

The FCPA adopts a two prong approach to counter bribery, based on separate accounting and penal provisions. The accounting provisions focus on disclosure; it requires all

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10 See Wu, supra note 9, at 154.


13 See Larson, supra note 12, at n.1; Business Without Bribes, NEWSWEEK, Feb. 19, 1979, at 63.
corporations that have stock registered with the SEC to keep accurate books and accounts of all transactions, and to adopt a system of internal accounting controls.\textsuperscript{14}

The anti-bribery provisions specifically prohibit U.S. corporations and their agents from making payments to a foreign official\textsuperscript{15} in return for her influence to help the corporation "in obtaining or retaining business."\textsuperscript{16} These provisions apply to any U.S. "issuer" or "domestic concern" as well as any official, employee, agent, or other party acting on behalf of the issuer or domestic concern.\textsuperscript{17}

The Act has been amended twice, once in 1988 and again in 1998.\textsuperscript{18} The 1988 amendment was largely in response to complaints by U.S. corporations that the original Act was too vague and wide in scope. Originally, payments made to third parties were only prohibited if a firm "[knew] or [has] reason to know" that the payment would be used corruptly.\textsuperscript{19} This was amended to a narrower "knowing" standard which requires that a guilty party is "aware" that the third party is engaging in such conduct or that the conduct is "substantially certain to occur."\textsuperscript{20}

The amendment also clarified the exemption of "grease" or

\begin{itemize}
  \item \textsuperscript{14} 15 U.S.C. § 78m(b)(2)(A)-(B) (2000).
  \item \textsuperscript{15} A foreign official is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality." 15 U.S.C. § 78dd-1(f)(1) (2000); see also 78dd-2(h)(2) (defining the same).
  \item \textsuperscript{17} See 15 U.S.C. § 78dd-1(a) (2000) (relating to issuers); § 78dd-2(a)(2000) (relating to domestic concerns); § 78dd-3(a)(2000) (relating to those other than issuers or domestic concern but acting on their behalf). Issuers include any corporation under the auspices of the SEC and domestic concerns refer to any U.S. citizen, national or resident or "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship" with its principal place of business in the U.S. or organized under U.S. law. 15 U.S.C. § 78dd-2(h)(1) (2000); see also 15 U.S.C. § 78m(b)(2)(2000).
\end{itemize}
“facilitating” payments. Originally, payments were exempted if they were for duties that are “essentially ministerial or clerical.” Payments are now exempt when used “to expedite or to secure the performance of a routine governmental action.” Finally, the amendment also introduced several affirmative defenses. Payments are exempt if they are legal under the laws of the receiving official’s country or if the payment is for “a reasonable and bona fide expenditure,” such as travel and lodging expenses.

The FCPA was again amended in 1998 when section 78dd-3 was added, which extends the Act’s purview to “any person” over which the U.S. Department of Justice (DOJ) has jurisdiction. The SEC is responsible for enforcing the accounting requirements, while the SEC and DOJ share responsibility for enforcing the anti-bribery provisions.

A. Thirty Years Later: Effects of the FCPA

1. Impact on U.S. Business Abroad

A claim made repeatedly by various U.S. commentators, politicians, and business leaders since the FCPA’s inception is that it creates a lopsided playing field. Within a market occupied completely by U.S. corporations, the Act would apply to all competitors, and should not affect firms’ relative profitability. But in reality, U.S. businesses compete in overseas markets with foreign counterparts not subject to the Act, and thus free to pay bribes. In markets where payments are common, U.S. firms may be precluded altogether from competing. At the very least, it is argued, U.S. businesses operate abroad at a significant competitive advantage.

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26 Indeed, some business leaders have claimed that in some countries bribes are “essential” for obtaining business. See P. Beck et al., The Impact of the Foreign Corrupt Practices Act on US Exports, 12 MANAGERIAL AND DECISION ECON. 295, 295 (1991).
disadvantage.\textsuperscript{27}

Business leaders have been outspoken in voicing such fears. Two years after adoption of the law, 71\% of respondent executives of multinational companies thought U.S. companies would lose business to foreign competitors as a direct result of the Act.\textsuperscript{28} Some politicians sympathized with this view, with one Senator describing the FCPA "as an export disincentive."\textsuperscript{29} A 2002 survey of business attitudes by the Control Risks Group indicates that such views remain prevalent among business leaders.\textsuperscript{30}

A number of empirical studies suggest the FCPA has led to a substantial loss of business or export opportunities to foreign competitors by U.S. companies operating abroad. One early study by the U.S. Department of Commerce surveyed Foreign Services posts, and found twenty-one embassies reporting that the Act was an export disincentive in the countries in which they were located.\textsuperscript{31} In 1981, a General Accounting Office study looked at 250 U.S. firms and found that 30\% reported losses of foreign business as a result of the Act.\textsuperscript{32} More recently, a 1995 Central Intelligence Agency report estimated that from 1994-95, the U.S. lost $36 billion in international business to bribe-paying international competitors.\textsuperscript{33}

Other studies, by way of contrast, dispute these findings. One Scholar John Graham finds no evidence that the U.S. share of exports to bribery prone countries declined after the Act's


\textsuperscript{28} Jack G. Kaikati & Wayne A. Label, American Bribery Legislation: An Obstacle to International Marketing, 44 J. MARKETING 38, 42 (1980).


\textsuperscript{31} See Beck et al., supra note 26, at 295.

\textsuperscript{32} COMPTROLLER GEN., REPORT TO THE CONGRESS OF THE UNITED STATES: IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 15 (General Accounting Office, 1981).

enactment, and another Scholar, Mary Jane Sheffet reports survey data from U.S. corporations indicating the Act has not hurt U.S. business abroad or demand for U.S. products.\textsuperscript{34} Between 1986 and 1995, the U.S. share of export trade in Asia actually increased from 20% to 31%. In Africa, between 1991 and 1996, the U.S. share grew by 70%.\textsuperscript{35} Interestingly, exports appear to have grown faster in markets where corrupt practices are reported to be particularly prevalent — aircraft, construction equipment, oil and gas field machinery, telecommunications equipment, and medical equipment — than in markets less exposed to corruption.\textsuperscript{36}

Against those studies finding a negative impact on U.S. business, other less quantifiable advantages also need to be considered. First, by forcing U.S. corporations to comply with anti-bribery laws, the FCPA may have made these businesses stronger competitors. In order to win contracts without paying bribes, companies have needed to focus on the quality of their services and products. An increase in quality will result in flow on benefits for operations in non-corrupt markets.\textsuperscript{37}

Second, the FCPA may have helped companies by providing an excuse not to pay bribes. James Kinnear, former president of Texaco, has suggested that the FCPA allows companies to save face while refusing to pay bribes, and thus insulates companies from the costs of bribery.\textsuperscript{38} Colgate-Palmolive cited the FCPA and its prohibition of bribery in response to demands for bribes from Chinese officials regarding the construction of a factory.\textsuperscript{39} The factory ultimately opened in 1992 without the payment of bribes.\textsuperscript{40}

Empirical studies have differed in the time periods analyzed,\textsuperscript{34,35,36,37,38,39,40}


\textsuperscript{36} Id.

\textsuperscript{37} Lisa H. Randall, \textit{Multilateralization of the Foreign Corrupt Practices Act}, 6 MINN. J. GLOBAL TRADE 657, 675 (1997); see also Wu, \textit{supra} note 9, at 154.


\textsuperscript{39} Rossbacher & Young, \textit{supra} note 12, at 530.

\textsuperscript{40} Id.
the metric used to measure the Act's impact, and the conclusions reached.\textsuperscript{41} While there were almost certainly some instances where U.S. corporations did not pay bribes and lost business to bribe-paying overseas competitors, the magnitude of this negative effect can be expected to differ from country to country, depending on the pervasiveness of corruption in a particular market. On balance, there is no conclusive evidence that U.S. business interests have suffered overwhelmingly.

2. Impact on the Incidence of Bribery

While fears that the FCPA would undermine the competitiveness of U.S. firms appear exaggerated, although not necessarily unfounded, there is also little evidence that the FCPA has had a particularly chilling effect on bribery by U.S. corporations.\textsuperscript{42} Empirical data on the incidence of bribery are difficult to acquire given the illegality and secrecy surrounding the practice. While the majority of bribe payments probably go undiscovered, the number of instances of bribery reported remains high,\textsuperscript{43} and prosecutions under the FCPA are actually increasing.\textsuperscript{44}

Further evidence that the foreign bribery remains widespread amongst U.S. businesses comes from the World Bank, where in one study, Hellman et al. examined twenty-two Eastern European and former Soviet transition economies.\textsuperscript{45} Their data suggest that the FCPA has not led to higher standards of business practice in these countries.\textsuperscript{46} Specifically, they report in another study that

\begin{footnotesize}
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\item \textsuperscript{41} Many rely simply on the business community's perceptions of the Act's effects, particularly those finding a negative effect on U.S. business competitiveness. See generally Pines, supra note 3, for a critique of the empirical literature.
\item \textsuperscript{42} The two observations may be linked – corporations continuing to use corrupt practices are unlikely to experience any impact on their business competitiveness in foreign markets.
\item \textsuperscript{43} See, e.g., Peter S. Goodman, Common in China, Kickbacks Create Trouble for U.S. Companies at Home, WASH. POST, Aug. 22, 2005, at A1 (reporting on payments by U.S. companies in China).
\item \textsuperscript{44} This may be due, in part, to increased enforcement.
\item \textsuperscript{46} Id. at 21.
\end{itemize}
\end{footnotesize}
foreign direct investment (FDI) originating in the U.S. is not characterized by "higher standards of corporate ethics than domestic firms or FDI originating in other countries." Indeed, a higher percentage of U.S. firms pay public procurement kickbacks (over 40%) in the countries analyzed than do firms based in France, Japan, Germany, and the U.K.

Another telling measure not limited to business activities in transition economies is Transparency International's Bribe Payers Index. The index ranks the world's leading exporting countries by the (perceived) propensity of their companies to bribe abroad. The 1999 index ranked the U.S. ninth out of nineteen countries (a lower ranking corresponds with higher levels of bribery), twenty-two years after the enactment of the FCPA and at a time when most other leading exporters were only beginning to implement similar domestic legislation. Three years later, the 2002 index put the U.S. thirteenth out of twenty-one countries. The most recent 2006 index, which includes in its sample thirty countries, places the U.S. ninth, equal with Belgium.

3. Waxing and Waning Enforcement

The limited impact of the FCPA on the incidence of bribery may be explained, in part, by its limited enforcement. In its first two decades, enforcement of the Act by the DOJ and SEC was, at best, sporadic, and limited to high profile investigations. The fight against corruption took a backburner to more pressing Cold War era foreign policy concerns.

Early in the FCPA's life, the DOJ instructed U.S. attorneys to only pursue bribery investigations with "express approval" from Washington. There existed serious concern that enforcement of the Act would potentially offend or embarrass officials in allied countries. It was not until 1986 that a case involving a major

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48 Id. at 6, figure 4.
52 Larson, supra note 12, at 569.
53 Id. at 569-70.
corporation, Ashland Oil, Inc., reached the courts, and this was only the third action brought under the Act by the SEC.\(^5^4\) As of 1997, only seventeen companies and thirty-three individuals had been charged under FCPA\(^5^5\) and numerous commentators were bemoaning the paucity of prosecutions.\(^5^6\)

There have been some important developments over the intervening decade, however. The Ashland Oil case was the first to involve what was ostensibly a legitimate business transaction (the company had overpaid for an acquisition from an entity controlled by a foreign government official in return for access to cheap crude oil) and suggested that enforcing agencies were willing to look, in judging the legality of a business transaction, at its form as well as its actual substance.\(^5^7\) A 1995 prosecution of the Lockheed Corporation led to $24 million in fines for a $1 million bribe, and a prison sentence for one company executive.\(^5^8\) The penalties imposed on Lockheed were some of the highest ever under the FCPA.\(^5^9\)

Enforcement actions by domestic agencies appear to be on the increase and the prosecutions undertaken in the last few years suggest that the SEC and DOJ are becoming serious about tackling overseas bribery. There were seven major investigations by the SEC and DOJ in 2002 and sixteen in 2004.\(^6^0\)

Importantly, both the enforcing agencies and courts appear to be taking an expansive approach to interpreting the reach of the FCPA in terms of its threshold requirement that a bribe be

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\(^5^4\) Shaw, supra note 29, at 789-90.

\(^5^5\) Rossbacher & Young, supra note 12, at 530.


incurred "in obtaining or retaining business." In United States v. Kay, the U.S. Court of Appeals for the Fifth Circuit concluded a payment to reduce a company’s customs duty and sales tax burden constituted an illegal bribe under the terms of the provision. Some legal professionals suggest the Act’s prohibition may now extend to “virtually any government action that may be favorable to a company.”

In the twenty-four months after the Kay ruling, the SEC brought more FCPA enforcement actions than in any previous two-year period since 1977. In some respects the SEC and DOJ’s enforcement programs appear to be more aggressive than ever before, as claimed by then SEC Enforcement Director, Stephen Cutler, in a speech in late 2004. However, at the same time there appears to be a shift from criminal prosecution to civil settlements. The Statoil case is particularly interesting as it is the first enforcement under the FCPA against a foreign company with no U.S. operations. Statoil is a Norwegian, publicly-traded (and

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62 The Court of Appeals ruled that bribes to lower taxes can reduce operating costs and provide “an unfair advantage over competitors and thereby be of assistance to the payer in obtaining or retaining business”. U.S. v. Kay, 359 F.3d. 738, 749 (5th Cir. 2004). See also HECTOR GONZALEZ & CLAUDIUS O. SOKENU, FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT AFTER U.S. v. KAY (Washington Legal Foundation 2006), available at http://www.mayerbrownrowe.com/litigation/publications/article.asp?id=3047&nid=258.

63 InVision Non-Prosecution Agreement with DOJ and Proposed Settlement with SEC Demonstrate Importance of Compliance with Foreign Corrupt Practices Act, CORP. & SEC. L. UPDATE at 3 (Fenwick & West LLP 2005).

64 GONZALEZ & SOKENU, supra note 62, at 2.

65 Id. at 15.

partially government-owned) company, but because its shares are traded on the New York Stock Exchange, it falls under the jurisdiction of the FCPA.

Observers have noted that the DOJ and SEC appear to be increasing both the scope and intensity of their investigations. These agencies are also obtaining increasingly high penalties. The penalty imposed on Titan, a combined civil and criminal penalty of $28.5 million, was the largest ever for a violation of the FCPA. Voluntary disclosure of corrupt acts will also evidently not exempt companies from penalties, as indicated by the Titan and GE InVision cases.

The 1988 amendment to the FCPA expanded its purview to include overseas based subsidiaries of U.S. companies. The Schering-Plough case, among others, indicates that the DOJ and SEC are committed to holding U.S. companies accountable for the actions of their subsidiaries. This is important because, in the early years of the FCPA, numerous U.S. companies sought to shield themselves from the Act by reorganizing distribution networks through such subsidiaries. The Statoil case suggests the SEC and DOJ are also expanding their efforts against foreign companies, even those with no actual U.S. operations.

The SEC also appears to be regularly seeking, in addition to large monetary penalties, the disgorgement of profits gained through corrupt practices. Additionally, the agency routinely insists on the violating company’s appointment of an independent consultant to monitor that company’s ongoing compliance with the FCPA for an SEC-selected minimum number of years.

It remains to be seen if the enforcement momentum will be maintained. In the past three years, there appears to have been a

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68 See, e.g., McCubbins, supra note 59 (noting the recent increase in enforcement of FCPA).
70 See id.
72 Kaikati & Label, supra note 28, at 40.
73 See In re Statoil, supra note 67, at 2-6.
74 GONZALEZ & SOKENU, supra note 62, at 27.
shift away from prosecution with the aim of punishment for violations to the use of deferred prosecution agreements. The agreements provide for the suspension of proceedings provided a corporation prima facie guilty of violating the FCPA complies with a number of commitments commonly including payment of a fine, reform of operations and compliance programs, and appointment of an independent consultant to monitor compliance. If, after an agreed period of time, the company has fulfilled its obligations, the charges are dismissed. Some commentators suggest this may simply allow corporations to sidestep being held accountable for corrupt practices; Rossbacher argues that "corporations with deep pockets and sophisticated defense counsel could buy their way out." On the other hand, it could be argued the arrangements achieve all the objectives of the FCPA legislation without the need for costly litigation.

B. Internationalizing Anti-Foreign Bribery Efforts

The internationalization of the anti-corruption effort has long been heralded by U.S. commentators as the key to bolstering anti-bribery efforts. If the FCPA has hurt U.S. business abroad, it has done so by placing a fetter on U.S. corporations competing with bribe-paying foreign competitors. The contribution of large business to the corruption of foreign governments has only gradually gained international recognition. The first multilateral convention targeting corruption was signed by members of the Organization of American States in 1996. The following year, the Organization for Economic Co-operation and Development adopted a similar convention (ratified by all members as of 2001) which commits member states to criminalize the bribery of foreign public officials. The fight against corruption became truly multilateral with the 2003 United Nations Convention Against Corruption. This Convention seeks to "promote, facilitate and

76 Rossbacher, supra note 60, at 206.
79 UN Convention Against Corruption, Dec. 9, 2003, UN Doc. A/58/422, 43 I.L.M.
support international cooperation and technical assistance in the prevention of and fight against corruption.”

III. Looking Forward: Problems Still Exist

Despite the evident advances in FCPA enforcement and the gradual internationalization of anti-bribery efforts, impediments to the Act’s effectiveness remain. The most obvious problem which plagues any anti-bribery legislation is that of defining exactly what constitutes a bribe and, furthermore, determining whether a payment falls under that definition.

Further confusion surrounds distinctions between bribes and mere “facilitating” or “grease” payments. The FCPA, as amended in 1988, specifically exempts these payments, defined as “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 a foreign official, political party, or party official.”

Examples of...
routine governmental action set out in the Act include: providing telecommunications services, unloading cargo, providing police protection, processing visas, and obtaining permits. 83

There remains some ambiguity as to what will constitute routine governmental action in different national settings, particularly where the distinction between public and private officials is not necessarily entirely obvious. 84 Corporations may seek to disguise bribes in the form of facilitating payments which are then passed onto the ministerial recipient. There is little case law and few judicial decisions clarifying the exact legal parameters of such practices. 85

A final problem of definition stems from cultural differences. Salbu argues that bribery is essentially a cultural construct, unlike murder, which is universally recognized as morally unacceptable. 86 Bribery, or what the FCPA defines as bribery, is not clearly wrong in all cultures. 87 What is viewed as an unethical bribe or conflict of interest in America may simply be an accepted part of etiquette in, for example, Japan. 88

While many cultures do have traditions of gift-giving, the type of corruption that international corporations are engaged in is typically on a grander scale. The adoption of FCPA-like legislation by signatories of the OECD and U.N. Conventions supports the view that preference-seeking bribery is widely, if not universally, condemned. Nonetheless, the fact that gift-giving, especially in business transactions, is a widespread practice contributes further uncertainty to the problem of identifying when


84 For much of Taiwan's history, for instance, the Kuomintang operated as both ruling political party and "as a huge corporate interest, controlling banks, manufacturing and service concerns." Moran, supra note 33, at 144.

85 Rossbacher & Young, supra note 12, at 525.

86 Salbu, supra note 4, at 276.


a payment is in fact a bribe.

Another problem lies with enforcement, both by the U.S. and by other countries. While the OECD and U.N. Conventions are promising, and even if all countries were to implement legislation roughly equivalent to the FCPA, it is unclear whether the enforcing agencies in each country would approach their task with equal zeal or commitment. Additionally, it is difficult to gauge the extent to which governments merely pay lip service to international agreements. Indeed, national governments seeking to further the interests of their countries’ businesses operating abroad may seek to help, or at least not hinder, their potentially corruption-assisted competitiveness.\(^8\) It is certainly questionable how serious some convention signatories take their commitments. Most recently, political expedience came before Britain’s obligations under the OECD Convention when their Attorney General halted an investigation into alleged bribery by BAE Systems.\(^9\) In addition, a number of other OECD countries, including Italy and France, continue to rank poorly on Transparency International’s Bribe Payers Index.\(^1\)

IV. Conclusions

The FCPA has raised the public profile of corruption and bribery. U.S. companies have not been able to simply ignore the Act and it has arguably been responsible for increasing political pressure to pursue multilateral conventions. Increased international awareness has also encouraged many developing countries to address the demand-side of bribery, with Argentina, Chile, Colombia, Costa Rica, Guatemala, Mexico, Romania, Uruguay, and Venezuela all taking steps in recent years to tackle corruption.\(^2\)

The secretive nature of bribery makes it difficult to know

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\(^8\) The U.S. government has in the past allegedly explicitly helped U.S. companies compete abroad. Moran cites claims that the NSA listened into telephone calls and lifted facsimiles between European consortium Airbus and the Saudi national airline by tapping into a commercial communication satellite. Moran, supra note 33, at 145.


\(^1\) TRANSPARENCY INT’L, BRIBE PAYERS 2006, supra note 51, at 4.

\(^2\) Randall, supra note 37, at 681, n. 113.
Curbing Corruption?

exactly what impact the Act has had on foreign bribery. There is a more easily identified basis for measuring the Act’s effect on U.S. overseas business and trade. While there may be a degree of validity to concerns that the legislation is having some chilling effect on business, the inconclusiveness of empirical studies suggests that more dramatic claims by some business leaders may be exaggerated.

Recent developments are promising. The internationalization of anti-bribery efforts, in the form of multilateral conventions, while only slowly beginning, should reduce the potential harmful effects of the FCPA on U.S. business and reduce the incentive for U.S. corporations to pay bribes. The more aggressive approach to enforcement by U.S. agencies increases the likelihood of being caught and, as a corollary, the potential costs of breaching the Act.

Has the FCPA actually made U.S. businesses more ethical? There is certainly a risk that aggressive enforcement of the FCPA simply forces companies to resort to more sophisticated methods of hiding payments, pushing bribery further underground. While the recent rise in high profile bribery cases suggests the practice remains widespread, it may be overly pessimistic to conclude there is “a general acceptance of lawlessness.”

The drafters of the FCPA were not so naïve to think that criminalization of foreign bribery would make it anathema for U.S. corporations. The Act merely introduced new costs into corporations’ cost-benefit analyses of their business practices. Both compliance and non-compliance with the Act carry with them costs. On the one hand, the cost of compliance includes that of following the internal auditing requirements and monitoring the behavior of employees and subsidiaries, as well as that of any business lost to bribe-paying competitors. On the other hand, the cost of non-compliance includes fines and criminal penalties if caught and damage to a firm’s reputation.

If foreign governments can be convinced to follow through with their commitments to stamp out the corrupt practices of their nationally based businesses, the risk of losing business to bribe-paying competitors should decrease. At the same time, as recent cases suggest, the risk of incurring costs for non-compliance are increasing. It remains to be seen, though, how serious both U.S.

93 Rossbacher, supra note 60, at 204.
enforcing agencies and foreign governments are about tackling corruption in the long-term. Meanwhile, corporations will continue to seek out new loopholes and cost minimization devices such as deferred prosecution agreements. And when the largest penalty ever imposed for foreign bribery is only $28.5 million, large corporations may still consider bribery a prudent business practice and fines a worthwhile risk.