The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem

E. C. Lashbrooke Jr.
THE FOREIGN CORRUPT PRACTICES ACT
OF 1977: A UNILATERAL SOLUTION TO
AN INTERNATIONAL PROBLEM

E.C. Lashbrooke, Jr.†

The enormous amount of attention and publicity generated by recent disclosures of the foreign corrupt practices of American-based multinational enterprises1 has exposed the need for some method of curtailing illegal and questionable payments made abroad. The problem of foreign corrupt practices is international in scope and the geographical diversity and internal complexity of the multinational corporation complicates the search for a solution.

A typical transaction might involve the following sequence: Corporate officers in the United States decide to pay a "sales commission" to a local agent overseas. The company could advance the money to the agent either from its U.S. offices or through one of its subsidiaries or divisions abroad. The agent in turn funnels the money to a foreign official or political party in exchange for assistance in some business matter.2 This type of transaction

† Assistant Professor of Law, DePaul University. B.A. 1967, M.A. 1968, J.D. 1970, L.L.M. 1977, University of Texas at Austin.

1. The lion's share of publicity went to Lockheed Aircraft Corporation. Lockheed's history of alleged payoffs goes back to attempts in 1954 to influence the Dutch government to purchase Lockheed F-104 Starfighters. NEWSWEEK, Feb. 23, 1976, at 27. It was also estimated that Lockheed paid Prince Bernhard of the Netherlands over $1 million in 1961 and 1962 for his help in influencing his government's decisions. Id. at 29. The company reportedly has also made payoffs in Germany, Italy, Turkey, Colombia, Nigeria, Spain, Greece, and South Africa. Id. at 26. Lockheed's biggest payments were made in Japan where former Prime Minister Tanaka allegedly received $2 million of the $12.6 million Lockheed reportedly paid to influence Japanese officials. NEWSWEEK, Aug. 9, 1976, at 32, 35.

2. Two members of the SEC's Division of Enforcement stated:

It is possible to distill four basic reasons for which overseas corporate payments have been made: (1) to procure or maintain business and corporate activities; (2) to
may also involve "slush funds," secret bank accounts, false or misleading corporate financial statements, and exorbitant "consultant" fees for the agent.3

Most countries have laws regulating corrupt practices such as bribery,4 but these laws usually apply only to persons within that country. As a result, the nation in which a corrupt transaction occurs may not be able to prosecute some of the principals to the transaction—the enterprise, its officers and domestic employees—due to a lack of jurisdiction. Although U.S. Government officials have unanimously condemned foreign corrupt practices by American enterprises, initially they were unable to agree whether the best solution to the problem was an international agreement, criminalization, or the implementation of disclosure requirements.5 Congress finally settled on unilateral criminalization as the most feasible answer and passed the Foreign Corrupt Practices Act of 1977 (FCPA or the Act).6

This Article will first consider pre-FCPA law dealing with foreign corrupt practices. Then the Article will examine the Foreign Corrupt Practices Act of 1977, its likely effect on U.S. foreign relations and American business, the potential effectiveness of the Act, and the constitutional implications of FCPA enforcement. Finally, recommendations will be made as to a different, and more effective, solution to the problem of foreign corrupt practices.

---

evade the payment of foreign taxes; (3) to prevent potential government interference with corporate operations; and (4) to affect or expedite ministerial matters at the lower levels of foreign governments. These reasons are by no means exclusive; they can, and often do, overlap.

Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 LAW & POLY INT'L BUS. 547, 550 (1976).
3. Id. at 553-58.
4. Foreign and Corporate Bribes: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 6 (1976) [hereinafter cited as Senate Hearings on Foreign and Corporate Bribes] (testimony of John J. McCloy); id. at 65 (testimony of Elliot Richardson, Secretary of Commerce). For a list of the penalties various countries impose for bribery, see Note, Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad, 10 CORNELL INT'L L.J. 231, 235 n.26 (1977).
FOREIGN CORRUPT PRACTICES

I

PRE-FCPA LAW

Prior to the enactment of the FCPA, no federal law specifically prohibited an enterprise from bribing foreign officials or from contributing to foreign political parties or candidates. Although some U.S. legislation does deal with improper or questionable payments abroad in certain transactions, these pre-FCPA laws—due to their limited, fragmented nature—fail to deter bribery of foreign officials by American corporations.7

One such pre-FCPA law is the International Security Assistance and Arms Export Control Act of 1976 (Arms Export Act).8 This Act regulates sales of military material abroad and the size of agent's fees paid in connection with such sales.9 It provides that the President shall submit a report to Congress recommending whether the United States should continue a security assistance program when information exists that an American corporation has made illegal or improper payments to foreign officials in return for a military goods contract.10 In addition, the President has the power to limit, prohibit, or prescribe conditions with respect to such sales. The Arms Export Act also authorizes the Secretary of State to promulgate rules and regulations requiring the reporting of political contributions that any per-

7. At the start of the Senate hearings on the subject, some cabinet members believed that pre-FCPA laws were adequate in deterring foreign bribes. Secretary of the Treasury William E. Simon thought that the activities of the IRS, SEC, and Departments of State and Defense represented a significant response to the problem of foreign corrupt practices. Senate Hearings on Foreign and Corporate Bribes, supra note 4, at 91-93. Secretary of Commerce Elliot Richardson felt that new legislation on foreign corrupt practices was not needed at the time. Id. at 84.

As the various hearings proceeded, the attitude of government officials changed. Secretary of Commerce Richardson came to believe that even the most vigorous enforcement of existing laws would be inadequate. Letter from Elliot Richardson, Chairman of the President's Task Force on Questionable Corporate Payments Abroad, to Sen. William Proxmire, June 11, 1976, at 13 [hereinafter cited as Task Force Letter, reprinted in Prohibiting Bribes to Foreign Officials: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 39-67 (1976) [hereinafter cited as Senate Hearing on Prohibiting Bribes]. Chairman Richardson also reported that President Ford felt that current law was not sufficient to deal with foreign corrupt practices. Task Force Letter, supra, at 23.


10. Id. § 607, 22 U.S.C.A. § 2394a (West Supp. 1979). Obviously, the intent of this section is to pressure foreign governments to comply with U.S. attitudes toward corrupt foreign practices. The foreign government, however, may be willing to forego the security assistance program rather than yield to pressure by the United States. Since foreign military sales play a large role in the American balance of payments system, it is unlikely that the United States will aggressively enforce the Arms Export Act.
son pays, offers, or agrees to pay to promote a sale of defense articles or services to foreign armed forces.\(^\text{11}\)

Despite these provisions, the Arms Export Act has little effect on foreign corrupt practices. Armament sales abroad account for a significant percentage of U.S. exports and the sales have both economic and political overtones. Arms sales not only help the balance of payments but also serve to implement U.S. foreign policy. Therefore, foreign policy and economic considerations frequently outweigh the antibribery policy expressed by the Arms Export Act.

The Export-Import Bank of the United States has regulations requiring an American firm involved in a contract that includes the payment of commissions to file a report detailing the commissions.\(^\text{12}\) Any person who knowingly and willingly falsifies this report is subject to a fine of up to $10,000 and imprisonment for up to five years.\(^\text{13}\) But the limited scope of the requirements prevents the Bank from significantly deterring foreign bribery. The requirements apply only to sales financed with loans from the Export-Import Bank. Moreover, the Bank's regulations do not prohibit the payment of commissions; they merely require that the contracting parties report the payments.

Similarly, the limited applicability of the criminal and civil sanctions imposed on U.S. corporations that deduct improper or questionable payments as a business expense on their corporate income tax returns prevents these sanctions from acting as effective restraints on foreign bribes.\(^\text{14}\) Although the Internal Revenue Service actively seeks out "slush funds" and investigates corporations for improper and questionable foreign payments,\(^\text{15}\) the IRS limits its confidential investigations to tax-related problems. Furthermore, federal tax laws do not prohibit improper or questionable payments but merely disallow them as business expense deductions.

The Securities and Exchange Commission has used the disclosure requirements of the Securities Act of 1933\(^\text{16}\) and the Securities Exchange Act of 1934\(^\text{17}\) to regulate foreign corrupt practices.\(^\text{18}\) These acts contain no ex-

\(^\text{11}\) *Id.* §604(b), 22 U.S.C.A. §2779(b) (West Supp. 1979).
\(^\text{14}\) I.R.C. §162(c) provides that taxpayers may not deduct bribes and kickbacks in computing taxable income if the payment would be unlawful in the United States under U.S. law.
\(^\text{15}\) *Senate Hearings on Foreign and Corporate Bribes, supra* note 4, at 92 (statement of William E. Simon, Secretary of the Treasury). The Securities and Exchange Commission refers information it receives that has tax consequences to the Internal Revenue Service. *Id.* 15 U.S.C. §§77a-77aa (1976).
\(^\text{16}\) *Id.* §§78a-78kk.
press provisions concerning the disclosure of improper or questionable payments, but the pre-FCPA position of the SEC was that the existing securities laws required disclosure of such payments.  

Although SEC enforcement of pre-FCPA securities laws may have been effective in controlling some foreign corrupt practices, SEC jurisdiction prior to the enactment of the FCPA extended to less than one-third of all U.S. enterprises doing business abroad. Furthermore, the pre-FCPA securities laws require disclosure only of material facts so that the investor may make an informed decision on the value of any security. Under this standard the issue of materiality amounts to a determination of the market impact of the information. Questionable or improper payments made abroad are therefore not material facts unless they affect the value of the security.

II

THE FOREIGN CORRUPT PRACTICES ACT OF 1977

A. PURPOSES

The FCPA prohibits payments or gifts to foreign officials or foreign political parties or candidates for the purpose of influencing an official act or decision of a foreign government on behalf of a U.S. business enterprise. American officials consider such activity reprehensible because it (1) corrupts the free enterprise system; (2) runs counter to U.S. ethical and moral

20. Over 30,000 U.S. exporters, plus some additional private companies that are not subject to SEC disclosure requirements, do business abroad. Approximately 9,000 corporations, not all of which do business abroad, regularly file documents with the SEC. Id.
21. “The term ‘material’, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered.” 17 C.F.R. § 240.12b-2(j) (1978).
22. To bolster its position with respect to materiality, the SEC has adopted the “stewardship” or “management integrity” approach. The SEC bases this theory on the belief that corporate managers are stewards acting on behalf of the shareholders for the honest use of the corporate funds entrusted to their care. SEC REPORT, supra note 1, at 19-20. Under this approach the falsification of corporate books and records and the establishment of “slush funds” would be material information. Id. at 22. Not everyone shared the SEC’s interpretation of materiality at the Senate hearings on corrupt foreign practices. Elliot Richardson, chairman of the President’s Task Force on Questionable Corporate Payments Abroad, believed that the legal grounds on which the SEC based its position on materiality were tenuous. Task Force Letter, supra note 7, at 16. Ray Garrett, former chairman of the SEC, thought that it would be difficult to justify singling out foreign bribery, but not other illegal corporate acts, as material. Id.
values; (3) creates foreign policy problems; and (4) undermines public confidence at home and abroad in U.S. business enterprises.\textsuperscript{23}

Congress considered two different approaches in its search for a unilateral solution to the problem of foreign corrupt practices. One approach would have required full disclosure of bribes or questionable payments.\textsuperscript{24} The other suggested approach was to prohibit such payments and impose criminal sanctions for offering, giving, or asking for them.\textsuperscript{25} After extensive debate, Congress selected the criminalization approach and passed the FCPA.

In opting for criminalization, Congress seems to have recognized the inadequacy of disclosure requirements as a remedy for the problem of bribery of foreign officials. Disclosure imposes great administrative costs and burdens on both the corporations required to disclose and the agency in charge of the program.\textsuperscript{26} Moreover, disclosure has little deterrent effect\textsuperscript{27} and may even legitimize bribes.

In contrast, criminalization of foreign corrupt practices is the strongest possible stance that the Federal Government can take in opposition to these practices. It leaves no doubt that the Government considers foreign corrupt practices reprehensible. The criminalization approach also allows business enterprises to point to the law when confronted with requests for illegal payments.\textsuperscript{28} Finally, criminalization avoids the time and expense of compiling and verifying lengthy reports.

\begin{footnotes}

A person shall report to the Secretary [of Commerce] . . . payments hereafter made on behalf of the person or the person’s foreign affiliate to any other individual or entity in connection with: An official action, or sale to or contract with a foreign government, for the commercial benefit of the person or his foreign affiliate.


\item[26] For example, Gulf Oil Corporation reportedly spent over $3 million conducting an investigation for the SEC’s voluntary disclosure program. Staff of House Subcomm. on Oversight and Investigations on Interstate and Foreign Commerce, 94th Cong., 2d Sess., SEC Voluntary Compliance Program on Corporate Disclosure 23 (Comm. Print 1976). See also Senate Hearing on Prohibiting Bribes, supra note 7, at 12; Senate Hearings on Foreign and Corporate Bribes, supra note 4, at 88.

\item[27] See Note, supra note 4, at 250.

\end{footnotes}
B. PROVISIONS

The FCPA applies to all domestic concerns, not just reporting companies. The Act thus amends and expands the traditional scope of the Securities Exchange Act of 1934. Under the FCPA provisions, it is unlawful corruptly to offer, give, or authorize a payment or gift to a foreign official for the purpose of influencing his act or decision in order to obtain or retain business for an enterprise. Similar payments or gifts to a foreign political party or its candidates are also unlawful. The purpose of the offer, gift, or payment must be the corruption of a foreign official, foreign political party, or its candidate. The intent must be to obtain or retain business for the enterprise. Significantly, the FCPA prohibits payments by a corporation to its foreign agents if the corporate officers or directors know or have reason to know that the agent will offer all or part of the payment to a foreign official, political party, or candidate for office for the purposes described above.

The FCPA contains stiff penalties to enforce its provisions. Reporting companies and domestic concerns that violate the Act face fines of up to $1 million. Any officer, director, or shareholder convicted under the Act is subject to a fine of up to $10,000 and imprisonment for up to five years. In keeping with the SEC's policy against corporate indemnification of fines imposed for willful violations of the securities laws, the FCPA does not

29. The FCPA defines a domestic concern as:
   . . . any individual who is a citizen, national, or resident of the United States; or . . . 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.
30. A reporting company is an issuer of securities registered or required to file reports under the Securities Exchange Act of 1934. Id. § 78dd-1(a).
31. The drafters of the FCPA intended "corruptly" to be interpreted consistent with 18 U.S.C. § 201(b) (1976), where it connotes an intent or desire to influence wrongfully. COMMITTEE REPORT ON S. 3664, supra note 23, at 7.
33. Id. §§ 78dd-1(a)(2), -2(a)(2).
34. Id. §§ 78dd-1(a)(1), -2(a)(1).
35. Id. The FCPA does not prohibit "grease" or facilitating payments since the intent of these payments is to induce minor officials to perform ministerial or clerical duties and not to obtain or retain business for an enterprise. 123 CONG. REC. H11,932 (daily ed. Nov. 1, 1977) (remarks of Rep. Eckhardt). The FCPA prohibits payments that undermine competition but not "grease" payments, which contribute to smooth operations. The exemption for "grease" payments can be justified on economic grounds since investigation and enforcement costs would preclude prosecution for all such payments.
37. Id. §§ 78dd-2(b)(1)(A), ff(o)(1).
38. Id. §§ 78dd-2(b)(1)(B), ff(o)(2).
allow an enterprise to indemnify convicted officers, directors, or shareholders.\textsuperscript{39}

The Act also requires all reporting companies to keep their records in sufficient detail to reflect accurately transactions involving the enterprise's assets.\textsuperscript{40} In addition, the reporting company must devise and maintain a system of internal accounting procedures that reasonably ensures that management directs these transactions and authorizes access to assets.\textsuperscript{41} The enterprise must properly record the transactions according to generally accepted accounting principles and make a comparison at reasonable intervals of differences between recorded and existing assets.\textsuperscript{42} By requiring accurate records and a system of internal auditing controls, the FCPA attempts to force officers and directors to ensure that their enterprises use corporate assets only for proper purposes.

III
EFFECTS AND EFFECTIVENESS

A. EFFECTS

Although the United States will generally be able to prosecute only domestic corporations and corporate officers and directors involved in the payment of foreign bribes,\textsuperscript{43} it will have to investigate the conduct of foreign government officials.\textsuperscript{44} One result of an FCPA investigation will be the disclosure of the identity of a foreign official suspected of accepting bribes. The officeholder will then be subject to adverse publicity and possi-


\textsuperscript{41} Id. §§ 78m(2)(B), (iv). The accounting provisions of the FCPA are essentially those recommended by the SEC in its report of May 22, 1976. SEC REPORT, supra note 1, at 63-64.

\textsuperscript{42} Three jurisdictional theories allow the United States to prosecute individuals or corporations for violations of the FCPA that occur in a foreign territory. The active personality theory of the nationality principle imposes a duty on every national, when abroad, to obey those of its sovereign laws intended to have extraterritorial effect. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965). Under the protective principle, a nation may protect itself from activity abroad that threatens a special state interest. Bassiouini, Theories of Jurisdiction and Their Application in Extradition Law and Practice, 5 CAL. W. INT'L LJ. 1, 47 (1974). Finally, the effects doctrine of the extended territorial principle grants jurisdiction to a country over criminal conduct that has a substantial effect within that country. COMMITTEE REPORT ON S. 3664, supra note 23, at 16.

\textsuperscript{43} Senate Hearings on Foreign and Corporate Bribes, supra note 4, at 95 (statement of William E. Simon, Secretary of the Treasury).
bly pressure from his own government to resign. This result is particularly unfortunate because he probably will not have an opportunity to prove his innocence. Obviously, unilateral prosecution by the United States alleging wrongdoing by foreign officials will cause serious foreign relations problems and will be detrimental to U.S. interests abroad.

In addition, enforcement of the FCPA could result in two countries prosecuting the payor of the bribe for the same act. If only the United States elects to prosecute, the result will be the unequal treatment of two parties both at fault. Most importantly, the FCPA may make it more difficult for the United States to negotiate a multilateral agreement on transnational bribery.

Furthermore, refusal of U.S. businesses to pay bribes will put these enterprises at a competitive disadvantage to foreign firms that are willing and able to make payments. A 1975 survey indicated that almost one-half of the corporate chief executive officers of major U.S. enterprises thought that bribery was necessary in order to do business in some foreign countries. Ian Macgregor, chairman of the United States Council of the International Chamber of Commerce, felt that imposing "totally mandatory arrangements on U.S. companies . . . without having any mechanism for insuring that the competitors of these American businesses accord to similar rules" could be counterproductive. The council itself concluded that unilateral action on foreign bribes by the United States "could and in some cases would mitigate severely against U.S. business and prevent it from being able to compete effectively in quite substantial markets of the world."

U.S. business enterprises will undoubtedly suffer a loss of business abroad as a result of the FCPA. The extent of this loss cannot yet be determined. With its current balance of payments problem, however, the United States should be encouraging foreign trade. Of course, the United States should not condone bribery for the sake of increased trade. It

45. Id. at 101 (statement of Charles W. Robinson, Under Secretary of State for Economic Affairs).
46. Id. at 95 (statement of William E. Simon, Secretary of the Treasury).
47. Id.
48. The Secretary of the Treasury was concerned that unilateral action "might undercut the vital principle that cooperative action by the whole international community of nations is needed in order to deal effectively with [the] problem [of foreign bribery]." Id. at 94.
49. Id. at 101 (statement of Charles W. Robinson, Under Secretary of State for Economic Affairs).
50. COMMITTEE REPORT ON S. 3664, supra note 23, at 4.
51. Senate Hearings on Foreign and Corporate Bribes, supra note 4, at 53.
52. Id.
53. Reporting companies will also incur the costs involved in complying with the FCPA's accounting requirements. See notes 40-42 supra and accompanying text.
should, however, seek to establish a system that prohibits the bribery of foreign officials without harming U.S. business interests.

B. EFFECTIVENESS

By opting for criminalization rather than disclosure in the FCPA, Congress has created acute enforcement problems.\(^54\) Essentially, the Government in an FCPA prosecution must prove beyond a reasonable doubt: (1) payment; (2) illegal purpose and intent;\(^55\) and (3) if, as will generally be the case, a foreign agent of the corporation makes the payment, knowledge or a reason to know of the bribe on the part of the corporate officers or directors.\(^56\)

It is probable that corporate agents bribe foreign officials to ensure that they receive their commissions on sales. The agent may or may not transmit knowledge of these transactions up the corporation's internal hierarchy. The law generally does not impute the knowledge of an agent to his principal when the agent secretly acts adversely to the interests of the principal.\(^57\) Nor will the law charge a principal with the knowledge that his agent has done or intends to do an unauthorized act.\(^58\) Therefore, when a corporation makes a payment to its foreign agent, the Government may have difficulty proving that the corporation through its officers or directors intended, knew, or had reason to know that the agent would use all or part of the payment to bribe a foreign official, political party, or candidate.

The difficulty of obtaining evidence compounds the problem of establishing the elements of the crime in an FCPA prosecution. The foreign situs of the act of bribery will generally be the location of some, if not most, of the necessary evidence. Three different jurisdictional situations may confront U.S. authorities in their efforts to obtain evidence abroad. First, a

\(^{54}\) The Securities and Exchange Commission and the Justice Department divide the task of enforcing the FCPA. The SEC collects and reviews information, conducts investigations, and brings suits for injunctions while the Justice Department carries out criminal prosecutions. S. REP. No. 114, 95th Cong., 1st Sess. 11-12 (1977). Referring a criminal case to the Justice Department places an added burden on the SEC staff since after completing its work the staff must assist a Justice Department attorney in the preparation of the criminal case.

Moreover, SEC jurisdiction does not extend to all domestic concerns but only to reporting companies. The Justice Department has sole investigative and prosecutorial authority over domestic concerns under the FCPA. \textit{Id.} Since reporting companies constitute a relatively small number of all domestic businesses subject to the FCPA, it hardly seems reasonable to divide authority on this basis. Sole authority should be given to the Justice Department to avoid conflict. \textit{See} 123 CONG. REC. H11,933 (daily ed. Nov. 1, 1977) (minority views to H.R. 3815).

\(^{55}\) \textit{See} notes 34-35 \textit{supra} and accompanying text.

\(^{56}\) \textit{See} note 36 \textit{supra} and accompanying text.

\(^{57}\) \textit{Restatement (Second) of Agency} \$ 282 (1957).

\(^{58}\) \textit{Id.} \$ 280.
U.S. citizen living abroad may have the evidence. Second, evidence may be in the possession of a foreign subsidiary or division of a parent corporation based in the United States. Finally, a foreign national having no link to the United States may be in control of evidence.

When evidence is in the possession of an American citizen living abroad, a U.S. court may exercise jurisdiction on the basis of the nationality principle. The court may issue a subpoena requiring the citizen to appear or produce documentary evidence under his control if the particular testimony or document is necessary in the interest of justice. Failure to honor the subpoena can result in a contempt citation.

When a foreign subsidiary or division of a parent corporation based in the United States has evidence in its possession, American courts can require that the parent corporation produce all evidence over which the parent has control. If any corporate officer or agent of the parent has the power to require that its foreign subsidiary or division send documents to the home office, the court will presume that the parent has sufficient control to produce them when ordered to do so by a subpoena. Some countries, however, impose civil or criminal liability for removal or disclosure of certain documents found within their borders. The Supreme Court has held that a U.S. court may order a party in a civil litigation to produce records even if production would violate a foreign statute. Since the fifth amendment's right against self-incrimination does not apply to corporations, courts will undoubtedly order an enterprise to produce all documents under its control, regardless of the location of the evidence, in an FCPA prosecution of a corporation. Corporate officers and directors, however, will enjoy the benefits of the fifth amendment. Furthermore, courts are reluctant to force any individual or corporation acting as a witness to violate a foreign law in order to comply with a subpoena duces tecum. Therefore, in a trial for FCPA violations, the prosecution may not be able to obtain documen-

61. Id. § 1784.
62. United States v. First National City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968); Hopson v. United States, 79 F.2d 302, 303 (2d Cir. 1935).
63. First National City Bank v. IRS, 271 F.2d 616, 618 (2d Cir. 1959).
64. See, e.g., Schweizerische Strafgesetzbuch [StGB] art. 273 (Swiz.); Application of Chase Manhattan Bank, 297 F.2d 611, 612 (2d Cir. 1962) (translation of Article 89 of Law No. 17 of Panama prohibiting Panamanian merchants from furnishing copies of their documents for use in an action abroad).
67. See Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).
tary evidence under the control of an individual defendant or a corporation acting as a witness.

The most difficult situation that may confront the prosecution in an FCPA case is that in which evidence abroad is in the hands of a foreign national who has no link with the United States. Since the United States does not have personal jurisdiction, the court will have to issue a letter rogatory seeking the cooperation of the foreign sovereign. As a matter of comity the foreign state may, if allowable under its legal system, obtain the requested evidence. American courts, however, have been generally hesitant to comply with requests for assistance from foreign criminal tribunals. Thus, it would not be surprising for foreign courts to note a potential lack of reciprocity and refuse to use their legal powers of coercion to obtain evidence for American criminal trials under the FCPA.

Unlike documentary evidence illegally seized abroad, oral testimony of foreign witnesses taken by deposition presents difficult constitutional questions. The sixth amendment guarantees the accused the right to confront adverse witnesses, but it is unlikely that foreign witnesses will be willing to come to the United States to testify in an FCPA prosecution. A court cannot dispense with the accused's right of confrontation simply because the witness is not within its jurisdiction; rather the prosecution must make a good faith effort to have the witness testify at trial. If this effort fails,

68. A letter rogatory is a request to assist the administration of justice issued by a court in one country to a court in another country, usually through diplomatic channels. See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 204 (1968).
70. Id. at 198. According to Professor Mueller, the reasons for American courts' lack of cooperation include "traditional isolationism, ignorance of foreign criminal law and procedure—which often is suspected of being inquisitorial—or simple unfamiliarity with a court's own express or implied powers to grant judicial assistance." Id.
71. If a foreign country does decide to cooperate with the American judiciary, any method it uses to obtain the requested evidence will probably be constitutionally permissible. U.S. courts hold that fourth amendment rights are "personal . . . [and] may not be vicariously asserted." Alderman v. United States, 394 U.S. 165, 174 (1969). Therefore, a defendant does not have standing to ask a court to suppress evidence seized from another person in a manner precluded by the fourth amendment's prohibition of unreasonable searches and seizures. Furthermore, the fourth amendment and the exclusionary rule of evidence do not apply to acts of foreign officials. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968) (evidence seized by Philippine officials admissible even though the Philippine Supreme Court ruled that the searches and seizures violated a provision of the Philippine constitution identical to the fourth amendment). Thus, in order for a court to suppress illegally seized evidence, a defendant will have to show that the seizure violated his fourth amendment rights and U.S. agents had a sufficient role in the confiscation. United States v. Morrow, 537 F.2d 120 (5th Cir. 1976); Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965).
72. See note 71 supra.
74. Id. at 723-25. See also California v. Green, 399 U.S. 149, 166 (1970).
another course of action remains open to the prosecution. Since the Supreme Court has held that the functions of the confrontation clause are to insure that the testimony offered is reliable\(^7\) and to "afford the trier of fact a satisfactory basis for evaluating the truth of the . . . statement,"\(^7\) other procedures that satisfy these requirements may substitute for actual confrontation at trial. Thus, when the prosecution finds it impossible to secure the presence of a foreign witness, the Organized Crime Control Act of 1970\(^7\) may permit the use of his deposition as substantive evidence.\(^7\)

Several circuit courts of appeals have upheld the constitutionality of the deposition provision of the Organized Crime Control Act in the face of confrontation clause challenges.\(^7\) These courts have reasoned that the statute meets the procedural safeguards called for by the confrontation clause by requiring an authorized person to place the deponent under oath, allowing the defendant to be present and represented by counsel, and permitting a wide scope of examination and rigorous cross-examination.\(^8\) Nevertheless, the Supreme Court has not ruled on the constitutionality of the statute, and it is likely that the use of a deposition as substantive evidence in an FCPA prosecution will produce allegations of deprivation of sixth amendment rights.\(^8\)

The effectiveness of the FCPA as a deterrent to American corporate bribery of foreign officials is contingent on successful prosecution. Many barriers obstruct any attempt by the Justice Department to have a corpora-

\(^7\) Dutton v. Evans, 400 U.S. 74, 89 (1970).
\(^7\) See United States v. King, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), cert. denied, 419 U.S. 965 (1974); United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973). But see the strong dissenting opinion in Singleton, 460 F.2d at 1158 (case "goes further than any other in the history of federal jurisprudence to make the sixth amendment and its confrontation clause a nullity") (Oakes, J. dissenting).
\(^8\) 552 F.2d at 840; 498 F.2d at 374; 460 F.2d at 1153.
\(^8\) The use of depositions obtained by foreign witnesses in FCPA prosecutions presents another problem. The prosecution may only obtain and use a deposition as substantive evidence under 18 U.S.C. § 3503 if the Attorney General or his designee has certified that he believes the defendant has "participated in an organized criminal activity." 18 U.S.C. § 3503(a) (1976). The statute contains no definition of "organized criminal activity"; therefore the question becomes whether the act of bribing a foreign official satisfies the provision. In United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973), the court held that the Attorney General had complete discretion as to what constituted an "organized criminal activity" and his decision was not subject to judicial review. 460 F.2d at 1154. The dissenting judge felt that the majority had abdicated its judicial function. 460 F.2d at 1157 (Oakes, J. dissenting).
tion or its officers or directors convicted for FCPA violations. The prosecution may not be able to obtain necessary documentary evidence located abroad. The fifth amendment right against self-incrimination may prevent the use of subpoenaed documentary evidence against individual officers and directors. Depositions taken abroad may not withstand sixth amendment claims to the right of confrontation. Moreover, any attempted prosecution, whether or not successful, will damage American business and foreign relations. Clearly a different approach to the problem of foreign bribery is needed.

IV
THE ADVANTAGES OF AN INTERNATIONAL AGREEMENT

The FCPA represents a strong unilateral stance taken by the United States against foreign corrupt practices. But a lack of international cooperation in controlling such practices may reduce the U.S. stance to little more than a policy statement. Obviously, the United States needs a means of ensuring the regulation of foreign enterprises as well as the recipients of bribes (who may in fact be extortionists). The only way to obtain the necessary international cooperation is by means of a multilateral agreement.

An international agreement would eliminate most of the potentially adverse effects that the United States will suffer in trying to enforce the FCPA. First, an international agreement would protect American businesses since all firms would compete for contracts on an equal basis. Qual-

82. Currently, the only multilateral agreement dealing with foreign corrupt practices in general is the Organization for Economic Cooperation and Development (OECD) Declaration and Guidelines. The OECD Declaration sets forth standards for the activities of multilateral enterprises in OECD member countries. It provides:

Enterprises should

7. not render—and they should not be solicited or expected to render—any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
8. unless legally permissible, not make contributions to candidates for public office or to political parties or other political organizations.

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES 13 (1976). Unfortunately, the OECD Declaration and Guidelines are only recommendations and contain no sanctions for violations. S. REP. No. 1307, 94TH CONG., 2d SESS. 2 (1976).

ity, price, and service rather than freedom to bribe would be the determinative factors in awarding contracts. Since bribery would not be a cost of doing business, this approach would also benefit purchasing countries, which would receive goods at lower prices.

Second, a multilateral treaty would avoid the detrimental foreign relation implications that FCPA prosecutions would generate. The foreign official accused of accepting a bribe would have the opportunity to clear himself in a tribunal of his own country rather than having to face innuendos from abroad and pressure to resign from home. If duly convicted, the official probably could not take retaliatory measures against American businesses operating in his homeland. In addition, a treaty would provide for the punishment of both parties to a bribe, thereby preventing unequal treatment of those who may be equally at fault.

Finally, an international agreement would avoid the appearance that the United States is attempting to export its morality to other nations. Although bribery is illegal in almost all countries, sovereign governments may interpret an FCPA prosecution as an attempt by the United States to pressure them into bringing charges against their own officials. By contrast, an international agreement would represent a voluntary commitment by all signatory nations to prosecute persons who either offer or accept bribes.

An international agreement would also be the best method of ensuring foreign judicial assistance whenever evidence or witnesses are in another country. Currently, the United States is party to several international agreements that pledge assistance to another country’s attempts to enforce its criminal laws. Although it covers a variety of crimes, the Treaty on Mutual Assistance in Criminal Matters between the United States and Switzerland serves as a useful source of the types of provisions needed to effectuate judicial assistance between nations attempting to prosecute those

83. See note 4 supra and accompanying text.
85. "In order to establish the smoothest exchange of the maximum amount of judicial assistance in criminal matters, a treaty, unquestionably, is ultimately called for." G. MUELLER & E. WISE, INTERNATIONAL CRIMINAL LAW 416 (1965).
87. Treaty on Criminal Matters, supra note 86.
who offer, give, solicit, or receive bribes in international business transactions.

An international agreement modeled after the U.S.-Switzerland treaty but dealing solely with foreign corrupt practices would oblige each contracting nation to assist in locating persons, taking testimony or statements, effecting the production of evidence, and serving and authenticating documents.\(^{88}\) Upon receiving a request for judicial assistance, the contracting nation would be bound to compel a person to testify and produce documents in the same manner and extent as in the requested state’s purely domestic investigations and proceedings.\(^{89}\) By agreeing that the treaty provisions take precedence over municipal legislation, the parties could prevent the law of the requested nation from frustrating bribery investigations and prosecutions.\(^{90}\)

Although a treaty would make obtaining evidence of foreign corrupt practices easier, the agreement could protect the accused’s fundamental rights to a greater extent than they are currently safeguarded in international investigations. First, the treaty could provide that a court may not compel a person to testify or produce evidence if he has a right to refuse to do so under the law of either the requesting or requested nation.\(^{91}\) Second, the agreement could prohibit all searches and seizures that would violate the law of the requesting state.\(^{92}\) Finally, the treaty could allow the presence of the accused, his counsel, and representatives of the requesting state at any evidentiary proceeding initiated under the agreement if the parties’ presence was necessary to make the evidence admissible.\(^{93}\)

The United States should not jeopardize its chances of negotiating a multilateral agreement on foreign corrupt practices by actively enforcing the FCPA and thereby alienating other governments.\(^{94}\) Nor should the United States allow other governments to become complacent by unilaterally policing multinational enterprises. Administrative hearings and civil proceedings are adequate to enforce the accounting requirements of the FCPA. The United States should not enforce the criminal provisions of the FCPA in any situation that could cause a strain on U.S. foreign relations or harm American business.

\(^{88}\) See id. art. 1, para. 4.

\(^{89}\) See id. art. 10, para. 1.

\(^{90}\) Compare Treaty on Criminal Matters, supra note 86, at art. 38, para. 3 with note 64 supra and accompanying text.

\(^{91}\) See Treaty on Criminal Matters, supra note 86, at art. 10, para 1.

\(^{92}\) Compare id. art. 9, para. 2, with note 71 supra.

\(^{93}\) Compare Treaty on Criminal Matters, supra note 86, at art. 12 with notes 73-81 supra and accompanying text.

\(^{94}\) See note 48 supra and accompanying text.
CONCLUSION

The FCPA is a unilateral approach to the international problem of foreign corrupt practices. Foreign states may be indifferent to the corruption problem and antagonistic to U.S. intrusion into their domestic affairs. Therefore, attempts to enforce the FCPA will have detrimental effects on U.S. foreign relations and businesses. There will also be difficulties with acquiring evidence and protecting constitutional rights in criminal prosecutions under the FCPA. A multinational agreement on transnational corrupt practices is the most satisfactory way to eliminate these problems.
CORNELL INTERNATIONAL LAW JOURNAL

Volume 12 Summer 1979 Number 2

OFFICERS

DAVID A. CHURCHILL
Editor-in-Chief

ANDREW H. SHAW
JAMES F. BAUERLE
KATHLEEN A. BURSLEY
Managing Editors

DAVID R. CLARKE
Article & Book Review Editor

BARBARA R. HECK
Business Editor

ALEXANDER C. BLACK
PAMELA ANN CUMMINGS
J. ALLEN MILLER
Note & Comment Editors

CYNTHIA L. AUGUSTYN
GARY M. ROWEN
Research Editors

BOARD OF EDITORS

KATHLEEN S. ALLEN
STEWART F. ALY
ROBERT K. ANDERBERG
KARIN BIERSTEIN
DANIEL C. BRENNAI
PETER J. CALIN
RICHARD M. COGEN
KEVIN J. CULLIGAN
GEORGE H. DIPPEL
STEPHEN DUNEGAN
DAVID A. FRANKEL
PETER J. FRIEDENBERG
MATTHEW A. GABEL
WALTER T. GANGL
THOMAS GEORGE GENTITHES
JONATHAN H. GEORGE
KEVIN M. GILLIS
SUSAN D. GOLAND
STEVEN E. GRILL
BRUCE D. GRIVETTI
ELIEZER HASSIN
FREDERICK T. HAWKES
ROBERT HYKAN
DONALD A. JOSEPHSON
DAVID LEE KOVACS

EDWARD J. LINDNER
THEODORE LINDSAY
DORIS E. LONG
SANDRA E. LORIMER
WILLIAM J. LYNN III
KEVIN MACKENZIE
MARY BRIGID McMANAMON
JENNIFER L. MILLER
STEPHANIE J. MITCHELL
VICKI ORANSKY
JOHN C. PEIRCE
ALICIA PLOTKIN
STUART J. RAPPAPORT
RICHARD A. SAMUELS
ALAN D. SCHEER
DAVID REUEL SCHMAHMANN
WILLIAM W. SCHROEDER
STEPHEN R. SEELY
ROBERT F. SHARPE, JR.
MICHAEL J. SMITH
ROBERT G. SQUAIID
JANET G. SPECK
CHARLES B. STOCKDALE
CAROLYN J.A. SWIFT
ANDREW N. WELLS

WILLIAM TUCKER DEAN, Faculty Advisor
POLLY C.P. WONG, Secretary

The Journal is pleased to announce the election of Officers for Volume 13, 1979-80: WILLIAM W. SCHROEDER, Editor-in-Chief; PETER J. FRIEDENBERG, JONATHAN H. GEORGE, and MARY BRIGID McMANAMON, Managing Editors; JOHN C. PEIRCE, Article & Book Review Editor; SUSAN D. GOLAND, SANDRA E. LORIMER, and ALICIA PLOTKIN, Note & Comment Editors; DAVID A. FRANKEL and STEPHEN R. SEELY, Research Editors; ALAN D. SCHEER, Business Editor.