



Winter 1-1-1997

Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act

Steven R. Salbu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [International Trade Law Commons](#)

Recommended Citation

Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 Wash. & Lee L. Rev. 229 (1997).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol54/iss1/6>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act

Steven R. Salbu*

Table of Contents

I. Introduction	230
A. Recent Efforts to Eliminate Bribery	233
B. The Intransigence of Corruption Despite U.S. and Global Efforts	236
C. The Policy Challenge for Congress	238
II. The U.S. Approach Under the Foreign Corrupt Practices Act	239
A. The Original Version of the FCPA	239
B. The 1988 Amendments to the FCPA	243
III. Arguments for Criminalizing the Payment of Bribes Abroad	249
A. Bribery Must Be Fought Aggressively to Avert Economic Waste	249
B. The United States Must Encourage Adoption of FCPA-Style Legislation Abroad to Eliminate Competitive Disadvantage to U.S. Firms in International Markets	254
C. Vagueness and Chilling Effect Charges Lodged Against the FCPA Are Spurious	257
1. Arguments That the FCPA Is Not Unduly Vague	257
2. Arguments That Any Unavoidable Vagueness Is Not the Source of Significant Chilling Effects	259

* Visiting Associate Professor, University of Michigan; Associate Professor, University of Texas. Ph.D., University of Pennsylvania; J.D., College of William and Mary. The author expresses gratitude to Caprice L. Roberts of the *Washington and Lee Law Review* for her excellent work in editing this Article.

IV. Arguments Against Criminalizing the Payment of Bribes Abroad	261
A. The FCPA Imposes a Competitive Disadvantage Upon U.S. Firms Operating Abroad	261
B. Market Mechanisms Can Provide a More Effective, Less Costly, Less Severely Punitive Means of Inhibiting International Corruption than the FCPA	271
C. Condemnation of Bribery Is a Cultural Construct, Therefore Efforts to Control Bribery in Other Nations May Constitute Moral Imperialism	275
V. Analysis and Recommendations	280
A. Should the United States Continue to Support the FCPA, Both As an Act of Congress and As a Model Statute to Be Marketed to Other Nations?	280
1. Classic, Preference-Seeking Bribery Is a Harmful Practice That We Should Seek to Curb	280
2. FCPA-Style Legislation Is Not the Best Way to Curb Bribery and Is Officious and Insensitive to Cultural Differences and Issues of National Sovereignty	282
B. What Alternative Should We Pursue to Reduce Global Bribery and Corruption?	286
VI. Conclusion	287

I. Introduction

Over the past twenty years, the United States has adopted and refined rigorous legislation to curb the payment of bribes by U.S. companies. Through the Foreign Corrupt Practices Act of 1977¹ as amended in 1988 (FCPA),² payment of bribes abroad by U.S. businesspersons has become a crime subject to incarceration, fines, or both.³ Under the FCPA's influence, corruption in world markets has become an important legal issue for U.S. companies doing business abroad.

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (1982)).

2. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. §§ 78dd-1 to -2 (1994)).

3. For a discussion of the penalty provisions of both the original 1977 legislation and the legislation as amended in 1988, see *infra* text accompanying notes 86 and 112-14.

The U.S. approach to bribery under the FCPA is severe by global standards. The United States is the only nation that has criminalized the extraterritorial payment of bribes by domestic companies.⁴ A district court decision suggests that the reach of the FCPA may go even further — that under appropriate conditions, foreign nationals subject to U.S. jurisdiction may be convicted under the provisions of the FCPA for paying bribes outside U.S. borders.⁵ The impressive scope and enforcement potential of the FCPA are enhanced by the recognition of private actions under appropriate conditions.⁶ Furthermore, if a pattern of violations exists, the FCPA's rigor can be intensified by the assessment of civil penalties, including treble damages, under the Racketeer Influenced and Corrupt Organizations Act (RICO).⁷

Historically, authorities have been lax in enforcing the FCPA.⁸ Although the government has instituted aggressive surveillance policies during the past few years,⁹ illegal payment of bribes remains among the

4. See Jennifer Daehler, Note, *Professional Versus Moral Responsibility in the Developing World*, 9 GEO. J. LEGAL ETHICS 229, 240 (1995).

5. See *Dooley v United Tech. Corp.*, 803 F Supp. 428, 438-40 (D.D.C. 1992).

6. For a discussion of private actions under the FCPA generally, see Lawrence W Newman & Michael Burrows, *Private Claims Under the Foreign Corrupt Practices Act*, N.Y.L.J., Feb. 20, 1992, at 3.

7. 18 U.S.C. §§ 1961-1968 (1994). For a discussion of the requirements of standing to pursue a civil RICO claim in regard to FCPA violations, see generally *Reddy v. Litton Indus.*, 912 F.2d 291 (9th Cir. 1990); *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987); and *Williams v. Hall*, 683 F Supp. 639 (E.D. Ky 1988). For a discussion of the boundaries of applying civil RICO to FCPA violations, see generally *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990); and *Clayco Petroleum v. Occidental Petroleum*, 712 F.2d 404 (9th Cir. 1983) (per curiam). For criticism of the evocation of civil RICO in FCPA cases, see generally Raymond J. Dowd, Note, *Civil RICO Misread: The Judicial Repeal of the 1988 Amendments to the Foreign Corrupt Practices Act*, 14 FORDHAM INT'L L.J. 946 (1990-91).

8. Although several dozen cases have been investigated under the FCPA, no chief executive has been convicted for a violation. *U.S. Firms Handicapped*, INTELLIGENCE NEWS L., Mar. 21, 1996, at 284, available in LEXIS, World Library, Allnews File. Furthermore, no new FCPA prosecutions have been filed during the past year. Arthur F Mathews et al., *The 1995 and Early 1996 SEC Enforcement Review: Part III*, INSIGHTS, Aug. 1996, at 15, 22.

9. See James K. Lehman, *Foreign Corrupt Practices Act*, S.C. LAW., Mar./Apr. 1996, at 38, 39 (observing that FCPA has recently attained prominence due to increased Department of Justice scrutiny of white-collar crime).

Experts expect even more vigorous enforcement in the future. See Gabriel Escobar, *IBM Is in Trouble in Argentina; Indictment Says Fraud Won Major Contract*, INT'L HERALD TRIB., Apr. 4, 1996, available in LEXIS, World Library, Allnews File (noting opinion of experts that number of FCPA enforcement cases will grow rapidly under conditions of increasing global competition).

most prominently publicized white-collar crimes,¹⁰ both domestically and internationally.¹¹ Corruption is a tenacious reality in many global markets, where foreign officials continue to solicit bribes routinely from U.S. companies and their representatives.¹² The proliferation of illegal payments has been exacerbated by recent increases in the size of typical kickbacks.¹³

The remainder of this Introduction provides background information concerning the current worldwide challenge of corruption. Subpart A outlines a wide range of recent global efforts to eliminate bribery. Subpart B provides examples of corruption or alleged corruption in the 1990s, demonstrating the pervasiveness and persistence of the problem. Subpart C outlines the challenges Congress faces as a result of the observations made in subparts A and B. Subpart C also outlines the body of the Article, which assesses and ultimately rejects the wisdom of the FCPA approach.

10. Ordinarily, we expect that criminalization will have a deterrent effect. However, when a single nation prohibits behaviors that are permitted worldwide, violation of the law may be rampant as a result of civil disobedience based on perceptions that the law is neither justifiable nor fair. This result may be especially pronounced when the behavior being curbed crosses international borders, thereby encouraging cross-national equity comparisons. Because the FCPA applies by definition to international contexts and reflects a contrarian philosophy that imposes disadvantage to those who comply, ongoing periodic violations are not surprising.

11. Although both the FCPA and much press coverage focus on bribery abroad, bribery has not been expunged within the United States. Domestic payment of kickbacks remains a particularly thorny problem. For example, a former purchasing director for Philip Morris recently admitted tax evasion in regard to a \$75,000 payment he received from a Philip Morris display materials supplier. Amy Neeno, *Ex-Philip Morris Purchasing Director Pleads Guilty to Tax Evasion*, WEST'S LEGAL NEWS 5538, June 12, 1996, available in 1996 WL 313605.

12. The most recent such allegations concern reports that Filipino officials requested and were refused bribes from Apple, IBM, and AT&T in exchange for a computer and telecommunication technologies contract. *Ramos Orders Probe into Government Computer Deal*, JAPAN ECON. NEWSWIRE, May 17, 1996, available in LEXIS, World Library, Allnws File.

13. See Kenneth A. Cutshaw, *Russian Roulette*, FED. LAW., Jan. 1996, at 30, 34 (citing American Chamber of Commerce report stating that "what used to be a reasonable and almost codified system of payments has now lost all sense of reality and proportion"); *Heads of State "For Sale" for \$5 Million, UN Says*, REUTERS LTD., Apr. 27, 1995, available in LEXIS, World Library, Allnws File (quoting background paper on official corruption given by Secretariat of United Nations conference on crime stating: "In many countries five percent would now be considered a laughably low rate of commission."); Cristina Rouvalis, *The Ecuadorean Connection: Even Though Business Conditions Are Better, a Distributor for a Pittsburgh Company Finds It's No "Piece of Cake" Keeping Things on the Up-and-Up in South America*, PITT. POST-GAZETTE, Jan. 8, 1995, at E1 (citing observation of one U.S. businessperson that bribes have increased in recent years from 3-4% to 10-15%).

A. Recent Efforts to Eliminate Bribery

Although it is the only country to criminalize the extraterritorial payment of bribes,¹⁴ the United States is working to encourage other nations to follow suit. In the spring of 1995, U.S. Trade Representative Charlene Barshefsky stated that the United States would move aggressively to promote adoption of FCPA-type laws in other major trading nations as part of an effort to increase transparency in frequently furtive government procurement processes.¹⁵

By early 1996, the Organization of Economic Cooperation and Development (OECD) addressed a tax policy that is widely believed to encourage or support international bribery — the deductibility of bribes paid to foreign officials as business expenses in a number of industrialized nations.¹⁶ The OECD's Committee on Fiscal Affairs adopted a resolution that member countries reject or abolish such deductions.¹⁷ Because the resolution represents a commitment only from the twenty-six member countries of the OECD, the organization is seeking ways to encourage nonmembers to institute similar reforms.¹⁸

Likewise, U.S. and Latin American officials are working on the development of a hemispheric agreement to curb the payment of bribes to foreign

14. See Daehler, *supra* note 4, at 240. Despite sluggish progress in persuading the world to adopt an FCPA-style stance on bribery, experts frequently observe that tolerance for bribery appears to be waning worldwide. See Barbara Ettore, *Why Overseas Bribery Won't Last*, MGMT. REV., June 1994, at 20, available in LEXIS News Library, Manrev File (recognizing that other nations are beginning to realize economic harms associated with corporate bribery).

15. *U.S. to Seek Foreign Acceptance of Anti-Corruption Laws, Practices*, 12 Int'l Trade Rep. (BNA) 714, 714 (Apr. 26, 1995).

16. See Robert S. Leiken, *An End to Corruption*, WASH. POST, Apr. 16, 1996, at A15 ("If a German bribes a German he gets thrown in jail; if he bribes a foreign official he gets a tax deduction."). According to Jean-Claude Paye, Secretary General of the OECD, tax deductibility of bribes "increas[es] transaction costs and distort[s] competitive conditions." Gary G. Yerkey, *OECD Nations Agree to Eliminate Tax Deductibility for Foreign Bribes*, 13 Int'l Trade Rep. (BNA) 628 (Apr. 17, 1996) (quoting Jean-Claude Paye).

17. *OECD Looking to Encourage Non-Member Countries to Adopt Anti-Bribery Laws*, DAILY TAX REP., Apr. 17, 1996, at D7. This OECD stance does not have the force of law, but does represent the first time the organization has called upon members to eliminate the deductions voluntarily. For a discussion of the resolution, see *Bribery and Corruption: Goodbye to All That?*, FIN. TIMES, Apr. 29, 1996 (Power Asia), available in LEXIS, World Library, Allnws File; and *Bribes Can Cost the U.S. an Edge*, BUS. WK., Apr. 15, 1996, at 30; *OECD Urges Bribes Action*, FIN. TIMES, Apr. 12, 1996 (Power Asia), at 5.

18. See *OECD Looking to Encourage Non-Member Countries to Adopt Anti-Bribery Laws*, BNA INT'L BUS. & FIN. DAILY, Apr. 17, 1996, available in LEXIS, BNA Library, Bnaibf File.

officials.¹⁹ In March of 1996, the Organization of American States (OAS), consisting of thirty-four Western Hemisphere members, drafted a multilateral agreement to prevent bribery and corruption in international business.²⁰ Under the agreement, known as the "Inter-American Convention Against Corruption" (Convention),²¹ signatories make a commitment to adopt laws that are the "rough equivalent" of the FCPA.²² The Convention also supports extradition, asset seizure, and evidence gathering; creates common ethical principles among signatories; and seeks regularity and transparency in financial disclosure and record-keeping practices.²³ The Convention was a central issue at an OAS meeting held in Panama City in June of 1996.²⁴ Later that month, the United States became the twenty-second member of the OAS to subscribe to the agreement.²⁵ While the ramifications of the OAS Convention remain uncertain, a State Department official observed that "for the first time in a regional setting, other countries have signed up in some measure" to the principles of the FCPA.²⁶ The degree to which signatories follow through on their commitments by adopting FCPA-style prohibitions of extraterritorial bribes remains to be seen.

Simultaneously, other organizations committed to free trade are looking for ways to combat bribery. In 1995, a United Nations committee drafted a code of conduct that would prohibit public officials from accepting gifts and favors.²⁷ In 1996, the U.S. delegation proposed a United Nations declaration calling for international transparency in accounting standards, accurate record-keeping practices, and international cooperation in the investigation of bribery.²⁸

19. See *U.S. Discusses Possible Agreement with Latin America to Deter Bribery*, 13 Int'l Trade Rep. (BNA) 276, 276-77 (Feb. 21, 1996).

20. See Gilles Trequesser, *Inter-American Convention Signed Against Corruption*, REUTERS EUR. BUS. REP., Mar. 29, 1996, available in LEXIS, World Library, Allwld File.

21. *Id.*

22. See *Remarks by Secretary of State Warren Christopher at the Council of the Americas Conference, State Dep't. Briefing*, FED. NEWS SERVICE, May 6, 1996, available in LEXIS, World Library, Allwld File.

23. *United States Signs OAS Convention on Preventing Bribery, Corruption*, BNA INT'L TRADE DAILY, June 17, 1996, available in LEXIS, BNA Library, Bnaitd File.

24. *State Department Regular Briefing*, FED. NEWS SERVICE, June 4, 1996, available in LEXIS, World Library, Allwld File [hereinafter *State Department Briefing*].

25. See *United States Signs OAS Convention on Preventing Bribery, Corruption*, 13 Int'l Trade Rep. (BNA) 1014, 1014 (June 19, 1996).

26. See *State Department Briefing*, *supra* note 24 (quoting State Department representative Davies).

27. Samia Nakhoul, *U.N. Wants Anti-Graft Code for Officials*, REUTERS WORLD SERVICE, May 1, 1995, available in LEXIS, World Library, Allwld File.

28. Thalif Deen, *U.S. Seeks U.N. Declaration Against Bribery*, INTER PRESS SERVICE,

The World Trade Organization (WTO) is likewise engaged in efforts to fight bribery in foreign procurement settings and has plans to begin negotiations regarding "transparency, openness, and due process in government procurement practices of all WTO Members."²⁹ U.S. Trade Representative Barshefsky intended to encourage similar efforts in Asia at the Asia-Pacific Economic Cooperation summit, convened in Manila in late 1996.³⁰

A group called Transparency International is the first major private organization created for the sole purpose of eliminating global corruption. Established in Berlin in 1993, it has branched into dozens of countries throughout the world,³¹ in locations such as England, the United States, Turkey, and Nepal.³² Transparency International works to effect reforms through a process of "quiet diplomacy,"³³ espousing increased visibility of government procurement procedures as a vital step in the eradication of bribery.³⁴ Much of the organization's work in its first few years of operation has focused on investigating and exposing international corruption.³⁵ Efforts have included lobbying for reform in both developed and developing countries,³⁶ encouraging companies to establish "islands of integrity" by participating in antibribery pacts,³⁷ and compiling a survey ranking fifty countries on the basis of a corruption index.³⁸

Some transnational treaties address the problem of bribery. As one observer notes, the North American Free Trade Agreement (NAFTA) "prescribes unbiased and transparent administrative procedures. [I]n the case

July 23, 1996, available in LEXIS, World Library, Allwld File.

29. *USTR Announces Two Decisions: Title VII and Special 301*, WEST'S LEGAL NEWS 3385, May 2, 1996, available in 1996 WL 359843.

30. *Just Say No to Bribery*, BUS. WK., July 29, 1996, at 43.

31. *Anti-Corruption Organization — Hungarian Section*, MTI ECONews, Mar. 1, 1996, available in LEXIS, World Library, Allwld File.

32. See Stevie Cameron, *Dreaming of a World Without Corruption*, MACLEAN'S, Apr. 8, 1996, at 36.

33. Raymond Bonner, *The Worldly Business of Bribes: Quiet Battle Is Joined*, N.Y. TIMES, July 8, 1996, at A3.

34. Advocates of transparency reason that it encourages the accurate flow of information, which is necessary to the efficient functioning of free markets. Andrew Hilton, *Without Transparency, Corruption Flourishes — But So Can Prosperity*, WORLD PAPER, Mar. 1996, at 1.

35. *Uganda: Nongovernmental Organization Launched to Investigate Corruption*, BBC SUMMARY WORLD BROADCASTS, Mar. 17, 1996, available in LEXIS, World Library, Allwld File.

36. Baie Netzer, *Stopping Bribes at Source*, INT'L HERALD TRIB., Nov. 11, 1995, at 17.

37. *Id.*

38. See Gary Borg, *Survey Rates Corrupt Nations*, CHI. TRIB., June 4, 1996, at 8. For a description of the Transparency International corruption index, see Barbara Crossette, *New Watchdog Group Ranks Nations in "Corruption Index"*, N.Y. TIMES, Aug. 13, 1995, § 1, at 6.

of government procurement of goods or services, these procedures are designed to ascertain that governmental contracts, grants, concessions or franchises are adjudicated not on the basis of family or friendly connections or bribery, but on a publicly advertised, lowest-bidder basis."³⁹

Most recently, the American Bar Association (ABA) Section of International Law and Practice issued recommendations to the House of Delegates supporting efforts in the international community to control corruption in the conduct of international business (ABA Recommendations).⁴⁰ The ABA Recommendations recognize the value of global cooperation in developing measures to deter corrupt practices.⁴¹ The ABA Recommendations observe that past efforts towards such cooperation have been "soft."⁴² Without outlining a specific approach, the ABA Recommendations emphasized the importance of a global commitment to "the development and enforcement of proper national and international laws."⁴³

B. The Intransigence of Corruption Despite U.S. and Global Efforts

Despite past and present efforts to expunge bribery, corruption in overseas markets remains a daunting problem.⁴⁴ The sampling of recent prosecutions discussed in this subpart, although illustrative, represents only a fraction of worldwide incidents in recent years, the majority of which are likely to go undetected and therefore unreported.

In 1989, advertising firm Young & Rubicam was indicted for violation of the antibribery provisions of the FCPA during contract negotiations with the Tourist Board of Jamaica.⁴⁵ The firm settled, entering a plea of guilty and agreeing to pay fines totaling \$500,000.⁴⁶

39. See Boris Kozolchik, *NAFTA in the Grand and Small Scheme of Things*, 13 ARIZ. J. INT'L & COMP. L. 135, 138 (1996).

40. See generally Jay M. Vogelsson, *Corrupt Practices in the Conduct of International Business: Section Recommendations and Reports*, American Bar Association Section of International Law and Practice Reports to the House of Delegates, 30 INT'L LAW. 193 (1996) (making recommendations about how to address corrupt practices).

41. *Id.* at 198.

42. *Id.*

43. *Id.*

44. See generally Stewart Toy et al., *From Corner Office to Corner Cell*, BUS. WK. INT'L ED., July 22, 1996, at 20.

45. See *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 337 (D. Conn. 1990). For a discussion of the indictment, see Joanne Lipman, *Indictment Charges Young & Rubicam, 2 Top Aides Bribed Jamaican Officials*, WALL ST. J., Oct. 9, 1989, at B5.

46. See Joanne Lipman, *Young & Rubicam Pleads Guilty to Settle Jamaica Case*, WALL ST. J., Feb. 12, 1990, at B4.

Several years later, charges were brought against Vitusa in connection with its sale of powdered milk to Horizontes Dominicanos, a company in the Dominican Republic.⁴⁷ The company pleaded guilty to allegations that it offered, through an agent, so-called "service fees," with the knowledge that some of the fees would go to foreign officials to gain their influence in obtaining and retaining business.⁴⁸ Settlement negotiations resulted in the imposition of a two-year probation period against the company's president and personal and corporate fines totaling \$20,000.⁴⁹

In early 1995, Lockheed Corporation admitted paying \$1,000,000 to a government official to facilitate the sale of aircraft in Egypt.⁵⁰ Fines assessed totaled over twenty million dollars, double the profits realized by Lockheed under the contract associated with the prohibited payments.⁵¹ Shortly thereafter, a federal grand jury investigated suspicions of improper payments by Lockheed in the sale of fighter jets and antisubmarine planes to Korea.⁵²

In 1996, companies such as IBM and Boeing were under investigation for possible violations related to alleged illegal payments in Argentina and the Bahamas, respectively.⁵³ Activity that is prohibited by the FCPA or that evokes examination of FCPA compliance is prominent in today's national and world media. The proliferation of publicity surrounding the behavior of reputable companies suggests that, despite the statutory reforms adopted in 1988,⁵⁴ FCPA compliance remains a thorny issue for American businesses. With the FCPA approaching its twentieth anniversary and with global antibribery efforts thriving, why are so many reputable businesses still getting into trouble?

47. *United States v. Vitusa Corp.*, 3 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 699.155, 699.155-.175 (1994).

48. *Id.* at 699.164.

49. *Id.* Although the settlement assessed fines of \$5000 in personal penalties and \$20,000 in corporate penalties, the personal penalties were designated as applicable towards the payment of the corporate penalties. *Id.*

50. Andy Pasztor, *Lockheed Pleads Guilty to Conspiring to Violate Anti-Bribery Regulations*, WALL ST. J., Jan. 30, 1995, at B6.

51. *\$24.8 Million Penalty Paid by Lockheed*, N.Y. TIMES, Jan. 28, 1995, at 35.

52. Andy Pasztor & Jeff Cole, *Lockheed Martin Faces 3 Federal Probes into Possible Payments for Foreign Sales*, WALL ST. J., Sept. 5, 1995, at A6.

53. See Gabriel Escobar, *Ex-Officials of IBM Argentina Are Indicted in Payoff Probe*, WASH. POST, Apr. 3, 1996, at A1, Jonathan Friedland, *Did IBM Unit Bribe Officials in Argentina to Land a Contract?*, WALL ST. J., Dec. 11, 1995, at A1, Sharon Walsh, *For IBM, Nightmare in Argentina*, INT'L HERALD TRIB., Mar. 8, 1996, at 11.

54. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. §§ 78dd-1 to -2 (1994)).

Among the plausible explanations are two diametrically opposed theories. One theory suggests that the FCPA places unreasonable burdens on U.S. businesses and is therefore destined to fail.⁵⁵ In cutthroat global markets, U.S. companies are pressured to match the moral standards of competing suppliers. Because the United States is the only country to criminalize extraterritorial bribery payments,⁵⁶ these moral standards are often low. Because the FCPA creates unrealistic expectations, frequent violations are inevitable. This line of reasoning suggests that violations may be more attributable to quixotic law than to evil companies.

An opposing theory contends that FCPA compliance would improve if global standards became universally stringent.⁵⁷ This theory concedes that companies presently violate the FCPA because its unilateral stringency creates a burdensome competitive disadvantage. The question that follows is whether Congress should level the playing field by seeking uniformly low ethical standards or uniformly high ethical standards. Proponents of the FCPA suggest that the United States should lobby for global adoption of FCPA-style legislation rather than abandon the statute's lofty moral ground.⁵⁸

C. The Policy Challenge for Congress

Each of the two positions discussed in the previous subpart is grounded in the same basic premise — that FCPA violations are encouraged by unfair competitive global markets created by unilaterally stringent American rules. Violations so attributable can be reduced either by revoking the law or by universalizing it. This Article examines in detail the many issues that Congress should consider in determining which method best addresses the challenge.

Part II describes the provisions of the FCPA, as originally passed in 1977 and as amended in 1988. The discussion addresses the original version's perceived shortcomings and the ways in which the 1988 Amendments sought to rectify them.

Part III contains a detailed catalogue and discussion of arguments put forth by proponents of the FCPA, who believe that criminalization of extraterritorial bribery is sound public policy that should be maintained in

55. For a more complete discussion of the ideas outlined briefly in this paragraph, see *infra* Part IV.A.

56. See Daehler, *supra* note 4, at 240.

57. For a more complete discussion of the ideas outlined briefly in this paragraph, see *infra* Part III.B.

58. See *infra* note 176 and accompanying text.

the United States and adopted by other countries. These arguments include assertions of the importance of averting economic waste by eradicating corruption; the need to establish a globally consistent high moral ground so that companies in nations that criminalize bribery do not suffer a competitive disadvantage; and the relatively low burden to companies under improvements attempted via the 1988 Amendments.

Part IV compiles and discusses the arguments made by opponents of the FCPA, who believe that extraterritorial bribery should not be criminalized. Included are contentions that such legislation imposes a competitive disadvantage on countries that choose to adopt it; that market mechanisms can provide more effective, less costly, less severely punitive means of inhibiting international corruption than the FCPA, and that efforts to control bribery in other nations constitute moral imperialism.

Part V contains recommendations regarding the advisability of maintaining the FCPA in the United States and promoting the adoption of similar legislation in other countries. Weighing the arguments in Parts III and IV, Part V concludes that although many forms of bribery are harmful, FCPA-style legislation is not the best means of eliminating corruption. Part V then provides alternative solutions. It is followed by a brief Conclusion, summarizing the Article's main points.

II. The U.S. Approach Under the Foreign Corrupt Practices Act

A. The Original Version of the FCPA

The FCPA was passed by Congress in 1977,⁵⁹ in reaction to a flurry of scandals during the 1970s⁶⁰ and an SEC report of questionable payments made to foreign officials by hundreds of U.S. companies.⁶¹ In addition to provisions that created accounting standards for issuers of securities,⁶² the FCPA established what have become known as antibribery provisions. The antibribery provisions prohibited the corrupt offering, paying, promising to

59. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (1982)).

60. See GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE* 17-31 (1982) (describing origins of FCPA).

61. SEC. & EXCH. COMM'N, 94TH CONG., *QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES* (Comm. Print 1976). Through a survey in which respondents were promised immunity from prosecution in exchange for their provision of information, over four hundred companies, including 117 Fortune 500 companies, admitted to the practice of paying bribes. H.R. REP. No. 95-640, at 4 (1977).

62. 15 U.S.C. § 78l(m) (1982). One purpose of these provisions was to discourage payment of bribes by requiring companies to keep accurate records in which all forms of payments would be disclosed.

pay, or authorizing of payments or gifts of value⁶³ by issuers of U.S. securities,⁶⁴ domestic concerns,⁶⁵ and their officers, directors, employees, and agents,⁶⁶ to foreign officials, foreign political parties, officials thereof, candidates for foreign political office, and intermediaries, in order to obtain, retain, or direct business.⁶⁷

Congress intended the FCPA to be expansive, prohibiting not only the successful payment of bribes, but also attempts not fully consummated or effective in achieving their desired ends.⁶⁸ The FCPA prohibited indirect payments — payments through intermediaries or third parties — under language forbidding offers, payments, and related acts to "any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office,"⁶⁹ for proscribed purposes.⁷⁰

63. *Id.* §§ 78dd-1(a), -2(a).

64. Although "issuers" were not defined by the statute, they were noted to include those who register a class of securities pursuant to Section 12 or those who are required to file reports under Section 15(d) of the Securities Exchange Act of 1934. *Id.* § 78dd-1(a).

65. *Id.* § 78dd-2. The statute defines a domestic concern as:

- (A) any individual who is a citizen, national, or resident of the United States; or
- (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id. § 78dd-2(d)(1).

66. *Id.* §§ 78dd-1(a), -2(a).

67. *Id.* Both the original and revised versions of the FCPA prohibit only payments ultimately directed to government officials and not payments ultimately directed to private parties. The distinction between public officials and private parties may be obscured in transitional economies that are in the process of privatization. Jeffrey P. Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Russia and Other Transitional Economies*, in *INTERNATIONAL COMMERCIAL AGREEMENTS 1995*, at 747-48 (Michael Gruson ed., 1995).

68. S. REP. NO. 95-114, at 10 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108; H.R. REP. NO. 95-640, at 7-8 (1977).

69. 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3) (1982).

70. The proscribed purposes are:

- [I]nfluencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions [or] inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer [or domestic

The phrase "any person" extended the FCPA's coverage to include payments not directly given to prohibited classes of recipients, but indirectly passed to such recipients through the use of an agent.

The FCPA's third-party payment prohibition covered two types of agent utilization: making payments through one's own agents⁷¹ and directing payments to the agents of prohibited recipients.⁷² The "reason to know" scienter standard applied not only to the corrupt purpose behind the payment, but also to the identity of the end receiver.⁷³ Critics characterized the "reason to know" standard as vague⁷⁴ and harsh,⁷⁵ imposing criminal liability on businesspersons unaware that foreign agents sometimes divert portions of their fees to the payment of bribes.⁷⁶ Proponents of the third-party payment provision, with its powerful "reason to know" standard, insisted that in its absence, payers could and would maintain an intentional ignorance of the passing of funds from agents to foreign officials for corrupt purposes.⁷⁷

The 1977 antibribery provisions in the FCPA contained a business purpose clause, forbidding payments and gifts made or offered for the purpose of assisting the issuer or domestic concern to obtain, retain, or direct

concern] in obtaining or retaining business for or with, or directing business to, any person.

Id. §§ 78dd-1(a)(3)(A) to -1(a)(3)(B), -2(a)(3)(A) to -2(a)(3)(B).

71. *Id.* §§ 78dd-1(a), -2(a).

72. *Id.* §§ 78dd-1(a)(3), -2(a)(3).

73. *Id.*

74. See Richard A. Hibey, *The Practical Necessity for Amendment of the Foreign Corrupt Practices Act: S.708 — the Current Legislative Initiative*, 10 HOFSTRA L. REV. 1121, 1131 (1982); John M. Fedders, *The "Reason to Know" Standard — A Troublesome Ambiguity in the Foreign Corrupt Practices Act*, MIDDLE E. EXECUTIVE REP., July 1981, at 2, available in LEXIS, World Library, Allnws File.

75. The peculiar harshness of the original FCPA has been grounded in the notion that its "reason to know" standard is stricter than the scienter standard applied by domestic U.S. bribery law. Ruth Aurora Witherspoon, *Multinational Corporations — Governmental Regulation of Business Ethics Under the Foreign Corrupt Practices Act of 1977: An Analysis*, 87 DICK. L. REV. 531, 562 (1983).

76. For example, British managers who pay local agents fees to represent them in negotiating business transactions abroad may be unaware that portions of the fees are used to purchase gifts for influential individuals. See Tim Hardy, *Suitable Codes of Conduct for English Businesses Abroad*, LAWYER, June 13, 1995, at 6.

77. See Julia Christina Bliss & Gregory J. Spak, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?*, 20 LAW & POL'Y INT'L BUS. 441, 459-60 (1989) (citing 134 CONG. REC. 8528 (daily ed. June 24, 1988) (containing arguments of Senator Proxmire in favor of maintaining third-party payment provisions of 1977 Act in 1988 Amendments)).

business.⁷⁸ The business purpose clause could reasonably be interpreted to restrict the statute's prohibitions exclusively to those payments made to procure or maintain business, for oneself or another. Under this construction, payments rendered to create favorable business relationships with foreign officials could arguably be exempt from the FCPA's coverage.⁷⁹

The FCPA, as originally passed in 1977, created an exception permitting payments to those foreign officials whose duties were essentially "ministerial" or "clerical."⁸⁰ This special accommodation reflected a philosophy that such payments comprise a kind of fee that becomes a part of the pay received by lower-level workers whose official salaries may be inadequate.⁸¹ Moreover, because ministerial and clerical duties presumably entail little or no application of discretion in the conferral of scarce favors, the rendering of payments in exchange for the execution of such duties was considered relatively innocuous.⁸²

The 1977 version of the FCPA evoked federal jurisdiction through a requirement that a purported violation use a means or instrumentality of interstate commerce or the mails.⁸³ Like other statutes that establish federal jurisdiction in this manner, the FCPA's interstate commerce requirement has been easily met and has rarely inhibited applicability.⁸⁴ Civil enforcement of the FCPA's antibribery provisions against reporting companies was and still is handled by the Securities and Exchange Commission (SEC), whereas civil enforcement against domestic concerns, as well as all criminal prosecutions against any parties, are relegated to the Department of Justice (DOJ).⁸⁵ Although violators of the 1977 version of the FCPA were subject to fines of up to \$1,000,000 for corporations, \$10,000 for persons, and imprisonment for up to five years,⁸⁶ prosecutions were rare.⁸⁷

78. 15 U.S.C. §§ 78dd-1(a)(1) to -1(a)(3), -2(a)(1) to -2(a)(3) (1982).

79. See Bliss & Spak, *supra* note 77, at 456.

80. 15 U.S.C. § 78dd-2(d)(2) (1982).

81. For a discussion of the characterization of some bribes as tips, consultancy fees, commissions, etc., see *On the Take*, ECONOMIST, Nov. 19, 1988, at 21-24.

82. Veronica A. Deberardine, Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203, 224-25 (1984).

83. 15 U.S.C. § 78dd-2(a) (1982).

84. Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 439-40 (1987).

85. Statement of Commission Policy Concerning Section 30A of the Securities Exchange Act of 1934, 45 Fed. Reg. 59,001, 59,003 (1980); *Illegal Payments Provisions of Foreign Corrupt Practices Act Discussed at Law Journal Seminar*, 452 Sec. Reg. & L. Rep. (BNA) A-3 (May 10, 1978).

86. 15 U.S.C. §§ 78dd-2(b)(1) to -2(b)(3) (1982).

87. During the period following enactment of the FCPA through the 1988 Amendments,

B. The 1988 Amendments to the FCPA

During the 1980s, critics began calling for modification of the FCPA.⁸⁸ In 1988, the FCPA was revised under the aegis of the Omnibus Trade and Competitiveness Act (OTCA).⁸⁹ According to Senator Heinz, one of the principal sponsors of the 1988 Amendments to the FCPA, the changes embodied an effort to eliminate some exportation obstacles facing U.S. firms in the era of a burdensome trade deficit.⁹⁰ Of particular concern were charges that the FCPA as originally enacted was so vague as to be indecipherable.⁹¹ Critics contended that U.S. businesses shunned legitimate transactions, the legality of which was difficult to assess under the statute's ambiguous language.⁹²

Like their predecessor, the 1988 Amendments cover issuers of securities, domestic concerns, and the officers, directors, employees, agents, or stockholders of either issuers or domestic concerns.⁹³ It is unlawful for these individuals and entities "to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of

only twenty-three cases were prosecuted by both the DOJ and the SEC. Sherry R. Sontag, *Bribery a Close Call: Is New Legislation Really Needed?*, NAT'L L.J., May 9, 1988, at 1, 16.

For DOJ prosecutions, most of which resulted in guilty pleas, see generally *United States v. McLean*, 738 F.2d 655 (5th Cir. 1984); Complaint for Permanent Injunction, *United States v. Carver*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 645 (Dec. 31, 1982); Information, *United States v. Kenny Int'l Corp.*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 649 (Dec. 31, 1982); Information, *United States v. International Harvester Co.*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 696.27 (Jan 31, 1984); and Information, *United States v. Ruston Gas Turbines, Inc.*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 696.38 (Jan. 31, 1984).

For SEC actions, see generally Complaint for Permanent Injunction and Certain Ancillary Relief, *SEC v. Sam P Wallace Co.*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 683 (Dec. 31, 1982); Complaint for Permanent Injunction and Other Equitable Relief, *SEC v. Tesoro Petroleum Corp.*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 637 (Dec. 31, 1982); and Complaint, *SEC v. Katy Indus., Inc.*, 2 Foreign Corrupt Prac. Act Rep. (Bus. L., Inc.) 616 (Dec. 31, 1982).

88. Irwin Arieff, *U.S. Business Groups Back Move to Ease Overseas Bribery Law*, REUTERS N. EUR. SERVICE, Apr. 20, 1986, available in LEXIS, World Library, Allnws File.

89. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1107-1574 (codified as amended at 15 U.S.C. §§ 78dd-1 to -2 (1994)).

90. 134 CONG. REC. S2589-90 (daily ed. Mar. 18, 1988) (statement of Senator John Heinz).

91. See Barbara Bradley, *Trade Bill Could Dilute Anti-Bribe Law*, CHRISTIAN SCI. MONITOR, Mar. 23, 1988, at 3.

92. See *id.*

93. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

value," to proscribed classes of recipients for prohibited purposes.⁹⁴ Classes of recipients covered by the 1988 Amendments continue to include foreign officials, foreign political parties, officials of foreign political parties, candidates for foreign political office, and their intermediaries.⁹⁵ Prohibited purposes can be classified under the general headings of "influence" and "inducement." Payments cannot be made to influence decisions, induce the use of influence, or induce violation of lawful duties.⁹⁶

The 1988 Amendments altered the scienter requirement of the 1977 version of the FCPA, which prohibited payments that the payer knew or had reason to know were for the purpose of influencing officials or inducing officials to use their influence for some business gain — obtaining business, receiving business, or having business directed to another person.⁹⁷ The 1988 Amendments require actual knowledge that some or all moneys paid will go to designated recipients for proscribed purposes.⁹⁸ This new scienter standard includes a "firm belief" that the unlawful activity is "substantially certain to occur."⁹⁹ The statute further clarifies: "When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."¹⁰⁰

The purpose of the actual knowledge standard is to maintain the essence of the 1977 version of the FCPA's proscription of third-party payments, without holding payers liable when they are unaware that the ultimate purpose of the payment is illegal influence of a foreign official. Under the "firm belief" and "awareness" components of the knowledge standard, managers who maintain a willful ignorance can still be held accountable for having information they seek to avoid.¹⁰¹ How much real progress the 1988 Amendments have made in improving the scienter requirement of the original FCPA is discussed in some detail in Parts IV and V

94. *Id.*

95. *Id.* §§ 78dd-1(a)(1) to -1(a)(3), -2(a)(1) to -2(a)(3).

96. *Id.* §§ 78dd-1, -2.

97. The gain can be in the form of the officer's directing business to the payer of the bribe, as well as the receipt of preferential treatment not associated with any particular transaction. H.R. CONF. REP. NO. 100-576, at 918 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1951.

98. 15 U.S.C. § 78dd-1(a)(3) (1994).

99. *Id.* §§ 78dd-1(f)(2)(A)(ii), -2(h)(3)(A)(ii).

100. *Id.* § 78dd-2(h)(3)(B).

101. Michael D. Nilsson, *Foreign Corrupt Practices Act*, 33 AM. CRIM. L. REV 803, 809, 813 n.53 (1996).

As in the original FCPA, the intent required under the 1988 Amendments is encompassed in the term "corruptly." Specifically, the amended FCPA prohibits "use of the mails or any means or instrumentality of interstate commerce corruptly" in furtherance of prohibited acts.¹⁰² Unfortunately, the amended FCPA offers no definition of "corruptly."¹⁰³ Legislative history and reports from both 1977 and 1988 suggest that the concept of corruption was used in the statute to signify a bad intent. The legislative history of the 1977 version indicates that the word "corruptly" "connotes an evil motive or purpose, an intent to wrongfully influence the recipient."¹⁰⁴ A 1988 House report reaffirms that the "corruptly made" requirement refers to intent to influence the actions of foreign officials.¹⁰⁵ A 1977 Senate report likewise notes that "corruptly" signifies payments "intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation."¹⁰⁶ Functioning to explicate an intent requirement that is largely embodied in the statute's scienter provision, the "corruptly made" requirement appears to create few, if any, hurdles in the prosecution of alleged FCPA violators.¹⁰⁷

The 1988 Amendments did not expressly clarify ambiguities regarding the business purpose test of the 1977 version of the FCPA — i.e., whether solicitation to procure, retain, or direct business is necessary to trigger liability, or whether liability also extends to payments made to create favorable business relationships with foreign officials or bodies.¹⁰⁸ Congress rejected a House version of the OTCA that would have expressly prohibited payments not only for the purpose of directly receiving business, but also for the more indirect purposes of procuring "legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government."¹⁰⁹ The legislative history indicates, however, that the bribery prohibition language of the 1988 Amendments covers payments "related to the execution or per-

102. 15 U.S.C. §§ 78dd-1(a), -2(a).

103. *See id.* §§ 78dd-1(f), -2(h) (definition section appurtenant to antibribery portions of FCPA).

104. S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108.

105. H.R. CONF. REP. NO. 100-576, at 328 (1988).

106. S. REP. NO. 95-114, at 10 (1977).

107. *See United States v Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991) (rejecting defendant's arguments that gifts of airline tickets to official's relatives were not corruptly tendered).

108. For a discussion of the business purpose test, see *supra* text accompanying notes 78-79.

109. H.R. 3, 100th Cong. § 701(a) (1988).

formance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment."¹¹⁰

Violation of the 1988 Amendments includes not only actual payment of bribes, but also acts "in furtherance" of bribery.¹¹¹ Although the maximum imprisonment for violation remains at five years under the 1988 Amendments, the maximum fines were raised to \$2,000,000 for domestic concerns and \$100,000 for individuals.¹¹² In addition, both domestic concerns and individuals can be assessed maximum civil penalties of \$10,000.¹¹³ The FCPA maintains the separateness of its entity and individual punishments by prohibiting domestic concerns from paying, either directly or indirectly, fines that have been assessed against individuals.¹¹⁴ The 1988 Amendments also contain a section that authorizes the Attorney General to bring civil actions seeking injunctive relief when domestic concerns or their officers, directors, employees, agents or stockholders are making or are about to make payments prohibited under the FCPA.¹¹⁵

Because of difficulties under the 1977 version of the FCPA in identifying officials who could be given lawful payments because their duties were essentially "ministerial" or "clerical,"¹¹⁶ the 1988 Amendments reformulated the exclusion for grease payments. Instead of focusing on the duties of the recipient of the payment in the manner of the original FCPA, the 1988 Amendments exempted payments for "routine government actions" by foreign officials.¹¹⁷ The 1988 Amendments illustrated routine government actions by providing specific examples, including the obtaining of permits, licenses, and official documents necessary to do business; the processing of papers, police protection, mail delivery, and inspections; the provision of basic utilities and like services; and other similar actions.¹¹⁸

The 1988 Amendments created two new affirmative defenses to liability for the payment of bribes — reasonable, bona fide expenditures and legality in the host country. The reasonable, bona fide expenditure defense applies to payment for such services as travel and lodging in relation to such legiti-

110. Bliss & Spak, *supra* note 77, at 456-57 (quoting H.R. CONF. REP. NO. 100-576, at 918 (1988) (accompanying H.R. 3)).

111. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

112. *Id.* §§ 78dd-1(b), -2(g).

113. *Id.* §§ 78dd-2(g)(1)(B), -2(g)(2)(C).

114. *Id.* § 78dd-2(g)(3).

115. *Id.* § 78dd-2(d).

116. *See supra* note 80 and accompanying text.

117. 15 U.S.C. § 78dd-2(h)(4)(A) (1994).

118. *Id.*

mate contractual processes as promoting, demonstrating, and explaining products or services.¹¹⁹ The legality defense exonerates the payer of a bribe to a foreign official if the written laws of the country in which it is paid permit the bribe.¹²⁰ The legality defense applies only when a payment is made expressly permissible by a written law.¹²¹ In other words, a country's decision not to proscribe payments prohibited under the FCPA is insufficient to trigger the legality defense.¹²² This requirement of written authorization renders the legality defense virtually unusable.¹²³

Although neither the original FCPA nor the 1988 Amendments specifically addressed the issue, the Fifth Circuit Court of Appeals held in 1991 that the FCPA does not authorize prosecutions of foreign officials who receive bribes either for direct violation of the FCPA or for engaging in conspiracy to violate the FCPA.¹²⁴ This finding logically follows from the wording of the FCPA that prohibits offers, payments, promises to pay, and authorization of payment, but not receipt of bribes.¹²⁵ Moreover, even if the intent of the FCPA were to criminalize the taking of bribes by foreign officials, grounds for exercising jurisdiction in such cases would frequently be lacking.

In *Kirkpatrick v Environmental Tectonics Corp.*, the Third Circuit Court of Appeals upheld a private civil RICO action predicated on FCPA violations.¹²⁶ Under *Kirkpatrick*, damages can be awarded to a firm that competes unsuccessfully against the payer of a bribe.¹²⁷ The Sixth Circuit Court of Appeals has restricted the use of private FCPA antibribery actions in cases when the plaintiff's purported injuries were not in the form of direct

119. *Id.* § 78dd-2(c)(2).

120. *Id.* § 78dd-2(c)(1).

121. *Id.*

122. H.R. CONF. REP. NO. 100-576, at 556 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1589; see Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 126 nn.27-28 (1996); Nilsson, *supra* note 101, at 813 n.63.

123. Written laws typically identify unlawful rather than lawful acts. The infinite variety of human activities are presumed lawful unless otherwise so stipulated. It is therefore unlikely that the acceptability of certain payments in particular nations will be denoted by the express codification required to trigger the legality defense. For further discussion, see Gregory K. Smith et al., *Foreign Corrupt Practices Act*, 28 AM. CRIM. L. REV. 541, 557 (1991).

124. *United States v Castle*, 925 F.2d 831, 831 (5th Cir. 1991) (per curiam).

125. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

126. *Kirkpatrick v Environmental Tectonics Corp.*, 847 F.2d 1052, 1067 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990).

127. *Id.*

loss of a contract or business opportunity to the payer of a bribe. In *Lamb v Philip Morris, Inc.*, the plaintiffs were tobacco growers in Kentucky who sued Philip Morris for alleged payments of bribes overseas that purportedly facilitated the purchase of Venezuelan tobacco, thereby reducing the defendant's purchase of domestic tobacco, including tobacco grown by the plaintiffs.¹²⁸ The court ruled that the FCPA does not create actionable private rights in this context.¹²⁹

The 1988 Amendments establish an executive charge to foster global adherence to the principles and policies of the FCPA. They request the President to seek the cooperation of OECD members in adopting FCPA standards and to report to Congress on progress in this effort.¹³⁰ The 1988 Amendments likewise require the U.S. Attorney General to determine the extent to which compliance would be enhanced and the business community assisted by "further clarification" of the FCPA's provisions.¹³¹ Specifically, the mandate requires the Attorney General to consult high-level agencies and officials¹³² and solicit more general public opinion via notice and comment procedures to assess the value of guidelines (i) describing specific kinds of conduct covered by the statute, and (ii) providing "general precautionary procedures" that might be used to conform with the DOJ's FCPA enforcement policies.¹³³ In compliance, the Attorney General solicited public comments in 1989¹³⁴ and determined the following year that the publication of FCPA guidelines was unnecessary.¹³⁵ As of early 1996, the Attorney General's office has not reversed this decision.¹³⁶

128. *Lamb v Philip Morris, Inc.*, 915 F.2d 1024, 1025 (6th Cir. 1990).

129. *Id.* at 1028.

130. The OTCA contained an International Agreement Negotiations Report that described "the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section." Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424-25.

131. 15 U.S.C. § 78dd-1(d) (1994).

132. The agencies and officials enumerated included the SEC, the Secretary of Commerce, the U.S. Trade Representative, the Secretary of State, and the Secretary of Treasury Omnibus Trade and Competitiveness Act § 5003(a), 102 Stat. at 1417

133. *Id.*

134. Anti-Bribery Provisions of the Foreign Corrupt Practices Act, 54 Fed. Reg. 40,918, 40,918 (1989).

135. Anti-Bribery Provisions, 55 Fed. Reg. 28,694, 28,694 (1990).

136. 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*,

III. Arguments for Criminalizing the Payment of Bribes Abroad

Those who favor the FCPA's prohibition of extraterritorial bribery payments, as well as the promotion of such legislation in other countries, rely on three basic arguments. The first two arguments address the dysfunctional and unethical nature of bribery, and the third argument explains why the FCPA is a reasonable mechanism for fighting bribery. Discussed in detail in separate subparts, these arguments include assertions that (a) bribery must be fought aggressively to avert economic waste, (b) the United States must encourage adoption of FCPA-style legislation abroad to eliminate competitive disadvantage to U.S. firms in international markets, and (c) vagueness and chilling effect charges lodged against the FCPA are spurious.

A. Bribery Must Be Fought Aggressively to Avert Economic Waste

The payment of bribes is wasteful and inefficient¹³⁷ and has been found to be associated with low economic growth as measured by gross domestic product.¹³⁸ Bribery pollutes the purity of transactions in a free marketplace, in which buyers and sellers ideally compete for business on the basis of value optimization. Without bribes, buyers purchase from the best bidder in terms of relevant issues of transactional value such as price, service, and quality.¹³⁹ Bribery subverts the underlying transaction by diverting decisionmaker attention to extraneous considerations.¹⁴⁰ When a seller wins a contract by paying a bribe, the buyer is replacing consideration of price, service, and quality with an interest in transactionally irrelevant side payments. This phenomenon harms rejected potential sellers who might have won a contract in the absence of bribery, as well as a public that relies on government officials to optimize value in purchasing decisions. Moreover,

14 DICK. J. INT'L L. 207, 210 (1996).

137 See Robert F. Dodds, Jr., *Offsets in Chinese Government Procurement: The Partially Open Door*, 26 LAW & POL'Y INT'L BUS. 1119, 1121 (1995) (observing that waste is ameliorated by competition through open, transparent procurement system characterized by accountability).

138. *Bribonomics*, ECONOMIST, Mar. 19, 1994, at 86.

139. Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983).

140. One commentator has described bribery as exacerbating the uneven playing fields associated with trade barriers by moving the goalposts. Gregory L. Miles, *Crime, Corruption and Multinational Business*, INT'L BUS., July 1995, at 34, 36. Under these conditions, technological advantage and quality are marginalized by awarding business to the payer of the biggest bribe. *Id.*

it harms the economy by engendering a decline in our confidence in global markets.¹⁴¹

Because a decisionmaker who receives a bribe is not typically the ultimate beneficiary of the product or service being purchased, bribery is an agency issue.¹⁴² When a government's best interests are supplanted by an agent's or an official's desires to maximize her own payoffs, quality of purchasing decisions is likely to be impaired.¹⁴³ Both officers of private firms and officials of governments who cannot be perfectly monitored may sacrifice the best interests of their shareholders and constituencies, respectively, in the interest of their own profit.¹⁴⁴

Even forms of bribery often considered relatively harmless can impair the quality of decisions. For example, bribes requested by public officials for the performance of routine functions may be considered innocuous¹⁴⁵ under the theory that payments supplement insufficient salaries in nations that operate under severe financial constraints.¹⁴⁶ Yet compulsory tipping for public services suggests that basic entitlements, such as police protection, are being denied to a disenfranchised poor.¹⁴⁷ In this sense, bribes that elicit special consideration or service at a windfall price may be indistinguishable from those that elicit basic services at a low price that goes

141. See U.S. Trade Representative Mickey Kantor, Remarks on Bribery and Corruption in International Trade, Address Before ECAT (Mar. 6, 1996) (observing that Americans are harmed by loss of confidence in global trading system that is occasioned by bribery in many parts of world) (transcript on file with *Washington and Lee Law Review*).

142. Agency issues concern costs incurred when agents act out of self-interest rather than exclusively in the interest of their principals. Agency theory addresses the costs to principals of monitoring agents to ensure against opportunistic, self-serving behaviors. See Robert J. Klein, Note, *The Case for Heightened Scrutiny in Defense of the Shareholders' Franchise Right*, 44 STAN. L. REV. 129, 132 (1991). Although agency theory ordinarily focuses on agency costs related to corporate governance, analogous costs exist in regard to national governance and the need to use officials as government agents.

For a detailed discussion of agency theory and agency costs, see generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

143. See Karen Pennar et al., *The Destructive Costs of Greasing Palms*, BUS. WK., Dec. 6, 1993, at 133, 138 (describing construction in Italy of highway overpasses that serve no apparent function).

144. See David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 798 (1992) ("The greater the capacity to monitor, the less the risk of opportunistic behavior.").

145. This is certainly the case under the 1988 Amendments, which permit payments for "routine government actions." See *supra* note 117 and accompanying text.

146. *On the Take*, ECONOMIST, Nov. 19, 1988, at 21, 24.

147. *Id.*

toward the reasonable compensation of public officials. In either instance, agency costs distort how officials decide to allocate the resources or public goods they are charged to distribute.

The agency costs of bribery are harmful not only because they subvert market transactions. In addition, because many bribes are paid secretly, their cost is not reflected in the financial statements of bribe-paying companies.¹⁴⁸ As bribes sometimes reflect as much as thirty percent of the cost of a contract,¹⁴⁹ the magnitude of discrepancy between book entries and actual payments can be substantial. The omission of bribes from financial statements interferes with a number of fundamental rights of investors, including the right to know whether corporate books have been doctored, whether the corporation has violated laws and paid bribes, and whether corporate officers have disbursed money without recording the use of funds.¹⁵⁰ Ironically, the ill effects of omissions of payments from company financial statements could be rectified in two very different ways — either by eradicating bribery so that there are no illegal payments to hide or by legalizing bribery and requiring companies to report the payments they make.¹⁵¹ Accordingly, accounting inaccuracies cited in defense of the FCPA can be furnished as readily as reasons to abandon the FCPA.

Less easily dismissed are claims that bribery deprives governments of tax revenues, as corrupt officials permit underreporting of taxes in exchange for corrupt payments.¹⁵² The result of such practices is odious on two distinct levels. First, the immediate effect of illicitly purchased tax leniency is to deplete national treasuries charged with the provision of public services. Second, the relative burdens to individual taxpayers are unfairly apportioned when payers of bribes are furtively exonerated from their statutory responsibilities.¹⁵³

148. Longobardi, *supra* note 84, at 434-35.

149. See Paul Coombes, *Australia: Greasing Palms Still Used to Ensure Contracts Handed Out*, AUSTL. FIN. REV., June 14, 1995, available in LEXIS, World Library, Allnws File.

150. Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 235-36 (1982).

151. Indeed, if bribery is an unavoidable fact of global business that cannot realistically be expunged, accounting accuracy is arguably fostered by practices in some countries that permit the payment of bribes to be deducted from taxes as a business expense.

152. Pennar et al., *supra* note 143, at 133.

153. This problem is a distinctly local one. Nations concerned about both protecting their tax bases and preserving justice in the allocation of tax burdens can and should pass and enforce laws prohibiting the bribery of or the taking of bribes by tax officials.

While these problems affect businesses and governments of all nations, they can be especially damaging in developing countries.¹⁵⁴ Warped political processes that drain resources have a pronounced effect in places where scarcity magnifies the harm of dissipating or misdirecting funds.¹⁵⁵ Bribery payments that convince public officials to invest in marginal rather than necessary projects or to award contracts on the basis of kickbacks rather than the overall quality of a bid's value waste assets in developing countries that can ill afford to have them squandered.¹⁵⁶

Inflated contract prices, discouragement of investment, and substantial escalation of the debt of poor countries have all been attributed to the proliferation of bribery.¹⁵⁷ Corruption likewise erodes the public's confidence in the leaders and institutions of developing nations,¹⁵⁸ potentially undermining governmental stability.¹⁵⁹ Moreover, corruption has been credited with perpetuating authoritarian regimes by giving leaders financial support that bears no relationship to the quality of their performance.¹⁶⁰

The pernicious effects of bribery are likewise severe in a second class of susceptible economic environments — former Communist economies that are becoming market driven.¹⁶¹ Transitional processes of privatization

154. See Sebastian Rotella, *IBM Scandal Is Equal Parts Spectator Sport and Lesson*, L.A. TIMES, Aug. 11, 1996, at D1 (citing belief of Transparency International that corruption exacerbates inequality of developing and developed nations).

155. See Cameron, *supra* note 32, at 36 (referring to comments of Peter Eigen, founder of Transparency International).

156. Andrei Schleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 616 (1993); Michael Holman, *New Group Targets the Roots of Corruption*, FIN. TIMES, May 5, 1993, at 4.

157. Gail R. Chaddock, *More Trade Brings Graft to Light — and to Trial*, CHRISTIAN SCI. MONITOR, Jan. 10, 1996 (Int'l Global Report), at 1.

158. See *Hearing of the Senate Finance Committee on Drug Trafficking and International Organized Crime*, FED. NEWS SERVICE, July 30, 1996, available in LEXIS, World Library, Allwld File (testimony of Robert Leiken, President of New Moments in America, that bribery has pronounced negative effect on developing nations, and specifically that "[c]orruption destroys the people's trust in their government, breeds mutual distress amongst citizens, subverts the rule of law and undermines the work ethic").

159. Catherine Yannaca-Small, *Battling International Bribery*, OECD OBSERVER, Feb./Mar. 1995, at 16; see also JOHN T. NOONAN, JR., BRIBES 656 (1984) (suggesting causal relationship between Honduran bribery scandal in 1975 and military coup d'état leading to removal of President Oswaldo Lopez); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1583 (1990) (suggesting that disclosure of bribes paid by American companies may have been related to collapse of several governments).

160. Christopher Lingle, *Australia: Why Corruption Really Is Wrong*, AUSTL. FIN. REV., July 8, 1996, available in LEXIS, World Library, Allwld File.

161. See Klich, *supra* note 122, at 121 ("A negative side effect of the confusion and

inherently entail what one commentator describes as "shifting assets out of governments' hands" and "seeing into whose hands they fall."¹⁶² Because power in such contexts is initially concentrated in the hands of government officials, determining how state-owned assets will be transferred to private ownership is fraught with the potential for corruption.¹⁶³ Favoritism toward the payers of bribes can have two potentially devastating effects on transitional economies. First, as in newly developing economies, kickbacks impair the efficient operations of markets by undermining free transactional exchanges based solely on the quality of what each transactor openly brings to the table.¹⁶⁴ Second, the influence of corruption can exacerbate gross inequities in the prosperity of the people under newly capitalized systems. Free markets may be viewed with justifiable disdain if transition yields a majority of discontented poor.¹⁶⁵ Such dynamics may help explain why recent experiments in capitalism have proved disappointing in countries like Russia,¹⁶⁶ where allegations of substantial government corruption abound.¹⁶⁷

dislocation caused by the move to market based economies is the rise of corruption in local business practices."); Melame Manion, *Corruption by Design: Bribery in Chinese Enterprise Licensing*, 12 J.L. ECON. & ORG. 167, 167 (1996) ("In China, as elsewhere, the transition from socialist bureaucratic planning to a more decentralized and partially marketized economy has been accompanied by an explosion of economic crime and corruption."); Karl M. Meessen, Essay, *The Role of International Law in the Twenty-First Century: Fighting Corruption Across the Border*, 18 FORDHAM INT'L L.J. 1647, 1647 (1995) (noting that in regard to shift from central planning to free markets, "[t]imes of transition are times of corruption").

162. *World: Stealing the Family Silver*, EUROMONEY, Feb. 27, 1996, available in LEXIS, World Library, Allwld File.

163. See Benjamin B. Klubes & Roberto Iraola, *Complying with the FCPA in an Era of Globalized Trade: A Primer for U.S. Businesses*, E. ASIAN EXECUTIVE REP., Feb. 1996, at 9 (noting that in countries with state-owned or state-dominated businesses, trade opportunities require involvement, approval, and oversight of government, creating substantial risks of solicitation of bribes that are illegal under FCPA).

164. See *supra* text accompanying note 156.

165. Movements against market reform may be attributable to disparity in wealth during transition years, especially within the context of high inflation and unemployment rates. James P. Nehf, *Empowering the Russian Consumer in a Market Economy*, 14 MICH. J. INT'L L. 739, 742 (1993).

166. Yaroslav Lissovlik, *Cost of Fiscal Populism*, MOSCOW TIMES, Aug. 7, 1996, available in LEXIS, World Library, Allwld File. For a discussion of post-Cold War opening of markets in Russia, see generally David F. Black, Note, *So You Want to Invest in Russia? A Legislative Analysis of the Foreign Investment Climate in Russia*, 5 MINN. J. GLOBAL TRADE 123 (1996).

167. See generally Scott P. Boylan, Essay, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999 (1996).

In addition to subverting national economies, bribery fosters a second, more micro-level form of waste — the dissipation of scarce corporate resources. When bribes assess extra costs rather than simply shift or re-categorize existing costs, contract winners pay more than they would in the absence of bribery. For this reason, some businesspersons have voiced an appreciation that the FCPA keeps "outrageous demands at bay"¹⁶⁸. Former Texaco President James Kinnear has stated his belief that the FCPA is a help rather than a hindrance to U.S. businesses, providing a way to save face while refusing to pay bribes.¹⁶⁹ In this manner, the law can be evoked by American executives who resent the wasteful diversion of scarce resources towards corrupt ends,¹⁷⁰ but want a basis for graciously refusing to make a solicited payment.¹⁷¹

B. The United States Must Encourage Adoption of FCPA-Style Legislation Abroad to Eliminate Competitive Disadvantage to U.S. Firms in International Markets

Supporters of the original FCPA cited literature suggesting that alleged competitive disadvantage for U.S. firms was illusory and that blaming the FCPA for trade deficit woes was simplistic.¹⁷² Given the spate of data generated to support either side of most controversies, FCPA detractors could likewise provide their own statistics, attesting to the harm suffered by U.S. businesses under the legislation.¹⁷³

168. Keith Rockwell & Richard Lawrence, *Revised Corruption Law Gets Mixed Reviews*, J. COM., Nov 1, 1988, at 1A.

169. See James W Kinnear, Retired President and Chief Executive Officer, Texaco, Inc., Address Before the 35th Annual Naval Academy Foreign Affairs Conference (Apr. 19, 1995), in 61 VITAL SPEECHES 561, 562 (1995).

170. For example, transactions for munitions, telecommunications equipment, heavy equipment, and services sometimes bear costs inflated by five, ten, or fifteen percent. Richard Alm, *Brave Few Battle Corruption in Global Business*, DALLAS MORNING NEWS, Mar. 14, 1994, at 1D.

171. See Glenn A. Pitman & James P Sanford, *The Foreign Corrupt Practices Act Revisited: Attempting to Regulate "Ethical Bribes" in a Global Business*, INT'L J. PURCHASING & MATERIALS MGMT., June 22, 1994, at 15 ("Americans have learned to utilize the FCPA in a bribery-prone climate. Many find that the FCPA gives them the basis to refuse a solicitation of a bribe.").

172. See Bader & Shaw, *supra* note 139, at 646-47 ("Statistics contradict the perception that the FCPA has hindered U.S. sales abroad. Placing the blame for balance of trade woes on the FCPA is simplistic.").

173. See Paul J. Beck et al., *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 MGRL. & DECIS. ECON. 295, 301 (1991) (finding that FCPA has hurt U.S. exports to non-Latin American "bribery countries").

Some commentators continue to provide evidence suggesting that the costs to U.S. businesses of complying with the FCPA have not been prohibitive.¹⁷⁴ Recently, however, an increasing number of FCPA defenders have adopted a new approach. Rather than suggest that the FCPA's burden on U.S. businesses is exaggerated, these commentators concede that unilateral adoption of the FCPA is economically harmful to American firms competing abroad.¹⁷⁵ The solution, they contend, is not for the United States to abandon its purportedly virtuous position, but rather to campaign aggressively for the adoption of FCPA-type legislation throughout the world.¹⁷⁶

The contrast between the FCPA's strict prohibition of overseas bribes and the absence of similar legislation throughout the rest of the world creates a lopsided playing field.¹⁷⁷ Most commentators today agree that U.S. businesses are disadvantaged in the global marketplace¹⁷⁸ by the uniquely stringent standards to which they are held in regard to the payment of bribes. Statistics and studies aside, logic suggests that some competitive disadvantage is likely to result from the imposition of the FCPA's exceptional restrictions. If bribes are either necessary or conducive to the award of business contracts in some environments,¹⁷⁹ a unilateral criminal prohibi-

174. See Mary Jane Sheffet, *The Foreign Corrupt Practices Act and the Omnibus Trade and Competitiveness Act of 1988: Did They Change Corporate Behavior?*, 14 J. PUB. POL'Y & MARKETING 290, 297 (1995) (citing survey data suggesting that FCPA compliance costs have not eliminated business abroad, and that U.S. products are still in demand in global markets).

175. For a discussion of the competitive disadvantage faced by U.S. firms due to the unilateral nature of the FCPA's restrictions, see *Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. and Monetary Policy of the Comm. on Banking, Hous., and Urban Affairs*, 97th Cong., at 74-75 (1981) (statement of Earnest Johnston, Deputy Assistant Secretary for Economic and Business Affairs, Department of State).

176. See Michael D. Sandler, *Advising Lawyers of Cross-Border Developments*, NAT'L L.J., Aug. 7, 1995, at D6 (noting that although U.S. businesspersons see FCPA as handicap, most Americans believe law would be appropriate if competitors from all nations were bound by such rules).

177. Michael Skol, *Out from Under the Table: Governments Forge Ahead with Anti-Corruption Efforts*, BUS. MEX., Feb. 1996, at 23, available in LEXIS, World Library, Allwld File.

178. This disadvantage may be especially pronounced because some of our most competitive rivals, such as Japan, Germany, and France, are frequently cited as the domiciles of those companies that win contracts over U.S. firms by paying bribes. See Amy Borrus, *A World of Greased Palms: Inside the Dirty War for Global Business*, BUS. WK., Nov. 6, 1995, at 36, 37.

179. Payment of bribes would be irrational if they were neither necessary nor conducive to the award of business contracts. Bribes always incur the cost of the payment made and sometimes incur the risk of prosecution under local domestic antibribery laws. Even

tion will impose a handicap on the companies it governs. In systems where payment of bribes is necessary, U.S. firms in compliance with the law will be precluded from competing. The sphere of possible business settings overseas will be circumscribed. In systems where payment of bribes is advantageous rather than essential, U.S. competitors will still be able to compete, but will be disadvantaged by the FCPA's restrictions.

Cases abound in which U.S. firms have lost business by refusing to pay illegal bribes sought by foreign officials. One study suggests that U.S. companies lost \$45 billion of international business in 1994 alone to international competitors that paid bribes.¹⁸⁰ Moreover, a classified report compiled by U.S. intelligence agencies predicts that U.S. businesses will be seriously disadvantaged in bidding for \$1 trillion in international capital projects against foreign companies that pay bribes.¹⁸¹ Secretary of Commerce Ron Brown recently testified before the House International Economic Policy and Trade Subcommittee that in two hundred cases of bribery and extortion recently studied, U.S. exporters lost half the sales, totaling \$25 billion.¹⁸²

Opinions diverge, however, in regard to the best way to achieve a more level field of competition. Two obvious but diametrically opposed policy approaches have the potential to place all nations on equal footing — convincing the rest of the world to ban extraterritorial payment of bribes or repealing the FCPA so that American companies can compete for foreign business by paying bribes as freely as companies in other countries do.

Supporters of the FCPA approach to extraterritorial bribe payments reason that because bribery is both morally wrong and economically dysfunctional, the global playing field should be balanced by "getting the rest of the world to raise its standards, not [finding] ways to lower U.S. standards."¹⁸³ This approach has been adopted by the OECD, which in 1994 recommended that members take steps to prevent the bribery of

accounting for frequent irrationality, the flourishing of bribery in global markets is likely to reflect the existence of distinct business advantages conferred in exchange for at least some of the payments.

180. Borrus, *supra* note 178, at 36.

181. Robert S. Greenberger, *Foreigners Use Bribes to Beat U.S. Rivals in Many Deals, New Report Concludes*, WALL ST. J., Oct. 12, 1995, at A3.

182. *Hearing of the House Int'l Relations Comm., Int'l Econ. Policy and Trade Subcomm., on U.S. Export Promotion Program*, Oct. 12, 1995, FED. NEWS SERVICE, available in LEXIS, World Library, Allwld File (testimony of Secretary of Commerce Ron Brown).

183. See *Focus on "Controlling the Climate" - Reducing Corruption Worldwide*, CORP. COUNS. ACTIVITY UPDATE, Mar. 1996, at 20 (quoting Fritz Henmann, Chairman of Transparency International-USA).

foreign officials in the process of transacting international business.¹⁸⁴ Likewise, the OAS has drafted an Inter-American Convention Against Corruption.¹⁸⁵

Some suggest that foreign FCPA-style legislation might even create a competitive advantage for American businesses.¹⁸⁶ U.S. firms would be able to exploit years of unilateral experience in competing on the basis of market-oriented advantages.¹⁸⁷ Having survived and thrived for years without making corrupt payments, U.S. businesses that have complied with the FCPA would be insulated from transitional strains that foreign firms would likely experience as they move toward more stringent antibribery policies. To the degree that learning-curve benefits associated with early FCPA adoption would disproportionately assist American companies, it is arguably in our national interest to encourage multilateral enactment of FCPA-style laws as the preferred means of leveling the global playing field.

C. Vagueness and Chilling Effect Charges Lodged Against the FCPA Are Spurious

Another way to defend the FCPA is to rebut critics' charges that the FCPA's vagueness creates a chilling effect on the transaction of lawful business by U.S. firms.¹⁸⁸ Logically, two approaches can be taken, each of which is discussed in a separate subpart. The first approach suggests that the FCPA is not unduly vague, and the second approach suggests that any unavoidable vagueness is not the source of significant chilling effects.

1. Arguments That the FCPA Is Not Unduly Vague

Among the terms of the 1977 legislation challenged for purported ambiguity were "corruptly," "in furtherance of," "foreign official," "obtaining or retaining business," and "knowing or having reason to know"¹⁸⁹ In response to continuing allegations of vagueness, supporters can contend that

184. OECD Press Release, *OECD Governments Agree to Combat Bribery*, SG/Press 94(36), May 27, 1994 (visited Jan. 23, 1997) <<http://www.oecd.org/daf/cms/bribrecm.htm#1994>>

185. See *supra* notes 19-26, 177

186. Arthur T. Downey, *No Time for Complacency on Corporate Corruption*, CONN. L. TRIB., July 1, 1991, at 24.

187. *Id.*

188. For a discussion of vagueness and chilling effect issues, see *infra* notes 220-71 and accompanying text.

189. Longobardi, *supra* note 84, at 443.

the alterations enacted in 1988 were effective remedies of the purported ills of the 1977 predecessor.

Arguably, the 1988 Amendments to the FCPA have reduced or eliminated the most troublesome sources of vagueness. The most critical of these is the scienter requirement for a statutory violation. Congress replaced the slippery 1977 "reason to know" standard with the purportedly clearer "knowledge" standard,¹⁹⁰ which requires a "firm belief" that unlawful activity is "substantially certain to occur,"¹⁹¹ or awareness "of a high probability" of a violation.¹⁹² The replacement of an objective assessment of what the defendant should have known with a subjective assessment of the defendant's actual knowledge may remove one element of peril to businesses operating abroad — the invocation of criminal liability on the basis of carelessness or negligent lack of awareness or vigilance.¹⁹³ This reduces the systematic risk to U.S. businesses operating abroad under the FCPA.

A second important source of vagueness that was arguably addressed by the 1988 Amendments relates to the distinction between legal and illegal payments. The 1977 FCPA's authorization of payments to officials whose duties were essentially ministerial or clerical left substantial room for interpretation. The FCPA was criticized for creating a category of exceptions that was frequently unusable, as decisionmakers feared their assessments of qualifying recipients would diverge from assessments made during the process of litigation.¹⁹⁴ The 1988 Amendments attempt to reduce or eliminate this source of vagueness by shifting the exception from the function of the official to the purpose of the payment¹⁹⁵ and by providing a representative listing of permitted payments.¹⁹⁶ Some observers interpret this change to cover "virtually every commonly performed governmental act except those involving an exercise of discretion by a foreign official for

190. See *supra* note 98.

191. See *supra* note 99.

192. See *supra* note 100.

193. For an assessment of the effectiveness of the 1988 Amendments at adequately clarifying the FCPA's coverage and application, see *The New Trade Act: Tools for Exporters*, BUS. AM., Oct. 24, 1988, at 2 [hereinafter *The New Trade Act*].

194. *Id.* at 3.

195. The purported reduction of risk here may be attributable, at least in part, to the fact that the payer of a bribe has a better understanding of the purpose of the bribe than of the essential responsibilities of the official to whom the bribe is being made. Accordingly, the payer should experience increased confidence in the accuracy of her assessment of any payment under the revised standards for permitted payments.

196. See *supra* note 118 and accompanying text.

the purpose of obtaining or retaining business."¹⁹⁷ As we shall see in the following Part, some business entities have nonetheless barred all payments to foreign officials because of continuing concerns about statutory vagueness.¹⁹⁸

2. Arguments That Any Unavoidable Vagueness Is Not the Source of Significant Chilling Effects

Another argument against the vagueness critique challenges the very notion of a chilling effect, particularly in light of protection embodied in various government practices and procedures created to help managers better understand the coverage of the FCPA. The Department of Commerce and the DOJ provide interpretive assistance. The Department of Commerce provides nonbinding advice regarding FCPA compliance issues, but does not guarantee confidentiality to those who seek the Department's counsel.¹⁹⁹ DOJ review procedures²⁰⁰ are likely to be more helpful. The procedures require the DOJ to issue opinions in response to business inquiries within thirty days of receipt of all necessary information.²⁰¹ The DOJ has agreed to indicate its enforcement intentions under specific circumstances in response to letters of inquiry.²⁰² Moreover, an opinion letter of the Attorney General authorizing an activity under the review procedures creates a rebuttable presumption that the activity is lawful.²⁰³ Guidance from the DOJ is not binding in subsequent litigation.²⁰⁴ Although the SEC is not officially bound by DOJ reviews, it has agreed not to bring civil actions regarding payments ruled lawful by a review letter.²⁰⁵ The availability of preliminary review letters provides businesses with some protection against statutory vagueness, which mitigates potential chilling effects.²⁰⁶

197 Jere W. Morehead & Sandra G. Gustavson, *Complying with the Amended Foreign Corrupt Practices Act*, RISK MGMT., Apr. 1990, at 76, 78.

198. See *infra* note 250 and accompanying text.

199. Arthur Aronoff, *Antibribery Provisions of the Foreign Corrupt Practices Act*, PLI CORPORATE LAW & PRACTICE COURSE HANDBOOK SERIES, PLI Order No. B4-7074, June 30, 1994, at 69.

200. For details of the DOJ's review procedures, see 28 C.F.R. 80 (1996).

201. 15 U.S.C. § 78dd-1(e) (1994).

202. 28 C.F.R. § 80.8 (1996).

203. *Id.* § 80.10.

204. Aronoff, *supra* note 199, at 67.

205. Statement of Commission Policy, Exchange Act Release No. 34-17099, 45 Fed. Reg. 59,001, 59,002 (1980).

206. This argument may be more useful in theory than in practice, as the seeking of letters from a bureaucratic agency preliminary to pursuit of a business opportunity can be

Even without such protective devices, the FCPA's chilling effect on U.S. business abroad may be exaggerated. Because legislation ultimately entails the use of language, absolute avoidance of ambiguity in drafting any statute is impossible.²⁰⁷ If the existence of some ambiguity were to operate as an ultimate deterrent to the adoption of legislation, Congress would never pass a statute. Arguably, the critical question is not whether the FCPA contains ambiguity, but whether it contains so much ambiguity that it has an insupportably harmful effect on U.S. business.

FCPA supporters can argue that any vagueness in the Act is reasonably manageable. They can identify tactics that legal authorities have offered to protect U.S. businesses against unintended liability under the FCPA. For example, Brown recommends the development of written company policies for selecting and retaining foreign sales representatives, use of written agreements governing relationships with foreign marketing representatives, background investigations of such representatives, use of opinion of counsel in interpreting applicable laws, employee certification that foreign representatives of the company have been personally interviewed, utilization of the DOJ review procedures, and vigilance for a number of "red flags" as means of exercising due diligence in good faith efforts to comply with the FCPA.²⁰⁸ Likewise, Bialos and Husisian discuss in detail an array of warnings that can be part of due diligence efforts to ensure FCPA compliance.²⁰⁹ This kind of artillery may soften the purported harshness of the FCPA's application to U.S. businesses. To the extent that such weapons can avert hapless violations, the image of the FCPA as a land mine may be hyperbole.

time-consuming and cumbersome. At the very least, the process impedes the ability of cautious U.S. firms to seek business opportunities abroad, creating a competitive disadvantage. These shortcomings may be exacerbated by what some consider to be an inflexible approach taken by the DOJ in the issuance of opinion letters. *See Bribes in Russia: Just Say No?*, 6 RUSS. & COMMONWEALTH BUS. L. REP., Sept. 15, 1995, available in LEXIS, World Library, Allwld File (citing characterization of DOJ by Robert Vagt).

207 *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952) ("[F]ew words possess the precision of mathematical symbols, [therefore] most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions.").

208. H. Lowell Brown, *The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 INT'L TAX & BUS. L. 260, 283-290 (1994).

209. Jeffrey P Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Select Issues in the FSU and Other Transitional Economies*, 5 CENT. EUR. BUS. GUIDE, Aug. 1, 1995, available in 1995 WL 10085203.

IV Arguments Against Criminalizing the Payment of Bribes Abroad

Arguments against criminalizing the payment of bribes abroad include contentions that (a) the FCPA imposes a competitive disadvantage upon U.S. firms operating abroad; (b) market mechanisms can provide more effective, less costly, less severely punitive means of inhibiting international corruption than the FCPA, and (c) condemnation of bribery is a cultural construct, so that efforts to control bribery in other nations may constitute moral imperialism. These arguments are addressed individually in the following subparts.

A. *The FCPA Imposes a Competitive Disadvantage Upon U.S. Firms Operating Abroad*

Since the late 1970s, critics of the FCPA approach have suggested that the United States's unique hard-line legislation puts American businesses at a competitive disadvantage in world markets.²¹⁰ They argue that U.S. businesses are effectively foreclosed from seeking business in areas where the tendering of questionable payments, gifts, or gratuities is an essential or important component of dealmaking.²¹¹ Although this disadvantage would be expunged were all countries to adopt the tough antibribery stance of the United States, FCPA detractors suggest that persuading the world to embrace the FCPA's stance is extremely unrealistic.²¹² Accordingly, while payment of bribes remains a common, accepted practice in many parts of the world,²¹³ blanket prohibition of bribe payments by U.S. companies overseas is harmful to both the American economy and individual American businesses.

210. See Christopher L. Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, but for How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 303-06 (1994) (summarizing arguments that FCPA places U.S. firms at competitive disadvantage). See generally Edward L. Hudgins, *36 Ways to Narrow the U.S. Trade Deficit*, HERITAGE FOUND. REP. NO. 457, Sept. 24, 1985 (suggesting that FCPA places U.S. exporters at disadvantage relative to European and Japanese competitors).

211. See Tamara Adler, *Amending the Foreign Corrupt Practices Act of 1977: A Step Toward Clarification and Consolidation*, 73 J. CRIM. L. & CRIMINOLOGY 1740, 1749 (1982).

212. See Earle, *supra* note 136, at 209 (observing that proponents of FCPA-approach are sometimes characterized as excessively idealistic and unrealistic, "the equivalent of Don Quixote tilting at windmills"); 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, 15 (1995) (observing that current attempts to develop multilateral agreement on FCPA-style legislation are likely to fail).

213. See *supra* notes 10-13 and accompanying text.

Under this "avoidance of economic harm" argument against the FCPA, the price of being the lone bearer of a unique standard of behavior abroad is ever increasing. As one observer notes, the original version of the FCPA was adopted when the United States maintained a majority of the world's direct foreign investment (DFI).²¹⁴ Since that time, our portion of the world's DFI has dropped to twelve percent, in deference to business gains realized primarily in Europe and Asia.²¹⁵ If these losses are even partially attributable to impediments created by the relatively stringent standards of the FCPA, the United States may be unable to compete in the global markets of the future while fettered by the FCPA's handicap.

Beliefs that elevating all countries to the FCPA's lofty moral climate would remove the handicap appear to be unrealistic. Bribery is an intransigent global reality that is unlikely to disappear any time soon. In recent years, some of our closest allies, including France, Germany, Britain, and Japan, have resisted U.S. efforts to sell FCPA-style legislation to other countries.²¹⁶ Industrialized countries experiencing high unemployment see jobs supplied by overseas contracts, as well as the bribes that help to secure the contracts, as essential to national welfare.²¹⁷ Likewise, bribery of public officials is considered a virtual precondition to the conduct of business in a number of developing countries.²¹⁸ Perhaps because the stakes for many nations are so high, efforts to persuade other countries to adopt more stringent laws have proved extremely frustrating.²¹⁹

As noted earlier, FCPA supporters might contend that the 1988 Amendments mitigate the competitive disadvantage to U.S. companies by clarifying FCPA prohibitions, thereby reducing chilling effects on marginal but legal activities.²²⁰ In response to this argument, detractors can make two assertions: first, that total statutory clarity and concomitant avoidance of any chilling effect cannot expunge the disadvantages of the FCPA's unilateral restraints on U.S. businesses; second, that supposed improvements in FCPA clarity are illusory, so that the 1988 Amendments do little to reduce compli-

214. Andrew W. Singer, *Ethics: Are Standards Lower Overseas?*, ACROSS BOARD, Sept. 1991, at 31, 33 (citing comments of R. John Cooper, Executive Vice President and General Counsel of advertising agency Young & Rubicam, Inc.).

215. *Id.*

216. Rosie Waterhouse, *The Sleazy State: Britain "Resisting Moves to Halt Bribes to Officials"*, INDEPENDENT, Mar. 16, 1994, at 3.

217. See generally Chaddock, *supra* note 157.

218. See William L. Jennings & Craig A. Gillen, *Complying with the Foreign Corrupt Practices Act*, NAT'L L.J., Apr. 17, 1995, at C10.

219. See Muffler, *supra* note 212, at 13-16.

220. See *supra* Part III.C.

ance anxiety²²¹ associated with gray-area situations.²²² American managers who do business abroad continue to emphasize the complexity of social and economic systems in other countries, as well as the difficulty of understanding varieties of fees, the purpose and legality of which are frequently obscure.²²³

Some commentators even suggest that the SEC and the DOJ have intentionally avoided providing interpretational guidelines to the FCPA, fearing that such aids could foster its circumvention.²²⁴ This kind of regulatory approach actually seeks a certain amount of chilling effect at the margins of legality, under the theory that risk aversion under conditions of ambiguity will ensure the most rigorous possible self-enforcement.²²⁵

FCPA opponents can also challenge the notion that DOJ review procedures mitigate the chilling effects of statutory imprecision. Longobardi observes that only eighteen requests for review were made during the first six years that the procedures were available.²²⁶ This small number may reflect significant limitations of the review process, such as the nonbinding nature of DOJ review letters²²⁷ and the DOJ's refusal to grant review letters precedential effect.²²⁸ Whatever the reason, few U.S. businesses appear to

221. Compliance anxiety results from the possibility of inadvertently violating the law. According to one commentator, the opportunities to run afoul of the FCPA are greater today than ever before. See Jeffrey L. Snyder, *International Operations: Managing the Risks*, N.Y. L.J., May 20, 1996, at S4.

222. See John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009, 1017 (1990) ("[R]elatively minor 1988 amendments to the FCPA are unlikely to change the way a U.S. corporation makes sales abroad. Wherever the line is drawn in any particular case between permissible and impermissible behavior, people will wish to be comfortably within the permissible zone.").

223. See, e.g., Richard Konman, *On Corruption, All's Relative*, ENGINEERING NEWS-REC., July 24, 1995, at 31 (noting observations of U.S. businessperson in regard to transactions in Mexico).

224. See, e.g., Scott J. Lochner, Note, *The Criminalization of American Extraterritorial Bribery: The Effect of the Foreign Corrupt Practices Act of 1977*, 13 N.Y.U. J. INT'L L. & POL. 645, 654 (1981).

225. This rational yet perverse legislative approach to clarity is not uncommon. Lawmakers have declined to provide a statutory definition of insider trading, for example, out of fear that a precise definition will allow creative individuals to find loopholes that evade the spirit of the law. See H.R. REP. NO. 98-355, at 14 (1984), reprinted in 1984 U.S.C.C.A.N. 2274, 2287-88.

226. Longobardi, *supra* note 84, at 465.

227. Opinion letters from the Attorney General authorizing an activity under DOJ review procedures create a rebuttable presumption that the activity is lawful. See *supra* note 203 and accompanying text. The rebuttability of the presumption implies that the letters cannot be considered absolutely binding.

228. See Longobardi, *supra* note 84, at 472; see also Aronoff, *supra* note 199, at 69.

see the review procedures as a valuable tool for assessing gray areas of statutory application. The procedures play a small role in mitigating any chilling effects associated with the ambiguity of the FCPA.

Furthermore, the 1988 Amendments have made little progress in approaching a precision that clearly distinguishes permissible and prohibited acts. Recall, for example, that the FCPA tries to distinguish among various kinds of payments to foreign officials. Prohibited payments to receive preferential treatment in the awarding of a government contract²²⁹ are different from the permitted grease or facilitation payments that are needed to obtain necessary services such as utilities and mail.²³⁰ The former class creates a conflict of interest that undermines the objectivity of officials charged with the public welfare; the latter class is relatively innocuous.²³¹ Moreover, some view standard grease payments as especially justifiable when they function as a kind of direct taxation,²³² whereby users pay officials directly for the routine services they perform.

Unfortunately, the 1988 Amendments do not always create a clear distinction between illegal corrupt payments and permissible grease payments. Congress intended the latter to fall within the clause that permits payments for "routine government actions."²³³ As we have seen, this standard replaced the 1977 FCPA language that permitted payments to officials whose duties were essentially "ministerial" or "clerical,"²³⁴ in order to clarify the distinction between permissible and prohibited payments.²³⁵ However, the discretion needed to determine what is a "routine" activity may be equal to or greater than the discretion exercised to determine what were ministerial or clerical duties under the old approach. Because the list of routine activities contained in the statutory language is illustrative rather than exhaustive,²³⁶ an element of unavoidable discretion remains intact. While the statutory examples may help business concerns to assess the

229. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

230. *Id.*, §§ 78dd-1(b), -1(f)(3)(A), -2(b), -2(h)(4)(A).

231. Shaw differentiates bribes by distinguishing between "variance bribes" and "transaction bribes": a variance bribe is made to procure special treatment or dispensation, whereas a transaction bribe facilitates or speeds actions that are generally available to all. Bill Shaw, *Foreign Corrupt Practices Act: A Legal and Moral Analysis*, 7 J. BUS. ETHICS 789, 790 (1988).

232. See Susan Lim, *Corruption: Can It Be Stamped Out?*, STRAITS TIMES (Singapore), Oct. 8, 1995, at 1.

233. 15 U.S.C. § 78dd-2(h)(4)(A) (1994).

234. 15 U.S.C. § 78dd-2(d)(2) (1982).

235. See *The New Trade Act*, *supra* note 193.

236. 15 U.S.C. § 78dd-1(f)(3)(A)(i) to -1(f)(3)(A)(iv) (1994).

legality of other payments by analogy, the catchall category of payments "similar" to those listed²³⁷ ultimately retains an element of subjective interpretation. Accordingly, the purported clarifications of the 1988 Amendments may be partially or completely illusory

A common experience of business travelers abroad illustrates the problem. In some countries, officials sporadically demand payment for the release of a foreign guest's luggage at the border.²³⁸ Although this type of payment does not fall within the classically corrupt framework of purchasing a contractual preference, its status under the FCPA's language of exemption is uncertain. On one hand, one could reasonably characterize customs practices as routine, suggesting that the payment is permissible under the dispensation for "routine governmental actions."²³⁹ On the other hand, the discretion exercised in any sporadic behavior is arguably inconsistent with the concept of a routine action. Because the exacting of payment occurs inconsistently, it has elements of harassment and potential discrimination that ordinarily are missing in truly "routine" payments. This ambiguity creates a quandary for the international business traveler: should she pay a bribe for the release of her personal belongings? In so doing, is she committing a crime under U.S. law?

The confusion created by the FCPA over this kind of question is disturbing. Obviously, anxiety is raised in unfamiliar²⁴⁰ and authoritarian²⁴¹ settings. Entry through customs into foreign countries evokes both unfamiliarity and authoritarianism, thereby increasing apprehension.²⁴² Within this context, while a majority might agree that it is odious for officials to demand sporadic luggage-release payments, would they also concur that it is wrong for the visiting alien to make the demanded payment? Although arguments can be made on both sides of this issue, how many basically law-

237 *Id.* § 78dd-1(f)(3)(A)(v).

238. Teresa Watanabe, *Bribes Buy Trouble in New Korea*, L.A. TIMES, June 23, 1993, at A1.

239. 15 U.S.C. § 78dd-2(h)(4)(A) (1994).

240. See Terry J. Paradine, *Venturing Abroad: The Challenges of Emerging Economies*, RISK MGMT., July 1996, at 73 (discussing ways to reduce investor anxiety in unfamiliar territory).

241. See Richard A. Ifft, *Curbung the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1469 n.81 (1983) (attributing anxiety to exhibition of police authority).

242. See Timothy Harper, *Tales from the Fronts: Will They Blink or Wink?*, CRAIN'S CHI. BUS., Sept. 16, 1991, at T1 ("Most Americans who venture abroad are familiar with the little flurry of internal anxiety that comes with walking past U.S. or foreign customs officials — even if they're not carrying anything illegal and haven't exceeded the import limits.").

abiding American citizens would refuse to pay in this setting? In any event, is the visitor's purported infraction so serious that she should be put in a position of concern regarding possible criminal liability? Moreover, will Americans who are risk averse be dissuaded by such quandaries from transacting business abroad? These questions highlight two concerns: that the FCPA sledgehammer may be poorly equipped to handle subtle moral differences among various factual situations and that the FCPA's ambiguity may deter businesspersons from interacting in international markets.

Another type of payment of uncertain status under the "routine government actions" exception is the payment to foreign officials to expedite decisions.²⁴³ The position of this kind of payment under the 1988 Amendments is unclear for three reasons. First, because payments made to hasten government decisions are not specifically mentioned as a statutory example of "routine governmental actions," a prospective payer must try to classify decision-expedition payments by analogy. As analogies rely on similarity rather than identity of characteristics,²⁴⁴ assessments of how closely two situations resemble each other are by nature imprecise. Second, whenever a prospective payer tries to assess qualification of a payment under the routine governmental actions exception, she implicitly must know something about the nature of the payment. Ironically, payers governed by the FCPA are executing transactions in foreign environments²⁴⁵ in which they are particularly ill-equipped to assess the routine or exceptional nature of the actions of officials. Finally, potential problems arise because of the indeterminacy of language.²⁴⁶ A foreign official requesting a payment to "expedite" a decision may truly be seeking payment for speedy service or may be using euphemistic language to describe a bribe paid for preferential treatment in choosing one prospective contractual partner over another. Language used by an official to soften the harshness of candor may express overtures in terms of facilitation or expedition rather than the preferential treatment that is actually being purchased.²⁴⁷ Implications concerning what

243. Bialos & Huisian, *supra* note 67, at n.69.

244. See 1 COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 304 (1971) (defining "analogy" in terms of similarity, simile, and similitude).

245. The FCPA prohibits payments to foreign officials, foreign parties and their officials, candidates for foreign political office, and intermediaries through which members of these groups are ultimately reached. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

246. For a discussion of the indeterminacy of language and the particular challenges it poses in cross-cultural contexts, see Steven R. Salbu, *Parental Coordination and Conflict in International Joint Ventures: The Use of Contract to Address Legal, Linguistic, and Cultural Concerns*, 43 CASE W. RES. L. REV. 1221, 1240-44 (1993).

247. For example, so-called "expedition" payments to receive taxi licenses in Mexico

expediting payments really entail may be communicated by a glance or a tone of voice.²⁴⁸ Even if the provisions of the 1988 Amendments were crystal clear, the murky linguistic territory of transnational communications²⁴⁹ could leave the prospective payer of a so-called facilitation or expedition payment on unavoidably precarious ground. Accordingly, some companies have adopted policies of routinely erring on the side of caution to avoid possible overstepping.²⁵⁰ These companies prohibit employees from making not only preference-purchasing payments, but also grease payments.²⁵¹ Such policies demonstrate that the FCPA's chilling effect on lawful behavior is no mere theoretical construct.

Legality of payments can be affected by another aspect of the indeterminacy of language — the fact that statutory language, fixed at the time of enactment until future amendment, may be poorly suited for application to dynamic environments. For example, while Congress clearly intended by its chosen language to prohibit extraterritorial bribes to foreign officials, foreign political parties and their officials, and candidates for political office, and their agents,²⁵² the lines between public officials and the officers of private firms has become increasingly blurred in countries whose markets are in transition from communism to capitalism. As productive entities move from public to private ownership, identifying their managers and agents as clearly either governmental or nongovernmental officials can be difficult.²⁵³ U.S. companies may reasonably err on the side of caution by

are actually mandatory payoffs, as those who do not pay the "mordida" will continually fail the licensing examination. See Deroy Murdock, *Yes, We Have No Tortillas*, WASH. TIMES, Jan. 4, 1996, at A15.

248. What comprises a bribe is complicated by this distinction between express and implied bribes. U.A.E. Armed Forces policy acknowledges the subtleties of implied bribery, allowing the Forces to "withdraw a contract from any contractor that offers or attempts to offer an express or implied bribe." Charles S. Laubach, *Selling to the Armed Forces of the U.A.E.. Regulations, Tenders, and Buying Methods*, MIDDLE E. EXECUTIVE REP., Mar. 1991, at 13.

249. See Salbu, *supra* note 246, at 1240-44.

250. For example, after settling government charges under the FCPA by paying a \$500,000 penalty, Young & Rubicam adopted a policy of prohibiting its employees from making grease payments so that it would avoid potential liability in the gray areas. Singer, *supra* note 214, at 33. The move appears to be a pragmatic effort to comply with the technicalities of the law rather than a respect for the philosophical approach of the law. Following settlement of the claims, one executive labelled the FCPA's criminal provisions "the most metaphysical felony I've ever pleaded guilty to." Lipman, *supra* note 46, at B4.

251. Lipman, *supra* note 46, at B4.

252. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

253. Norman Givant, *The Sword That Shields: Foreign Corrupt Practices Act Protects American Investments in China*, CHINA BUS. REV., May/June 1994, at 29.

avoiding lawful payments to executives who may no longer be considered "foreign officials" of governmental agencies.

Another source of ambiguity under the FCPA is its scienter requirement. Replacement of the "reason to know" standard of the 1977 version of the FCPA with a new, more rigorous scienter requirement²⁵⁴ may have altered rather than eliminated sources of potential statutory vagueness. The new knowledge requirement encompasses such potentially ambiguous states of scienter or quasi-scienter as awareness or a firm belief that a circumstance is substantially likely to occur. This kind of standard may create as many questions regarding the boundaries of the statute's coverage as existed under the original FCPA language.

Consider that under the 1988 scienter standard, requiring agents to sign nonbribery contractual provisions provides little or no protection to honest managers.²⁵⁵ If an agent breaches a nonbribery agreement by applying some commission to the payment of a bribe, the principal can be held liable simply for knowing that the agents she must use²⁵⁶ sometimes pay bribes despite exhortations to be honest.²⁵⁷ Should such behavior be resistant to

254. See *supra* notes 97-100 and accompanying text.

255. See Ettore, *supra* note 14, at 20.

256. Forced or unavoidable use of agents in a country may be a function of laws, protocols, or more pragmatic considerations such as the need to rely on persons who have cultural, linguistic, or relational skills that are critical to the successful consummation of a deal. Use of local consultants may also be necessary to work one's way through local bureaucracies. See Catherine Curtiss & Kathryn C. Atkinson, *United States-Latin American Trade Laws*, N.C. J. INT'L L. & COM. REG. 111, 160 (1995).

The forced use of local agents, and a concomitant loss of control over the selection of persons upon whom U.S. managers must rely, is exacerbated in countries where entry is actually or virtually limited to the development of joint ventures. For example, some countries have historically limited foreign direct investment to firms that develop joint ventures with host country entities. Some go so far as to require that the host country venturer maintain majority ownership or control. See Salbu, *supra* note 246, at 1223-24. In these instances, the loss of control occasioned by having to collaborate with host country firms is compounded by low levels of control associated with minority ownership. The crux of the problem in any of these instances lies in the fact that the quasi-involuntary arrangement must inevitably confer upon the coventurers authority to act as agents of the venture, thereby exposing the U.S. company to potential FCPA liability.

257 Arguments to the contrary — i.e., that a principal always has control over an agent's activities — may be predicated upon ethnocentric assumptions. For example, agents in some cultures may view exhortations to eschew bribery as formalities toward technical legal compliance, essentially presuming a wink on the part of the exhorter. It may be difficult to persuade agents in this kind of cultural setting that no bribes really means no bribes. Likewise, bribery may be so entrenched in some cultures that the exhortations are universally ignored. This may occur because the nature of an agent's moral, social, and legal obligations to obey the orders of the principal may differ within various cultural contexts.

the good faith efforts of U.S. managers, Americans may effectively be barred from doing business abroad.

Commentators observe that other gray areas remain unresolved under the 1988 Amendments.²⁵⁸ For example, foreign officials in China commonly demand payment of costs of foreign travel, purportedly to learn more about foreign products.²⁵⁹ Chinese inspectors likewise request trips abroad, ostensibly to educate themselves regarding U.S. technology so they can determine whether American contractors' projects should pass local inspections.²⁶⁰ The legitimacy of such expenditures becomes increasingly questionable as the size of the payment grows. Whether the payments meet statutory requirements²⁶¹ — i.e., are "directly related to the promotion, demonstration, or explanation of products and services; or the execution or performance of a contract with a foreign government or agency thereof"²⁶² — is also a question of degree. Obvious difficulties in assessing coverage under this language will be associated with the level of opulence of transportation, food, lodging, and amenities. Likewise, how much time abroad must the foreign official spend assessing products and services, as opposed to sightseeing during leisure hours or breaks, to remain in the spirit of the affirmative defense?²⁶³ Other ambiguous areas of coverage include the sale of black market import licenses and the payment of fees for inspection certificates.²⁶⁴

Another term retained in the 1988 Amendments that potentially engenders confusion is the corruption requirement. The statute prohibits persons and entities from making "use of the mails or any means or instrumentality

258. See, e.g., Delia Poon, Note, *Exposure to the Foreign Corrupt Practices Act: A Guide for U.S. Companies with Activities in the People's Republic of China to Minimize Liability*, 19 HASTINGS INT'L & COMP. L. REV. 327, 340-41 (1996) (discussing several areas in which coverage of particular practices under 1988 Amendments' prohibitions remains unclear).

259. See *id.* at 341 n.92 (citing *Corruption: Getting Tough Pays Off*, ECON. INTELLIGENCE UNIT BUS. CHINA, Jan. 11, 1993, available in LEXIS, Asiapc Library, Eiubc File).

260. See Givant, *supra* note 253, at 29.

261. See Poon, *supra* note 258, at 341.

262. 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2) (1994).

263. Admittedly, respondents to concerns about gray areas can persuasively argue that middle-ground judgment calls are at some level unavoidable in any statutory construction. For example, the tax deductibility of business expenses raises questions similar or identical to those discussed in this paragraph. Nonetheless, the negative effects of ambiguity are especially pernicious when millions or billions of dollars of foreign trade may be lost in increasingly competitive markets, as executives exercise caution to avoid being charged with criminal behavior under the FCPA.

264. See Poon, *supra* note 258, at 341-42.

of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value²⁶⁵ to prohibited classes of recipients. Unfortunately for those hoping to understand the requirements of FCPA compliance, "corruptly" is not among the terms explained in the definitions section of the FCPA.²⁶⁶

Courts provide little useful help to those seeking clarification. In *United States v Liebo*, the defendant argued that the word "corruptly" requires that the gift or payment at issue be intended as an inducement for recipients to misuse their official positions and that the jury should be instructed to differentiate between gifts or gratuities and bribes.²⁶⁷ The court ruled that "an act is 'corruptly' done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."²⁶⁸ This tautological explanation only reinforces the ambiguity of the adverb "corruptly," and the "voluntarily" component of the test merely reiterates an element of the statute's scienter requirement. Describing "corruptly" in terms of "unlawful" ends is so circuitous, obvious, and redundant as to offer little insight. Moreover, the idea that the phrase "bad purpose" helps illuminate the boundaries of corrupt behavior is suspect given that corrupt activities are a more constrained category than the larger, more generic sphere of acts with a "bad purpose."²⁶⁹ Defining a relatively narrow concept using a broader concept does nothing to help potential actors understand the boundaries of the FCPA's coverage.

The practical outcome of all these examples of indeterminacy under the FCPA is a chilling effect on U.S. business activity abroad. The ambiguity we have examined, in tandem with the criminal penalties of the FCPA, will deter U.S. companies from making payments that courts might ultimately find legal in order to avoid the publicity, lawyers' fees, and potential fines and incarceration that threaten at the margins.²⁷⁰ The implications of this

265. 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

266. *Id.* §§ 78dd-1(f), -2(h).

267. *United States v Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

268. *Id.*

269. Under standard usage, not all bad acts are corrupt, whereas all corrupt acts are bad. This distinction is based on the idea that corruption is comprised of some degree of rot, spoilage, contamination, or venality that is not characteristic of all bad purposes. See WEBSTER'S NEW WORLD DICTIONARY 319 (2d ed. 1982). Because corruption is a specific kind of bad activity, the use of bad purpose to define corruption fails to yield refinement or precision.

270. See GREANIAS & WINDSOR, *supra* note 60, at 97 (1982) (noting, in regard to 1977 FCPA, that "[t]he line between improper and proper payments is too ill-defined to admit of

chilling effect are twofold — from a practical standpoint, it exacerbates the competitive disadvantage that encumbers U.S. businesses operating in global markets. From a philosophical perspective, it functions as governmental overreaching into the realm of moral ambiguity best left to individual discretion in a free society²⁷¹

B. Market Mechanisms Can Provide a More Effective, Less Costly, Less Severely Punitive Means of Inhibiting International Corruption than the FCPA

Another pragmatic argument against the FCPA suggests that alternatives exist that are more effective, less costly, and less harmful to U.S. firms. Congress need not expose American companies to competitive disadvantage and unduly harsh criminal laws to fight bribery. Likewise, Congress can reduce corruption without forcibly imposing American values beyond American borders. This subpart will address an option that would supplant the FCPA's approach — the development and utilization of market mechanisms to foster transactional probity.

How can market forces inhibit bribery? Consider this example. An Ecuadorian refinery project has recently adopted a recommendation of Transparency International that companies bidding for public contracts be required to sign an antibribery pledge.²⁷² A matching, local commitment on the part of government officials to shun bribery²⁷³ can be transformed into an express contractual stipulation that bribes will not be accepted in the process of selecting contract winners. As forces such as Transparency International work to expose corruption,²⁷⁴ and as increasingly widespread global circles adopt antibribery sentiments as a result of persuasion in the

risk-taking with regard to potential liability"). If the changes rendered by the 1988 Amendments have indeed failed to resolve ambiguities, then Greanias's and Windsor's observation remains pertinent to the FCPA in its present form.

271. For discussion of the importance of retaining individual discretion in moral evaluation, both generally and in international and cross-cultural contexts specifically, see generally Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 *IND. L.J.* 101 (1992); and Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 *U. PA. J. INT'L BUS. L.* 327 (1994).

272. Andrew Taylor, *Singapore Exposes Tip of Corruption Iceberg — Efforts to Curb Bribery in the Award of International Contracts Are in Their Infancy*, *FIN. TIMES*, Feb. 15, 1996, at 4.

273. *Id.*

274. For a discussion of Transparency International's programs and influence, see *supra* notes 31-38 and accompanying text.

marketplace of ideas,²⁷⁵ companies have growing incentives to protect their reputations against imputations of corruption. The adoption of contract terms prohibiting both the payment and the acceptance of bribes could thrive under these conditions and serve as a potential alternative to FCPA-style criminalization.

The approach obviously has both disadvantages and advantages. Critics might question the likely effectiveness of isolated, voluntary anti-corruption commitments in eradicating rampant bribery throughout the world.²⁷⁶ Such justifiable skepticism is grounded in a realism that recognizes the intransigence of the problems this Article has examined.²⁷⁷ Respondents can counter, however, that the FCPA has likewise made few incursions into the widespread custom of paying bribes.²⁷⁸ Moreover, the use of voluntary antibribery contract provisions brings the potential benefits of market-based approaches to social change.²⁷⁹ Foremost among these benefits is a high degree of transparency. Companies paying bribes in the absence of the FCPA would be breaking no U.S. laws and would therefore have less motivation to hide their activities. Companies that agree to contractual terms forbidding the payment or receipt of bribes have incentives to publicize their probity. Reputations of companies and governments alike will be cast into higher profile by either the presence or the absence of antibribery contract provisions.²⁸⁰ Markets and projects in which participants openly and voluntarily pledge themselves against corruption become "islands of integrity"²⁸¹ that are attractive to entities concerned with their honor and community standing. In short, illumination of voluntary behav-

275. See *supra* notes 31-32 and accompanying text.

276. See *Hearing of the Senate Finance Committee on Drug Trafficking and International Organized Crime*, CONG. TESTIMONY, FED. DOC. CLEARING HOUSE (July 30, 1996), available in LEXIS, News Library, Curnws File (testimony of Robert Leiken suggesting that problem is "fact of business life," firmly entrenched in global marketplace).

277. See *supra* Part I.B.

278. See *supra* notes 10-13 and accompanying text. For a discussion of the low faith that middle-level and upper-level managers have in the ability of legislation to reduce bribery of foreign officials, see William F. Jung, Note, *Recognizing a Corporation's Rights Under the Indictment Clause*, 1983 U. ILL. L. REV. 477, 504 n.196.

279. See generally Skol, *supra* note 177.

280. Unilateral adoption of the noncompulsory antibribery clauses can confer generic public relations benefits, as well as transaction-specific advantage, on the entities that agree to be bound by the terms. The process has the potential to focus a spotlight on the moral stances of particular countries and companies, whereas the approach of the FCPA has encouraged the perpetuation of a shroud of furtiveness covering the activities of governments and firms alike.

281. See Lim, *supra* note 232, at 1.

iors creates market pressures that may have greater potential to ameliorate corruption than the largely ineffectual hard-line approach of the FCPA.²⁸²

A market-based approach obviously depends on the ongoing development of transparency, so that information regarding companies' standards and practices is widely available. Effective antibribery market mechanisms also require serious efforts at political and economic persuasion to convince governments and businesses across the globe that rectitude in avoiding bribery is an important component of the reputations of their institutions and organizations.²⁸³

Both transparency and persuasion are becoming increasingly achievable ends. U.S. intelligence surveillance identifies and discourages corruption. The Central Intelligence Agency (CIA)²⁸⁴ and the Federal Bureau of Investigation (FBI)²⁸⁵ uncover bribery of foreign officials by companies in other nations that compete against American firms for various business opportunities. As intelligence surveillance mechanisms identify bribes prohibited by local law, the United States can press governments to rescind corruptly purchased contracts in favor of the lowest honest bidder. Informal pressures will suppress bribery abroad, gradually leveling the playing field without resort to the FCPA and its negative effects.²⁸⁶

282. See *supra* notes 10-13 and accompanying text.

283. It is important at this juncture to emphasize the difference between persuasion and extraterritorial operation of laws from the standpoint of allegations of moral imperialism. Where extraterritorially applied statutes such as the FCPA exert the influence of legal compulsion abroad, persuasion seeks others' voluntary adoption of beliefs and policies that are marketed using the influence of reason. This distinction between force and influence is a critical one, as nations seek to balance their strongly held moral systems against considerations of cultural pluralism and sovereign autonomy. Exertion of influence is fair, relatively unofficious, and respectful of others' right to choose. An invasive, extraterritorial exercise of power, such as an exertion of law, is subject to charges of moral imperialism.

284. See Thomas W. Lippman, *U.S. Seeks to Halt Illegal Payoffs by Foreign Corporations: State Wants Industrialized Nations to Stop Practice; CIA Trying to Uncover Bribery That Costs Americans Contracts*, WASH. POST, Dec. 3, 1993, at A10.

285. Between the passing of the original FCPA and 1992, the FBI identified over four hundred instances of misconduct. Marlene C. Piturro, *Just Say Maybe*, WORLD TRADE, June 1992, at 86.

286. The effectiveness of U.S. intelligence activity in supporting a bribe-free global playing field may be limited. Two impediments likely to inhibit CIA initiatives are: (a) the widespread proliferation of bribery of foreign officials throughout the world and (b) global resentment of and hostility toward what is perceived as overreaching U.S. intelligence activity.

The first consideration reflects the global entrenchment and pervasiveness of bribery. Even a large, powerful agency like the CIA may have trouble thwarting pandemic activity that is unorganized and decentralized and therefore difficult to control efficiently.

Some commentators suggest that the United States can also apply trade sanctions to fight bribery abroad.²⁸⁷ Should the problem of bribery in foreign markets become sufficiently severe, sanctions could include the application of tariffs and quotas.²⁸⁸ Section 301 of the Trade Act of 1974 as amended²⁸⁹ may provide the basis for a trade sanctions supplement²⁹⁰ or alternative²⁹¹ to the FCPA. The Trade Act, as amended in 1988 under the OTCA,²⁹² grants the U.S. Trade Representative discretion to impose trade sanctions for "unreasonable" or "discriminatory" policies and practices.²⁹³

Murphy suggests that wilful blindness toward and tolerance of bribery may fit under the unreasonableness standard,²⁹⁴ which includes "toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market."²⁹⁵ While trade sanctions may be applied creatively either to supplement or to replace

The second consideration may be the more crucial one, as it bears potential ramifications in the areas of foreign policy and global security. Amidst sentiment that the United States plays an insupportably expansive, imperialistic role in extraterritorial activities and governance, it is not surprising that other nations have viewed CIA antibribery activities abroad with suspicion and hostility. See William Drozdiak, *French Resent U.S. Coups in New Espionage*, WASH. POST, Feb. 26, 1995, at A1. Trading partners understandably resent the use of U.S. spies to track deals, and critics have suggested that the practice is an inappropriate effort to justify maintaining large CIA budgets in the years following the Cold War. See Leslie Alan Horvitz, *Telling Bids from Bribes*, WASH. TIMES, Nov. 20, 1995, at 34.

287. See Christopher B. Johnstone, *White House Boosts Overseas Anti-Bribery Efforts*, JEI REP., Mar. 15, 1996, available in 1996 WL 8315911 (discussing receptivity of U.S. Trade Representative Mickey Kantor to application of trade sanctions in response to corrupt practices abroad).

288. See James Gerstenzang, *U.S. to Crack Down on Foreign Trade Bribery*, L.A. TIMES, Mar. 7, 1996, at D1.

289. 19 U.S.C. § 2411 (1994).

290. See generally Mark J. Murphy, Note, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385 (1995) (recommending application of Trade Act of 1974 to supplement existing efforts to eradicate bribery, such as FCPA).

291. See *id.* Although the argument that trade sanctions can and should replace the FCPA is philosophically different from the argument that trade sanctions should supplement the FCPA, each approach depends on the effectiveness of trade sanctions in the reduction or elimination of bribery.

292. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. §§ 78dd-1 to -2 (1994)).

293. 19 U.S.C. § 2411(b)(1).

294. See Murphy, *supra* note 290, at 406.

295. 19 U.S.C. § 2411(d)(3)(B)(i)(IV) (1994).

the FCPA, critics must examine this option carefully to ensure that the trade sanctions are not subject to the same flaws as the FCPA. Specifically, those who consider the FCPA overreaching, intrusive, or disrespectful of the sovereignty and autonomy of other nations may find the application of trade sanctions objectionable for many of the same reasons.²⁹⁶

*C. Condemnation of Bribery Is a Cultural Construct,
Therefore Efforts to Control Bribery in Other
Nations May Constitute Moral Imperialism*

Commentators have observed that Americans abroad should acknowledge cultural differences and avoid imposing controversial values on hosts operating in their own countries.²⁹⁷ The disturbing image of the ugly, ethnocentric American stands in bold relief when Congress imposes its will beyond the confines of the United States. Legislative overreaching evokes concerns that the United States is engaging in moral imperialism.²⁹⁸

296. Critics of the use of trade sanctions as a means of fighting global bribery are likely to find some approaches more acceptable than others. To replicate entirely the invasiveness of the FCPA, the U.S. government would have to apply trade sanctions to nations that fail to prohibit extraterritorial bribery by their own citizens. This approach fully mirrors the FCPA's encroachment. Less severe approaches, such as the application of trade sanctions to countries that exhibit a tolerance of bribery within their own borders, differ in principle from the FCPA. Although such sanctions certainly reflect and encourage the adoption of certain values that are well entrenched in U.S. culture, they are less peremptory than the FCPA. Such sanctions function as part of a commercial incentive system rather than dictating behaviors in foreign countries. Likewise, sanctions for tolerance of bribery apply pressure only to change market characteristics internally. In contrast, sanctions against countries that fail to adopt FCPA-type legislation would apply pressure to emulate the United States using what some consider unwarranted meddling and interference.

297. See, e.g., Kent Hodgson, *Adapting Ethical Decisions to a Global Marketplace*, MGMT. REV., May 1992, at 53, 54.

298. See, e.g., C. William Verity, *Restoring the Yankee Trader of Old*, AM. BANKER, Oct. 20, 1980, at 11 (disparaging as moral imperialism United States tendency to dictate concepts of right and wrong to other countries). Supporters of the FCPA rebut such claims of moral imperialism by asserting the universal nature of antibribery values. Aigner, for example, contends that anti-FCPA arguments lodged in terms of moral imperialism are spurious. Dennis J. Aigner, *The Rending Clash of Philosophic Virtue and Economic Reality*, ORANGE COUNTY REG., Nov. 5, 1995, at G3, available in 1995 WL 10765018. He notes that although bribery may be routine in some countries, the practice is generally deplored under the laws of those nations and by people of those nations. *Id.* He also cites the role bribery has played in the downfall of various governments as evidence of antibribery sentiments within socio-legal structures of the nations at issue. *Id.*

Noonan observes that bribery is consistently criminalized throughout the world. NOONAN, *supra* note 159, at 702. He adds that the universally surreptitious nature of payments indicates a generic social rejection of bribery. *Id.* If condemnation of bribery is

Extraterritorial application of U.S. laws, while permissible, is generally disfavored. Courts presume, for example, that congressional legislation is intended to apply exclusively within the territorial limits of the United States.²⁹⁹ Although rebuttable,³⁰⁰ the presumption suggests that while Congress has the authority to exercise its control abroad, it ordinarily declines to do so. FCPA detractors can argue that such restraint reflects a prudent recognition of the dangers of American moral imperialism.

The prospect of moral imperialism is especially troubling if bribery is viewed as a cultural construct. It is easy to justify the establishment and imposition of universal rules when a behavior, like murder or rape, can be identified as morally unacceptable under all conditions, for all people. These are instances in which the behavior would violate what Donaldson and Dunfee call "hyper-norms," referring to principles that are "fundamental to human existence."³⁰¹ It is more troublesome when Americans impose their values on other cultures in situations where right and wrong may be determined legitimately, but with varying results, by agreements or microsocial contracts within each society's "moral free space."³⁰² In these cases, the absence of universalizable distinctions between right and wrong justifies the adoption of values by consensus. If bribery falls within this area of moral free space, the FCPA interferes with the legitimate creation and operation of microsocial contracts around the world.

Lack of global consensus on the ethics of payments suggests a need to relegate the issue to local authorities. As the Minister of Trade and Industry in Indonesia has observed: "We do not have common standards on

indeed a ubiquitous value, claims that the FCPA imposes U.S. beliefs on other cultures lose credibility

On the other hand, the presupposition that bribery is a universal value needs further investigation. The identification of a number of governments that have tumbled due to bribery scandals yields limited information. It does not tell us whether other nations exist where various forms of bribery are considered acceptable. Likewise, political turbulence attributed to bribery does not necessarily imply either a social consensus or a majority view that any particular practice is immoral. Because changes in government are not necessarily democratic, inferences associating causes of change with purported majoritarian belief systems are suspect.

299. See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). Because the presumption of intraterritorial statutory limitation is not conclusive, but can be rebutted by evidence that Congress intended extraterritorial application, federal statutes that reach activities outside the United States are disfavored rather than prohibited. *Id.*

300. See *id.*

301. Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contract Theory*, 19 ACAD. MGMT. REV. 252, 265 (1994).

302. See *id.* at 260-62.

issues like corruption. Any effort to relate them to trade will be detrimental to the functioning of the WTO in the future.³⁰³ Indeed, what many in the United States would call bribery may be seen as innocuous or even admirable³⁰⁴ through the lenses of other cultures. In the late 1980s, Shariff and Lee identified a complex scheme of differences in the ways in which gifts and gratuities are viewed in Japan, Kenya, Hong Kong, China, South Korea, the Philippines, the former Soviet Union, Argentina, Brazil, and the United Kingdom.³⁰⁵ The range of distinctions from one country to the next³⁰⁶ suggests that the FCPA may be poorly equipped to recognize and respect subtle differences in acceptable business practices around the world.

Studies and reports continually confirm these differences. A study by Fritzsche and others reveals that U.S. managers are likely to approach a payoff scheme as a legal or ethical issue, whereas Asian managers are likely to frame the scheme in terms of return on investment.³⁰⁷ According to Ming, payment of so-called "broker fees" to persons with strong connections to the government is considered honest in some societies.³⁰⁸ Likewise, Johnstone observes that the tendering of expensive gifts in the course of business is common, accepted practice in some Asian countries.³⁰⁹ Whereas Americans often view gift-giving in business transactions as creating a conflict of interest,³¹⁰ many people in countries like Japan consider gift-giving

303. Editorial, *Is Corruption an Asian Value?*, WALL ST. J., May 6, 1996, at A14.

304. Thus the Czech proverb, "If you don't steal from the state, you're stealing from your family," arguably places bribery in the context of meeting familial responsibilities in nations where payments to civil servants may be viewed as a source of legitimate opportunity. See Sandrine Tolotti, *Nations United in Sleaze*, WORLD PRESS REV., Jan. 1, 1996, at 18, available in 1996 WL 8399531 (reprinting portions of writing of Sandrine Tolotti, appearing in leftist monthly *Croissance*).

305. See S. Shariff & Christina Lee, *Fine Line Divides Customs, Crimes*, J. COM., Nov. 2, 1988, at 1A.

306. See *id.*

307. See David J. Fritzsche et al., *Exploring the Ethical Behavior of Managers: A Comparative Study of Four Countries*, ASIA PAC. J. MGMT., Oct. 1995, at 37

308. See Chuang P Ming, *Foreign Businessmen Welcome OECD's Anti-Corruption Move*, BUS. TIMES, Apr. 13, 1996, at 3 (citing statement of Graham Hayward, Executive Director of Singapore International Chamber of Commerce).

309. See Johnstone, *supra* note 287, at 8.

310. Several companies have recently incorporated rigorous restrictions into their codes of ethics that forbid receiving gifts, entertainment, and gratuities from suppliers when a conflict of interest would be created thereby. These restrictions, which exceed those imposed by staunch U.S. laws, stand in stark contrast to the laxity regarding receipt of gifts exhibited by companies in other countries. For a discussion of General Motors' recently adopted strict policy against receipt of gifts, entertainment, and gratuities, see Gabriella Stern & Joann S. Lublin, *New GM Rules Curb Winning and Dining*, WALL ST. J., June 5, 1996, at B1.

in business contexts to be proper etiquette.³¹¹ The Japanese may see American qualms and punctiliousness about transaction-associated gift-giving as a quirky artifact, an "American idiosyncrasy."³¹² Moreover, a broad spectrum of gifts and social favors, ranging from lavish offerings to routine hospitality, can be traded with a wide variety of motives,³¹³ so complicating the task of winnowing the innocent from the corrupt as to render the effort futile. Some commentators likewise question the purported dysfunction of bribery, suggesting that paying bribes is not consistently associated with underdevelopment or that it may facilitate economic development within certain social and cultural frameworks.³¹⁴

These studies and observations validate the idea that bribery should occupy a sphere of moral free space within which various cultures can legitimately define the norms of appropriate behavior by consensus. In contrast, the legal imposition of U.S. standards abroad is heavy-handed and imperialistic.³¹⁵ Moreover, the aggressive imposition of culture-specific values on other societies may engender resentment and hostility, potentially placing unnecessary strain on international relations.³¹⁶

The strongest arguments against the moral imperialism critique are ultimately unpersuasive. One might suggest, for example, that the FCPA applies only to U.S. entities, without imposing U.S. values on foreign nations. This defense is inaccurate. The FCPA's reach is not limited to U.S. citizens and businesses. In *Dooley v United Technologies Corp.*, the United States District Court for the District of Columbia observed that the FCPA applies not only to issuers or domestic concerns, but also to their agents.³¹⁷ The court addressed whether non-U.S. individuals or entities could be prosecuted under the agents provision.³¹⁸ Judge Green found

311. See Singer, *supra* note 214, at 32.

312. *Id.*

313. For a discussion of the variety of actions and motives that must be analyzed under the heading of potential bribery, see Jack Mahoney, *Gifts, Grease, and Graft*, FIN. TIMES, Dec. 8, 1995, at 8.

314. For example, it has been suggested that corruption in Japan has been productive and has generated growth in accordance with theories characterizing bribery as a means of oiling economic machinery. See Tolotti, *supra* note 304, at 18 (referring to work of political scientist Jean-Francois Bayart).

315. Muffler, *supra* note 212, at 29.

316. See, e.g., Paul Blustem, *U.S. Target: Payoffs Abroad*, INT'L HERALD TRIB., July 20, 1996, available in LEXIS, World Library, Allwld File (reporting Malaysian trade minister's recent objection to what he perceives as cultural imperialism of U.S. anticorruption campaigns).

317. *Dooley v United Techs. Corp.*, 803 F Supp. 428, 438-39 (1992).

318. See *id.*

indications of statutory intent to cover foreign nationals in the FCPA's penalty provision,³¹⁹ which assesses fines to employees and agents of domestic concerns who are U.S. citizens, nationals, or residents, or who are "otherwise subject to the jurisdiction of the United States."³²⁰ The court also found in the House of Representatives' conference report an intent to cover foreigners who are subject to U.S. jurisdiction.³²¹ Judge Green concluded that the FCPA can even reach foreign individuals' activities outside the United States, provided the United States has jurisdiction over the defendants.³²² These findings suggest that the FCPA is highly invasive. It is simply inaccurate to suggest that the FCPA is nonimperialistic because it circumscribes only the behaviors of American citizens and companies.³²³

Another unpersuasive argument against charges of moral imperialism is based on the FCPA's affirmative defense permitting payments and gifts that are "lawful under the written laws and regulations" of a host country.³²⁴ FCPA defenders might suggest that the affirmative defense preserves the dominance of local law over the encroachment of U.S. law. However, given the structure and limitations of the affirmative defense, any purported

319. *See id.* at 439.

320. *Id.* (quoting 15 U.S.C. § 78dd-2(g)(2)(B) (1988)).

321. *See id.* For relevant portions of the House conference report, see H.R. CONF REP NO. 95-831, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4126.

322. *Dooley*, 803 F Supp. at 440.

323. Had *Dooley* limited the FCPA's application to individuals and firms domiciled in the United States, the FCPA would have remained subject to charges of moral imperialism. Moral imperialism must be assessed not only at a micro level, but also at a macro level. When a statute operating extraterritorially applies exclusively to U.S. individuals and entities — i.e., only to the micro-level transactions of its own citizens and domiciliaries — it nonetheless exerts a macro-level influence on the cultures and economies of the country into which it insinuates itself. From this macro-level perspective of broad cultural and economic effects, the imperialism of extraterritorial application cannot be eliminated simply by assuring that the transactors governed must hail from the United States. The statute operates in and affects other nations and is founded upon ethical precepts. It reasonably follows that the FCPA's macro-level invasiveness can be characterized as moral imperialism. The statute extends to transactions in other countries and shapes their economic activity and development.

The proliferation of joint ventures throughout the world exacerbates this global encroachment of the FCPA upon the autonomy of foreign firms. U.S. firms entering foreign markets may find it helpful or necessary to align themselves through joint ventures with local companies that are familiar with local laws, customs, and mores. Joint venture activity may be necessary if the country the U.S. firm seeks to enter requires some percentage of local ownership. *See supra* note 256. With these collaborative arrangements, the local companies join their fortunes with those of the American coventurer. In the process, they can become subject to the FCPA's rule, either directly through the operation of agency law or indirectly by sharing the losses that are suffered by their U.S. partners.

324. 15 U.S.C. §§ 78dd-1(c), -2(c) (1994).

deference to local law is illusory. The affirmative defense applies only when payments that would be unlawful under the FCPA are expressly authorized by a written law or regulation.³²⁵ Unfortunately, when payments are permissible in other countries, it is by default rather than by positive authorization. By declining to designate payments as civil or criminal infractions, the law implicitly authorizes them. Because countries permitting payments do not expressly authorize them, a defense requiring written authorization is unusable. The FCPA therefore criminalizes activities of U.S. companies abroad that are allowed under the host country's own rules. This impressive reach of U.S. law is invasive, as well as disrespectful of the host country's ability to determine the rules of operation within its own sphere of influence.³²⁶

V *Analysis and Recommendations*

The discussion to this point leads us to address two fundamental questions of law and policy: (a) Should the United States continue to support the FCPA, both as an Act of Congress and as a model statute to be marketed to other nations?; and (b) If not, what alternative should we pursue to reduce global bribery and corruption? This Part addresses these two questions.

A. *Should the United States Continue to Support the FCPA, Both As an Act of Congress and As a Model Statute to Be Marketed to Other Nations?*

The FCPA is a suboptimal policy solution to the problem of bribery. This subpart demonstrates that while classic, preference-seeking bribery³²⁷ is a harmful practice that we should seek to curb, FCPA-style legislation is not the best way to achieve this end and is officious and insensitive to cultural differences and issues of national sovereignty.

1. *Classic, Preference-Seeking Bribery Is a Harmful Practice That We Should Seek to Curb*

As we observed in some detail in Part II, payment of preference-seeking bribes is economically dysfunctional and morally repugnant. It is

325. *See id.*

326. *See* Dale C. Turza, *Corrupt Practices Act: How Far Have We Come?*, N.Y. L.J., Apr. 5, 1990, at 5 (noting criticism of FCPA as "paternalistic attempt to set moral standards for business conduct abroad").

327. Classic, preference-seeking bribes refer to payments made to win a business deal, in contrast to grease payments made to facilitate routine government action.

economically dysfunctional because it hinders economic growth,³²⁸ exacts agency costs,³²⁹ harms the quality of decisions made by public officials,³³⁰ impairs the accuracy of corporate financial statements,³³¹ reduces tax revenues,³³² inflates contract prices,³³³ discourages investment,³³⁴ increases national debt,³³⁵ and squanders scarce government³³⁶ and corporate³³⁷ resources. From a utilitarian perspective,³³⁸ bribery is also morally repugnant because it exacts all the above costs without yielding any social benefit. Moreover, the payment of classic, preference-seeking bribes is dishonest, and it diminishes fairness of results in the marketplace.

In contrast with classic, preference-seeking bribes, we have seen that a wide array of less clearly censurable payments are frequently made, with varying purpose and effect. These kinds of payments occupy a far more ambiguous position both economically and morally on a sliding scale of finely graded practices ranging from seriously troublesome to innocuous. Normatively ambiguous payments include the grease payments that the FCPA permits,³³⁹ as well as the many payments that simply do not fit easily or clearly within the FCPA's provisions.³⁴⁰ Moreover, practices considered highly acceptable within other cultures, including payment of a variety of "broker fees"³⁴¹ and tendering of gifts to business clients as a form of etiquette,³⁴² suggest that the economic and moral ambiguity of many payments is exacerbated by the complexities of global pluralism and diversity

328. See *Bribonomics*, *supra* note 138, at 86.

329. See *supra* notes 142-44.

330. See *supra* notes 145-47 and accompanying text.

331. See *supra* notes 148-50.

332. See Pennar et al., *supra* note 143, at 133.

333. See Chaddock, *supra* note 157, (Int'l Global Report), at 1.

334. *Id.*

335. *Id.*

336. See *supra* notes 155-56 and accompanying text.

337. See *supra* notes 168-71 and accompanying text.

338. Utilitarian analysis is an ethical analysis through which right behavior and institutions are determined by trying to maximize social good. It entails application of a calculus weighing social costs and social benefits. Rawls describes the central concept of utilitarianism in terms of righteousness and justice being achieved when "major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it." JOHN RAWLS, A THEORY OF JUSTICE 22 (1971) (citation omitted).

339. See *supra* notes 117, 229-51.

340. See *supra* notes 252-71 and accompanying text.

341. See Ming, *supra* note 308, at 3.

342. See Singer, *supra* note 214, at 32.

To summarize, whereas classic, preference-seeking bribery can legitimately be subjected to strong economic and moral condemnation, the many gradations of payments that fall short of this category are more difficult to classify. As we shall see in the following subpart, the FCPA is ill equipped to control preference-seeking bribery and has no business controlling the more ambiguous gradations of payment that proliferate in the real world.

2. *FCPA-Style Legislation Is Not the Best Way to Curb Bribery and Is Officious and Insensitive to Cultural Differences and Issues of National Sovereignty*

The FCPA appears to have had little effect in eliminating or reducing corrupt practices throughout the world.³⁴³ Although the FCPA might have greater effect if its approach were adopted by all nations, statutory ubiquity is unrealistic under any conditions and near impossible in regard to such controversial legislation.³⁴⁴ Even if some of the present promising efforts³⁴⁵ lead other countries to take a more aggressive position in fighting bribery, difficulties in universalizing the FCPA approach come from two sources: the fact that some countries which develop antibribery campaigns will create less aggressive, invasive programs than the FCPA,³⁴⁶ and the fact that global pluralism presently renders the establishment of any consistent global policy a highly remote prospect.³⁴⁷

The FCPA's ineffectiveness is exacerbated by poor drafting. Despite congressional efforts to rectify the deficiencies of the 1977 version of the

343. Of course, the effects of legislation such as the FCPA are difficult to measure. This is because we cannot make comparisons between global corruption levels with the FCPA and without the FCPA. We must choose one approach and can only observe one set of global outcomes within a given time frame. We do know that bribery remains a widespread practice despite the efforts of the FCPA, but whether these levels would increase, remain stable, or decrease in the absence of the FCPA cannot be determined conclusively.

344. For a discussion of the ongoing controversy over the FCPA approach, see *supra* notes 216, 303-16 and accompanying text.

345. For a discussion of the progress that is being made in the form of commitments and agreements by regional and world organizations, such as the OAS and the OECD, see *supra* notes 14-43 and accompanying text.

346. How conscientiously countries committed to fighting bribery will follow through, and whether they will go so far as to enact their own versions of the FCPA in so doing, are obviously conjectural. Even if all countries move to execute the commitments they make against corruption when they become signatories to compacts of regional or global organizations, historic context suggests that many will prefer less extreme approaches than the FCPA.

347. For a discussion of the variety of global approaches to bribery, see *supra* notes 307-14 and accompanying text.

FCPA,³⁴⁸ the 1988 Amendments remain as troublesome as their statutory predecessor. Specifically, ambiguities in both the statutory language and the cultural contexts in which the statute operates create an intolerable chilling effect on lawful business practices.³⁴⁹ Until and unless Congress can draft legislation that more clearly distinguishes between acceptable and unacceptable practices, the FCPA will remain unacceptably overreaching and blunt.

In addition, the reach of the FCPA into the behaviors of U.S. companies in their operations abroad is unjustifiably intrusive. We cannot move automatically from even the boldest assertion that bribery is morally and economically unsound to a conclusion that the FCPA is good policy. Even if the FCPA were effective in curtailing bribery, positive ends would not justify otherwise unacceptable means. Although it is true that all governments should seek to eliminate preference-seeking bribery, it does not necessarily follow that we should take pride in the FCPA's posture and explore all opportunities to "spread this gospel worldwide."³⁵⁰ Indeed, the missionary zeal suggested by this exhortation reflects the kind of overreaching we should studiously avoid.³⁵¹

Proponents of extraterritorial governance over U.S. individuals and firms may suggest that the FCPA's far-reaching approach is justified by growing antibribery sentiments across the globe.³⁵² This reasoning is specious, as a sympathy of underlying values between two countries does not vindicate imperialism. Increasing receptiveness to an American ideal does not justify American legislation that moderates activity abroad. If cross-cultural differences in attitudes toward bribery are indeed shrinking, and other nations are moving closer toward an American-style denunciation, they are free to develop laws and enforcement policies that restrict bribery and that are as rigorous as those adopted by the United States within U.S. borders.³⁵³ The more presumptuous approach of the FCPA is paternalistic,

348. See *supra* notes 88-92 and accompanying text.

349. See *supra* notes 220-71 and accompanying text.

350. Joseph H. Guttentag, *An Overview of International Tax Issues*, 50 U. MIAMI L. REV. 445, 447 (1996).

351. European Commission officials describe the zeal of U.S. Trade Representative Mickey Kantor in his fight against international bribery as "sanctimonious." See *Commission Shows Wariness at U.S. Antibribery Campaign*, EUR. INFO. SERVICE, MULTINAT'L SERVICE, Mar. 12, 1996, available in LEXIS, World Library, Allwld File.

352. Purported growth in global antibribery sentiments might be inferred from recent multilateral antibribery initiatives and movements. For a discussion of such efforts, see *supra* notes 14-43 and accompanying text.

353. Along these lines, Claire Davies, Press Officer for Britain's Department of Trade

invasive, and insulting toward other nations that should be free to monitor business transactions within their own borders. As one business consultant in London observes, the FCPA's intrusiveness engenders "a great deal of resentment in Europe and other places as well about U.S. efforts to externalize U.S. law"³⁵⁴

Understanding the offensiveness and invasiveness of the FCPA requires examination of more than legal technicalities. It demands the subtler analysis of political and cultural realities. While the United States may technically exonerate the FCPA under jurisdictional tenets,³⁵⁵ we are nonetheless unwise to exercise jurisdiction. We must consider questions of comity, international relations, and respect for the autonomy of other nations.³⁵⁶ Hardly renowned for adoption of a deferential posture in world

and Industry, defended Britain's decision not to adopt an FCPA approach. She described extraterritorial bribes paid by British companies as "a matter for the country that the British company is in at the time to deal with." John Kimelman, *The Lonely Boy Scout*, FIN. WORLD, Aug. 16, 1994, at 50.

354. *Id.*

355. *See* United States v Layton, 509 F Supp. 212, 217-18 (N.D. Cal. 1981). The court noted:

While it remains true that legislation of Congress is generally to be construed to apply only within the territorial jurisdiction of the United States, courts have not hesitated to invoke extra-territorial application for two types of statutes: (1) statutes which represent an effort by the government to protect itself against obstructions and frauds; and (2) statutes where the vulnerability of the United States outside its own territory to the occurrence of the prohibited conduct is sufficient, because of the nature of the offense, to infer reasonably that Congress meant to reach those extra-territorial acts.

Id.

356. The courts have recognized that questions of comity are at the core of the controversy over the appropriateness of the FCPA's reach. To date, they have generally found that the FCPA passes legal tests associated with comity. *See, e.g.,* W.S. Kirkpatrick & Co. v Environmental Tectonics Corp., 493 U.S. 400, 400 (1990) (addressing Act of State doctrine considerations). The Act of State doctrine, which shields foreign governments from U.S. judicial inquiry regarding their acts within their own territorial boundaries, has traditionally rested upon "the highest considerations of international comity and expediency" *Id.* at 404. The Supreme Court further observed that the function of the Act of State doctrine has recently shifted toward separation of powers considerations and concluded that the doctrine does not preclude civil actions merely because a decision may reflect or comment upon the acts of foreign officials in their own countries. *Id.* at 404, 406. The doctrine is evoked only "when a court *must decide* — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign." *Id.* at 406.

The Supreme Court's grant of substantial protection to the FCPA against application of the Act of State doctrine determines only whether the FCPA passes legal muster. The decision does not determine the social, political, and diplomatic wisdom of Congress's evaluating and assessing the actions of foreign officials within their own borders.

affairs, the United States should exercise great care to distinguish between persuasion and intrusion. Unfortunately, the FCPA's approach is invasive, encroaching on the reasonable expectation that sovereign nations will be accorded substantial freedom in regulating activities within their own borders. Especially when one considers the dubious success of the FCPA to date, as well as the possibility that more respectful efforts at influence may be more hospitably received, it seems eminently reasonable to accord sovereign interests in self-governance greater weight than technical U.S. jurisdictional claims over the activities of U.S. companies and citizens.

FCPA detractors can and should make a compelling case against the statute based on its ineffectuality, chilling effect on legitimate business, and officiousness. Critics should not rely on arguments that criminalization of classic, preference-seeking bribes places U.S. businesses at a global competitive disadvantage.³⁵⁷ Unilateral adoption of the FCPA clearly does impose such a disadvantage on U.S. firms.³⁵⁸ Nonetheless, compliance costs are unpersuasive arguments against legislation that seeks to curb extremely harmful activity

To understand why, consider this analogy. Countries whose domestic laws prohibit child labor abuses or industrial brutality and bloodshed obviously constrain the competitive practices of local companies. As in the case of the FCPA, persuasive arguments can be made that such laws place countries like the United States at a competitive disadvantage by prohibiting them from adopting the exploitative practices of foreign competitors in less controlled environments. Still, such protective laws are clearly justifiable, provided that they inhibit harmful behavior without undue ambiguity, excessive chilling of lawful behavior, or intrusion into the sovereignty of other nations. The competitive disadvantage to companies bound by the protective laws is outweighed by the utility of the laws in preventing clearly odious and injurious activities.

Analogously, there is little credibility in arguments that Americans should be permitted to pay harmful, preference-seeking bribes in order to remain competitive in global markets. Competitive disadvantage is a poor justification for condoning highly destructive activities. Accordingly, critics who stand on solid ground by protesting the FCPA's ineffectiveness, ambiguity, chilling effect on legitimate activities, and cultural intrusiveness dilute the power of their arguments by putting forth claims of global competitive disadvantage.

357 See *supra* Part IV.A.

358. As we have seen, speakers both for and against the FCPA use competitive disadvantage as an argument to support their cases. See *supra* Parts III.B & IV.A.

*B. What Alternative Should We Pursue to Reduce
Global Bribery and Corruption?*

For the reasons just enunciated, the United States should not continue to support the FCPA or press other nations to emulate our current invasive position. Instead, we should maintain domestic antibribery laws and work in the global marketplace to persuade other nations to adopt and vigorously enforce laws that criminalize bribery within their own borders. Stringent domestic antibribery laws can be a powerful instrument in the war against corruption. Businesses will be reluctant to violate the criminal laws of the nations in which they operate, provided the laws are seriously enforced and provide sufficiently punitive fines and prison sentences.

Moreover, given hostility toward the FCPA in many parts of the world, countries will be more receptive to adopting domestic laws than extraterritorial laws. If growing global antibribery movements³⁵⁹ are to be furthered, influential politicians and organizations must be careful to put forth options to which foreign governments are likely to be receptive. Successful proliferation of domestic antibribery legislation will have a greater impact on worldwide corruption than abortive efforts to sell the unpopular FCPA approach.

The U.S. government, as well as entities such as the OECD, OAS, WTO, and ABA, can also provide recommendations in regard to payments by guest firms in countries that lack meaningful antibribery legislation. Wallace has labelled the promotion of voluntary guidelines the "minimalist position."³⁶⁰ Nonbinding recommendations can provide valuable guidance to firms, while relegating ultimate decisionmaking authority to the strategic and moral judgment of businesspersons operating abroad. This position grants guests in foreign countries the discretion to make difficult choices. Because the status of alternatives is often ambiguous under the FCPA, adoption of voluntary guidelines eliminates the present chilling effect on legitimate transactions.³⁶¹

359. Leiken lists some of these countries, including Argentina, Cambodia, Italy, Hungary, Pakistan, Saudi Arabia, El Salvador, South Korea, Switzerland, Taiwan, Tanzania, Thailand, New Zealand, and Zimbabwe. See Robert S. Leiken, *An End to Corruption*, WASH. POST, Apr. 16, 1996, at A15.

360. Cynthia D. Wallace, *International Codes and Guidelines for Multinational Enterprises: Update and Selected Issues*, 17 INT'L LAW. 435, 442 (1983).

361. See *supra* Part IV

VI. Conclusion

Congress passed the FCPA with the best of intentions. The classic, preference-seeking bribery that the FCPA is meant to punish is economically and morally repugnant. Unfortunately, Congress's admirable goals cannot salvage the FCPA. Bribery has continued to thrive during nearly two decades of the legislation's existence,³⁶² and prosecutions have been rare.³⁶³

While the FCPA appears to have had little effect in reducing global corruption, it has yielded untoward side effects. Because of the FCPA's vagueness and the complexity of the international contexts in which it operates, the FCPA has a chilling effect on legitimate transactions.³⁶⁴ Moreover, the FCPA engenders worldwide hostility for its insupportable invasiveness into local sovereign autonomy.³⁶⁵ Finally, because the nuances of varying practices around the world must be understood in cultural context, the FCPA's bluntness subjects Congress's efforts to justifiable charges of ethnocentrism and moral imperialism.³⁶⁶

Accordingly, Congress should abolish the FCPA, and the United States should cease efforts to persuade other nations to enact their own versions of the FCPA. Instead, we should maintain strong domestic antibribery legislation and work to persuade other nations to do the same. In addition, both government and international organizations should provide voluntary guidelines that help businesspersons abroad assess the economic and ethical ramifications of various fees, payments, and gifts.

362. See *supra* notes 44-54 and accompanying text.

363. See *supra* note 8.

364. See *supra* Part IV.A.

365. See *supra* note 354 and accompanying text.

366. See *supra* notes 297-312 and accompanying text.

NOTES
