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Policing Illicit U.S. Business Actions Overseas

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POLICING ILLICIT U.S. BUSINESS ACTIONS OVERSEAS

JEFFREY P. BIALOS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES. New York: Oceana Publications Inc., 1996. xi + 170pp.

Reviewed by Paula Stern and Alexander W. Koff***

In *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies*, Jeffrey P. Bialos and Gregory Husisian explore a wide range of problems involving international bribery and its corresponding effects.[1] Its six chapters range from a legal discourse to a policy discourse to an economic discourse regarding the Foreign Corrupt Practices Act (FCPA).[2] But this is basically a book intended for business practitioners interested in avoiding FCPA liability, not lawyers or policymakers, and its strength lies in the breadth of advice it provides businesspersons. Although the authors' stations as practicing attorneys knowledgeable with FCPA issues lend credence to the underlying text, non-businesspersons may be frustrated with the lack of primary supporting materials.

The examination of international bribery and its corresponding effects are both timely and important. In May 1997, the Organization for Economic Cooperation and Development (OECD) announced it formally adopted a recommendation to help suppress bribery in international business. This recommendation was the result of extended negotiations

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1. JEFFREY P. BIALOS & GREGORY HUSISIAN, THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES (1996).

2. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 78dd-2 (1994), as amended.

over a considerable period of time. In short, prohibition of foreign payments is an area of potential international norm creation.

At the same time, the international business community is experiencing a period of galloping globalization. In the wake of communism's collapse, joint ventures, privatizations and other transitional economy opportunities, the idea of foreign investment has taken the business community by storm. Foreign investment is at a feverish pitch as businesses attempt to harness burgeoning opportunities overseas. In addition, U.S. fascination with emerging markets rife with corruption only thrusts the FCPA further into the limelight.

With the end of the Cold War, the U.S. government is pushing an anti-corruption agenda with its allies. Economic matters formerly given short shrift when compared to strategic alliances and other national security considerations are now being closely reexamined. A top priority of the Clinton administration is clearly the creation of an economic playing field where U.S. business concerns may operate in full parity with their foreign competitors.

This reality raises a more subtle point acutely recognized by the authors. The increase in U.S. government sponsored initiatives to export the standards of the FCPA raises the possibility of foreign governments enacting similar anti-bribery provisions. The extent to which the FCPA is mirrored multiplies the audience interested in exploring the subject of this book. In order to sidestep effectively the pitfalls of U.S. prosecution for FCPA violations, businesses should understand its provisions.

When enacted twenty years ago, the FCPA had noticeable negative effects on U.S. efforts to secure business opportunities abroad. Understanding this, the authors examine whether the FCPA should be amended, maintained or exported. Making clear their opinion that the harmful effects of corruption outweigh the benefits, they opine that the FCPA will not cause a competitive disadvantage for U.S. firms once there are uniform anti-bribery laws.[3] This set of reviewers agrees that leveling the playing field to uniformly prohibit bribery is better than repealing the FCPA. It is better *economically* because it helps transitional economies avoid the effects of dead-weight loss,[4] it is better *politically* because it helps fragile economies make the transition to a capitalistic form of government[5] and it is better *morally* because it helps companies underscore they are not willing to bribe.[6]

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3. *See* BIALOS & HUSISIAN, *supra* note 1, at 146.
4. *See id.* at 147.
5. *See id.* at 150–51.
6. *See id.* at 169.

THE BOOK BY CHAPTER

Chapter one describes the nature of the problem addressed in the book. In developing economies that are or once were communist, such as China and Russia, there is often a blurring of the public and private sector. This blurring is exacerbated by the lack of developed ethics rules. U.S. firms face the dilemma of trying to remain competitive with foreign firms while being constrained by the FCPA's anti-bribery provisions. The authors explain that although it is widely illegal for government officials to accept bribes, the U.S. remains the only industrialized nation whose laws forbid corrupt payments outside of its borders.

Chapters two and three provide truncated guidance for business leaders interested in understanding the legal liabilities and defenses to the FCPA. For example, the FCPA covers only payments to government officials. It does not criminalize bribes made to private companies. Although many parties are subject to the FCPA's provisions, inadvertent violations are rare. A corrupt payment is a precursor to liability. It connotes an evil motive or purpose, such as an attempt to induce an official to misuse a government position in order to obtain or to retain business. The FCPA also prohibits payments through intermediaries.

Chapters four and five discuss factors a company should take into consideration when quantifying FCPA risks regarding transitional economy investment. By doing so, it underscores the previous chapters, which explain that a FCPA violation requires: (1) a corrupt payment made by an agent or subsidiary; (2) an act in furtherance of that payment; (3) knowledge by the company; and (4) ultimately prosecution by relevant authorities.[7] The chapters also discuss issues such as how to structure relationships with foreign subsidiaries and joint ventures, recordkeeping requirements for minority-owned foreign ventures, disclosure requirements when a FCPA violation is discovered, and what measures to take when dealing with distributors, officials of state-owned enterprises, sales agents or intermediaries.

Chapter six considers what additional steps, if any, the U.S. government should undertake to level the playing field for U.S. firms. The measures range from amending the FCPA to reducing demand for bribes and company incentives to bribe. In this set of reviewers' opinions, increasing pay will increase inequities in income existing between government and private sector workers in many countries without changing the marginal incentives to bribe; this is where strengthened enforcement plays a role.[8]

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7. *See id.* at 75.
8. *See id.* at 133 n.6.

A supply-side option advocated in the book is currently being implemented. As mentioned earlier, in May 1997, the OECD announced it formally adopted a recommendation to help suppress bribery in international business. The final recommendation commits OECD members to submit to legislative bodies proposals criminalizing bribery by April 1, 1998, and to seek enactment of those proposals by the end of 1998.[9]

EVALUATION

The great strength of this book lies in the breadth of advice it provides businesspersons interested in mitigating FCPA risks. It discusses what factors to consider before entering transitional economies and suggests ways to avert FCPA violations. But it is important to remember the book is intended for those in business, not law. While lawyers may be apt to examine hypotheticals and case-by-case scenarios, businesses often place a premium on definite solutions and advice. Those readers who wish to avoid sifting through the entire book to glean advice relevant to their situation should focus on the latter pages of chapter five.[10] These pages provide concise and well-documented advice regarding a company's duties to detect and disclose FCPA violations.

When a business discovers information indicating that corrupt payments are being made, the business must investigate. An internal inquiry should be undertaken when it appears senior management is involved, the conduct is likely to recur, the payment is large, the business is significant or it appears the payment could take place only with the complicity of multiple members of the business or its foreign subsidiary.[11] The authors helpfully note that outside counsel lend the appearance of impartiality and their reports are protected by the attorney-client privilege.

Upon discovering a bribe, the authors note a business faces difficult choices. Thankfully, they offer substantive suggestions of concrete actions that should be taken to divorce the business from an illicit payment. At a minimum some form of action should be taken, such as taking action

9. *See* Revised Recommendations of the Council on Combating Bribery in International Business Transactions, OECD Doc. C(97)123/FINAL (May 30, 1997) (adopted by the Council at its 901st session on May 23, 1997). *See also* OECD News Release, *OECD Countries to Reinforce Measures to Combat Bribery*, May 26, 1997 (visited Sept. 24, 1997) <http://www.oecd.org/news_and_events/release/nw97-44a.htm>; OECD News Release, *Statement by Mr. Donald J. Johnston, Secretary-General of the OECD, to Open the Conference on Bribery in International Business Transactions*, Nov. 6, 1996 (visited Sept. 24, 1997) <http://www.oecd.org/news_and_events/release/nw96100a.htm>.

10. *See* BIALOS & HUSISIAN, *supra* note 1, at 121–30.

11. *See id.* at 124.

against the offending employee or agent, ceasing all payments to that entity, promulgating strengthened ethical guidelines, requiring affirmations to comply with FCPA guidelines, or even canceling the illicitly obtained project.[12]

Regarding disclosure, the authors suggest the FCPA does not require disclosure of detected violations of U.S. law. However, a publicly reported company may wish to make disclosures because of Securities and Exchange Commission (SEC) rules.[13] Although the authors counsel that basic prudence and sensible corporate decisionmaking favors disclosure in most FCPA cases, they do recognize this decision is necessarily case-specific. Fortunately, to help in deciding whether to disclose a known violation, the authors suggest considering such factors as the probability that the violation will surface, the probable criminal or civil penalties, the effect of adverse publicity, the risks of forcing a broader government investigation and the likelihood that timely, voluntary reporting will lead to mitigation of sanctions.[14]

In other areas of the book, however, the authors' touch is less sure. The authors rely heavily upon secondary sources for support, and some citations are either incomplete or do not support the accompanying text. For example, the authors write, "A report prepared for President Yeltsin 'concluded that 70 to 80 percent of all banks and private enterprises have been victims of extortion.'" The citation reads, "*See* Statement of Sen. Mitch McConnell (D-KY)."[15] Because the authors did not cite directly to the report, it appears they are relying upon the Senator's statement without checking the underlying information. If so, the statistics the authors used in the text are questionable. This citation is also incomplete, and it is impossible for an interested reader to cross-check the statement. Finally, Senator McConnell is actually a Republican!

This set of reviewers also has reservations about relying upon the formulaic probabilities the authors devise in Figures B and C.[16] Both figures attempt to quantify the cumulative probability that a U.S. business will be held liable for a FCPA violation. In these figures, the authors evaluate the risks of (1) a corrupt payment occurring, (2) the business taking an "act in furtherance" (3) while having the requisite "knowledge" and (4) the violation being prosecuted by U.S. authorities. Figure B

12. *See id.* at 126.

13. Even if a payment was not material to the financial statements, it nevertheless could expose the company to a material contingent liability that arguably should be exposed on the company's financial statements.

14. *See* BIALOS & HUSISIAN, *supra* note 1, at 129–30.

15. *Id.* at 19 n.55.

16. *See id.* at 82–83.

estimates FCPA risks without risk mitigation, and Figure C includes mitigation.

Figure B estimates the risks to be 80% x 60% x 60% x 80%, finding a 23% cumulative probability of liability. Figure C estimates the risks to be 25% x 30% x 30% x 20%, finding a 0.45% cumulative probability of liability. Although decision-trees are helpful, additional work must be done to substantiate the above percentages to make the cumulative probabilities cited above meaningful. Why is there an 80% chance of a corrupt payment occurring? Even assuming the correct figure is 80%, why does risk mitigation drop this to 25%? The authors recognize that this approach has limitations, including that it does not incorporate a particular company's attitude toward risk, but it is important to clarify that the final quantitative percentages are pure estimates and are not based on data.

THOUGHTS ON CORRUPTION: SECTION 301 AND THE WTO

The authors merely touch upon an interesting idea regarding the use of the U.S. trade remedy Section 301[17] and the World Trade Organization (WTO)[18] to address foreign bribery. With passage of the OECD final recommendation calling for an end to toleration of foreign bribery, the eye of the international community is clearly focused on this issue. The authors argue that should foreign governments tolerate corrupt payments, a pattern of such toleration may be actionable under Section 301. Section 301 provides that the president shall take action against "an act, policy, or practice of a foreign country . . . [that] is unjustifiable and burdens or restricts United States commerce."[19] The authors opine that a foreign government failing to take adequate action to prevent private conduct that ultimately harms U.S. interests may have engaged in a state "act."[20] As the authors acknowledge, this is a novel and untested approach.

The authors also argue that illicit payments may be in contravention of WTO obligations. But if this is actionable before the WTO as the authors suggest, it is still debatable whether the U.S. must first utilize the WTO's dispute settlement mechanism before imposing unilateral sanctions pursuant to Section 301.[21] At least one government has argued

17. *See id.* at 120–21.

18. *See id.* at 159–62.

19. 19 U.S.C.A. § 2411(a)(1)(B) (West Supp. 1997).

20. BIALOS & HUSISIAN, *supra* note 1, at 121.

21. *See* A. Lynne Puckett and William L. Reynolds, *Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, 90 Am. J. Int'l L. 675 (1996) (stating that the USTR may be increasingly reluctant to pursue unilateral sanctions under Section 301 and more likely to defer to WTO dispute settlement to strengthen the multilateral system).

that resort to Section 301 unilateral sanctions would be inconsistent with WTO Member obligations.[22]

The Final Act establishing the WTO creates a single institutional framework encompassing the General Agreement on Tariffs and Trade (GATT), as modified by the Uruguay Round. Basically, the Final Act contains legal texts defining WTO Member obligations, establishing dispute settlement procedures, encouraging greater transparency in national trade policymaking, and specifying plurilateral trade agreements, which are agreements managed by the WTO but not covered by the Uruguay Round.

WTO Members must accept all the results of the Uruguay Round without exception. The Government Procurement Agreement[23] is a plurilateral trade agreement and is therefore not covered by the Uruguay Round. Members choose whether to be bound by its provisions.

Although the authors do not discuss specific provisions in great detail, they argue the Government Procurement Agreement may restrict illicit foreign payments.[24] Article XIII(4) of the Government Procurement Agreement governs the award of contracts. In addition, Article VII governs tendering procedures. Whether a foreign bribe violates these provisions is left as a matter for further research.

As the authors note, GATT Article XI may also prohibit bribery.[25] Although the authors again do not discuss the issue in detail, this set of reviewers notices an interesting question. If Article XI does prohibit illicit foreign payments, would it do so through a violation or a non-violation complaint?

In a *violation* complaint, Members allege that a measure of another WTO Member is inconsistent with its WTO obligations.[26] Violation

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22. *See* United States—Imposition of Import Duties on Automobiles From Japan Under Sections 301 and 304 of the Trade Act of 1974, Request for Consultations by Japan, WTO Doc. WT/056/1 (May 22, 1995) (Japanese allegations that the United States' proposed import surcharges violated GATT Articles I and II. Status reports on WTO disputes may be found on the Internet at <http://www.wto.org/wto/dispute/bulletin/htm>).

23. The GATT Government Procurement Agreement (1996 Code), as renegotiated at Marrakesh, updates and improves the 1979 Tokyo Round Government Procurement Agreement. *See Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements*, 103d Cong., 2d Sess., H. Doc. No. 103-316, at 1719 (1994). *See also id.* at 1037 for a discussion of the Code's provisions.

24. *See* BIALOS & HUSISIAN, *supra* note 1, at 160.

25. *See id.*

26. For an excellent guide to the text of the GATT see WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE (1995). "GATT 1994," as defined in Annex 1A of the WTO Agreement, includes the original text of the GATT (GATT 1947), legal *acquis* of the GATT up to 1994, the understandings negotiated at the Uruguay Round and the Marrakesh protocol. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1140, 1154 (1994).

complaints are not concerned with whether the application of the law is proper, but whether the domestic law itself violates WTO Member obligations. In *non-violation* complaints, Members allege that any benefit accruing to it directly or indirectly is being "nullified or impaired" by application of the law, not that the underlying law itself conflicts with WTO obligations.[27]

In WTO violation complaints, the panel or appellate body makes a recommendation that the violating Member bring the measure into conformity with the WTO agreements. In WTO non-violation complaints, the panel and appellate body recommendations are limited. Where a panel has found that a measure of a Member nullifies or impairs benefits but does not conflict with the provisions of a covered agreement (a non-violation case), a panel must only recommend that the parties reach a "mutually satisfactory adjustment." In such cases, there is no obligation to change the WTO consistent measure but the party nullifying and impairing benefits must cease the infringing activity. A country may bring both a violation and a non-violation case, such as the U.S. has done in the Fuji film dispute with Japan.[28]

GATT Article XI provides for a general elimination of quantitative restrictions. All WTO Members are bound by its provisions. Article XI:1 reads, in pertinent part, "[n]o prohibitions or restrictions . . . , whether made effective through quotas, import or export licences *or other measures*, shall be instituted or maintained by any contracting party on the importation of any product . . . ."[29] Although the authors have not examined this issue, the following presents some introductory research into an area that requires additional attention.

The 1988 Report of the Panel on "Japan—Trade in Semi-Conductors" determined non-mandatory government requests constituted measures in contravention of Article XI. The panel determined that (1) there were reasonable grounds to believe sufficient incentives existed for non-mandatory measures to take effect and that (2) the operation of the measures was dependent on government action. Because the difference between the measures and mandatory requirements was only one of form and not of substance, the Japanese government's action was inconsistent with Article XI.[30] Similarly, perhaps incentives to bribe government

27. GATT 1994 art. XXIII.

28. *See* Japan—Measures Affecting Consumer Photographic Film and Paper, Request for the Establishment of a Panel by the United States, WTO Doc. WT/DS44 (Sept. 23, 1996). Recent WTO documents are also available on the Internet at <http://www.wto.org>.

29. GATT 1994 art. XI (emphasis added).

30. *See* Japan—Trade in Semi-Conductors, Report of the Panel, paras. 104–109, at 38–40, GATT Doc. L/6309 (Mar. 24, 1988).

officials could likewise be in contravention of Article XI. Of course, this assumes the bribery prohibits the importation of a *product.*

Perhaps a non-violation case also may be made regarding bribery. The 1984 Report of the "Panel on Japanese Measures on Imports of Leather" found restrictions on leather imports constituted a *prima facie* case of nullification or impairment. According to GATT practice, Japan had the burden of rebutting the presumption that nullification or impairment had actually occurred. The panel presumed nullification or impairment because of the volume of trade affected, the increased transaction costs and the uncertainties created regarding investment plans.[31] Similarly, bribery often involves contracts worth millions of dollars, undoubtedly increases transaction costs and creates investment uncertainties.

Whether the WTO is a proper forum for dealing with illicit payments is an area for further scholarly work. However, if members do request dispute settlement consultations for a violation or a non-violation case, such disputes would be settled relatively quickly under the WTO's adjudicative dispute settlement process.

CONCLUSION

Foreign bribery has generated a great deal of attention in the last twenty years. The trend seems to indicate that governments are outlawing such activities. In addition, perhaps international forums such as the WTO may be used in the future to address the problems posed by illicit payments. As an examination of the underlying principles of the law of the FCPA and its provisions, we hope this book will be only the first among more to come addressing this important topic.

31. *See* Panel on Japanese Measures on Imports of Leather, Report of the Panel, paras. 47–48, 53, 55, at 15–16, GATT Doc. L/5623 (Mar. 2, 1984).