The US Foreign Corrupt Practices Act and its implications for the Control of Corruption in Political Life

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The passage of the Foreign Corrupt Practices Act (FCPA) by the US government in 1977 was a watershed event in the fight against corruption in the post-war era. Its criminalization of bribery on the part of US citizens and corporations conducting business overseas, and its provisions for mandatory self-regulation through internal control mechanisms, maintenance of transaction records and other accounting practices made it unique: between the passage of the Act in 1977 and the adoption of the OECD anti-corruption convention in 1997 no other nation initiated similar legislation.[1] Recent studies, however, raise significant questions about the efficacy of this American initiative. Concerns have taken a number of forms. In 1999, Transparency International released the results of a survey ranking 19 leading exporting countries by the degree to which their companies were perceived to be paying bribes abroad.[2] The United States ranked ninth of nineteen countries in the resulting 'Bribe Payers Index'. Accompanying the United States in ninth position was Germany, a country where, until very recently, bribes paid to foreign public officials were both legally acceptable and deductible as legitimate expenses for taxation purposes.[3]

These results are not entirely surprising. The period following the passage of the FCPA was one of exponential growth in world trade. It was also a period of exponential growth in the incidence of corruption. American companies shared in that growth in all economic sectors. Although American business leaders claimed, following the passage of the FCPA, that the FCPA was costing them business opportunities, a 'Report to Congress of the United States'[4] dated March 4, 1981, noted that between 1977 and 1981 American exports had increased even in those areas where (a) White House task force (had) reported that the Act (had) had a significantly negative impact (on the ability of American corporations to compete effectively)'. (Comptroller General 1981, p. 17) The same report acknowledged that the

'SEC had emphasized that (as of 1980) it had no empirical evidence concerning the actual impact of the Act on business'.

A more recent study[5] reports that between 1986 and 1995, 'the US share of export trade to industrial countries maintained a continuous, steady growth pattern. The American share of the export trade in Asia rose from 20 percent to 31 percent, while in Africa it grew 70 percent between 1991 and 1996'.[6] The authors of the report point out further that 'from the 1980s to the 1990s US trade with 'bribe-prone' countries actually . . . outpaced trade with non-'bribe-prone' countries'.[7] They attribute the increase to 'larger shipments of aircraft, construction equipment, oil and gas field machinery, telecommunications and medical equipment,' areas where the American companies themselves reported (in a General Accounting Office survey) that American companies 'were more likely to be adversely affected by the Act'.[8] That is to say, American exports were growing faster in markets particularly exposed to corrupt practices than in areas in which corruption was less prevalent.

Most recently, two senior lawyers, Tracy W. Young and Henry H. Rossbacher, with extensive expertise in FCPA matters, point to the lack of FCPA prosecutions (by 1996), the lack of ongoing formal investigations into potential corruption, and the sheer pragmatic reality of transnational business in a global environment, and comment:

> The uncomfortable fact . . . is that these few are the only [FCPA] prosecutions in almost twenty years. And many were uncovered not by the SEC or Department [of Justice] but almost adventitiously by the press. It beggars the imagination to believe that corporations which reported $400,000,000 in bribes so few years ago [i.e., the questionable payments reported to the SEC by US corporations as part of the agency's Voluntary Disclosure Program of 1975] have been reformed so totally.[9]

What all of this taken together would seem to suggest is that the FCPA has not had a significant impact on the **general** standards of conduct of American corporations trading in international markets. It is a suggestion, however, that will for some have an anomalous and unsettling ring to it. It will be viewed by some as unsettling because it might appear to imply that determined and successful international efforts resulting in, for example, the OECD anti-corruption convention created in 1997 and ratified in 1998, modeled as it was on the American FCPA, were therefore unwarranted and unlikely to have their desired effect. It may well be viewed as anomalous because it flies in the face of the experiences of lawyers who have worked extensively with the FCPA and with the self-assessment of American companies reported in a variety of surveys and reflected in reports of financial resources expended to build effective compliance programs.

Some examples will serve to make the point. In extensive correspondence in response to earlier drafts of this paper circulated for comment, two lawyers involved in the creation and enforcement of the FCPA and the task of building corporate compliance programs for corporations falling under the Act, challenged the suggestion that the FCPA did not and has not had a dramatic impact on corporate behaviour. One correspondent pointed out that '(c)orporations spend vast sums of money training employees in FCPA matters and employ a substantial number of lawyers and internal auditors who do nothing other than FCPA compliance work'. A second correspondent commented that:

> A clear indication of the level of US corporate concern is the attendance at seminars on FCPA compliance. These are held several times each year, in different areas of the country, and are attended by hundreds of corporate lawyers and compliance managers. Many large law firms have partners who are FCPA specialists, as do corporate law departments. Two extensive treatises on FCPA compliance have been published. None of this would exist if US companies did not have serious interest in complying with the FCPA.

Surveys of the corporate community support these observations. In his report to the American Congress in 1981, the US Comptroller General pointed to the results of a General Accounting Office survey of 250 companies randomly selected from the Fortune 1000 list. Thirty percent of companies responding reported the loss of foreign business as a result of the Act. Forty-two percent of the top Fortune 500 companies that responded to the survey reported lost business due to compliance with the Act. Fifty-five percent of companies responding to the survey reported that their compliance efforts had resulted in significant costs. Fifty percent of those companies reported that their compliance programs had increased their accounting and auditing costs by 11 to 35%. Twenty-two percent reported that the burden increased their accounting and auditing costs more than 35%. Fifty-five percent reported that the costs of compliance exceeded the benefits.

American corporations have, with very few exceptions, argued consistently since the passage of the Act that it created an unfair disadvantage for American corporations in their efforts to export goods and services. The difficulty with these reports of the FCPA's effectiveness lies in the fact that they rely virtually exclusively on self-reported compliance. The Geo-JaJa/Mangum study, already cited, which focused on the consequences of the FCPA for US trade in Nigeria is a good example. The ostensible purpose and conclusion of that study was to demonstrate that the FCPA was in fact not an impediment to US companies trading in global markets. The study examined the success of US companies in Nigeria (as well as a number of other countries in which corruption is thought to be widespread). The authors of the report then contrasted their empirical findings with the results of a survey of US companies active in Nigeria. Survey respondents are reported as unanimous on two points. First, they all agreed that corruption in Nigeria was widespread and endemic. Second, they agreed that American companies did not bribe. Based on these findings, the authors of the study conclude that the FCPA has been effective in persuading American companies not to engage in bribery and that this change in behaviour has not impeded their ability to compete effectively, even in notoriously corrupt economies.

It is hard to ignore the ironic character of this conclusion, however. For, either the level and growth of corruption in countries like Nigeria since the passage of the FCPA has been fuelled entirely by the activities of non-US companies, or the source of the bribes fuelling corruption is entirely domestic. Neither of these options seems plausible. They are seriously at odds with findings reported in Transparency International's Corruption Perceptions Index. They seem to be seriously at odds with the heavy involvement of US companies in the developing world. And they would appear to be at odds with studies that point to the close relationship between increasing international competition and globalization and the growth of corruption, particularly in developing economies.

This paper takes the position that the US FCPA did not result in higher standards of conduct on the part of American companies in international markets and seeks to understand why that is the case. We trace the forces that led to the Senate investigations that in turn resulted in the passage of the FCPA in 1977. We examine the structure of the FCPA, its connection to legislation enacted in the 1930s designed to build transparency into the trading of securities on American stock exchanges, and exemptions related to the protection of the national security interests of the United States. We examine the role given to self-regulation, the response of American corporations to that role, and the history of enforcement between 1977 and 1995. We conclude that the Act has not had a significant positive impact on general or overall standards of international business conduct of American corporations, at least with respect to the bribery of foreign public officials. We trace the reasons for this to the impact of US foreign policy on the enforcement of the FCPA, the impact of globalization on the willingness and the capacity of American corporations to meet their obligations under the Act, and finally, the intersection of foreign policy concerns and competitive pressures and their implications for compliance and enforcement.

Our conclusions are important for two reasons. First is the growing consensus worldwide that corruption has been exacerbated by the phenomenon of globalization while seriously damaging the capacity of developing countries to realize the economic and social benefits on which justifications of globalization have been built. Second, in 1997, the industrialized world was finally persuaded to follow the lead of the United States and endorse an OECD convention modelled on the FCPA's criminalization of the bribery of foreign public officials. With the entry into force of this convention in February 1999, a new chapter was added to the fight against corruption in international business transactions. How effective the convention will be in controlling the supply side of corruption will depend in part, we surmise, on what can be learned from the American experience with the enforcement of the FCPA.[10]

HISTORICAL OVERVIEW OF THE FCPA

The post World War II era witnessed the extraordinary growth of American power and influence. Apart from obvious initiatives such as the Peace Corps and the Marshall plan, important new global institutions such as the United Nations and the World Bank were created and functioned with strong US support and sponsorship. To a large degree, this was made possible by the sheer economic power that US corporations were able to exert worldwide within the structure of the international financial framework established by the Bretton Woods Agreement of 1944. The US dollar, the value of which was fixed to the price of gold, became the world's base currency against which all other national currencies were measured. The international stature of the dollar was backed up by US worldwide industrial dominance, which was reflected in the fact that the US accounted for 40% of the world's industrial output and 20% of its exports. The subsequent worldwide demand for dollars as the means of financing world trade gave the American government and American multinational corporations the power to establish international standards of business conduct.

Reports that the International Telephone and Telegraph Corporation (ITT) had offered the US Central Intelligence Agency (CIA) $1 million in 1970 to block the election of Marxist presidential candidate Salvador Allende in Chile were the first clear indication that something was seriously amiss. The CIA declined the offer. However, in 1972 when the story became public knowledge, the Senate Committee on Foreign Relations formed the Subcommittee on Multinational Corporations headed by Senator Frank Church with a mandate to investigate this issue. The Church Subcommittee concluded that ITT had not acted unlawfully. It did not leave the matter there, however. What was not to be condoned, it stated, was the fact 'that the highest officials of ITT sought to engage the CIA in a plan to covertly manipulate the outcome of the Chilean presidential election. In doing so the company overstepped the line of acceptable corporate behaviour'.[11] The standard that had been breached was therefore an ethical not a legal standard of international business conduct for American corporations.

Had the ITT incident been an isolated event, it would not have had the impact it did. Unfortunately, it was not. As allegations of corporate misconduct overseas emerged from the Watergate investigations, it became increasingly clear that the practice of questionable payments to foreign government officials by US firms was widespread. The Allende government demand of $1 million from multinational corporations as protection against expropriation was one example.[12] The contributions of Gulf Oil to the Korean government were another.[13]

As the ITT case came to its conclusion in mid-1973, the mandate of the Church Subcommittee was expanded to investigate the questionable activities of a variety of US multinationals that were coming to light as a result of the Watergate investigations.[14]

Subsequent investigations by the Church committee were able to establish the widespread nature of questionable payments, to date the practice from the early 1960s, and to show that the size of questionable payments had grown substantially through the late 1960s and early 1970s. For example, Lockheed Aircraft Corporation, which by February 1976 had felt itself compelled to pay out more than $200 million in questionable payments, had been able to resist a $100,000 kickback requested on the sale of four Jetstars to the government of Indonesia in 1965.[15] Gulf Oil's payments to the Democratic Republican Party of Korea increased from $1 million in 1966 to $3 million in 1970, followed by a further solicitation for $10 million.[16]

It was argued in Senate hearings that US companies had to pay bribes to compete with foreign multinationals that were out to win market share from their US competitors. Since European corporations could deduct bribes as business expenses for tax purposes, an option not available to their American competitors, [17] competitive pressures may well have encouraged them to escalate the level of bribery to win business away from US competitors.

Competitive pressures were not an insignificant problem for American companies. By the mid-1970s some US corporations were earning half their pre-tax profits from foreign operations.[18] Maintaining market share was therefore a matter of strategic importance. There was therefore considerable pressure on companies competing in international markets to win acceptance for the view that if American companies were to remain competitive they had to accept prevailing 'local' standards of business conduct however distasteful they might appear to an American public. These arguments were in the end rejected by US legislators. However, they did illustrate the pressures an increasingly competitive international business environment was creating for multinational companies.

Those for whom bribery was a rational response to international business competition faced two powerful counter-arguments requiring a legislative response. First was the commitment of the SEC to the importance of maximizing the disclosure of relevant financial information for stockholders. The second was concern for the implications of corrupt practices by US corporations for American foreign policy.

The SEC commitment to ensuring financial transparency for the benefit of investors had, by the 1970s, a long legislative history dating from the dark days of the Depression in the 1930s. The Securities Act of 1933, the Securities Exchange Act of 1934, and other New Deal legislation were intended to maximize transparency of corporate conduct and to enhance the reporting of relevant information to both investors and securities enforcement agencies. The problem was that no provision had been made in any of this legislation for payments to foreign officials, much to the consternation of SEC officials called in to investigate potential violations of federal securities law during the Watergate crisis.

The Watergate investigations exposed the efforts of Nixon's Committee to Re-elect the President to illegally solicit campaign contributions from corporations during the 1972 federal election. But the Watergate investigations also revealed corporate slush funds used not only to aid Nixon but also to make questionable payments to foreign parties. This practice turned out to be widespread: over 400 corporations eventually admitted to making irregular or questionable payments totalling more than $300 million.

The SEC recognized that the general acceptance accorded by the US business community to the practice of overseas bribery[19] challenged long accepted principles of ethical securities trading in the United States. On the other hand, the SEC was concerned with proposals that were not within its enforcement capacities.[20] Its response was to launch a Voluntary Disclosure Program in 1975, placing the onus on US corporations governed by federal securities law to identify and report material foreign payments of a questionable nature. Since existing law did not include foreign payments, it was left to each corporation to determine what payments it felt were 'material', that is, significant enough to be reported to its stockholders. Monitoring, investigating, and reporting were to be conducted by audit committees comprised of directors who were not corporate executives and not linked to suspect transactions.[21] By the mid-1970s, committees of this kind had been a common feature of American corporate governance for almost 30 years and had proven useful in eliciting voluntary corporate efforts to improve audit standards and accountability.

In addition to concerns about securities trading, the various investigations also raised concerns about the conduct of American foreign policy. It was inevitable, therefore, that, as the various Senate hearings wound their way towards their conclusions, the question of effective remedies would come to the fore. The SEC pressed for provisions that would continue to put the onus on corporations to monitor themselves and therefore reduce its own enforcement role.[22] The Church Subcommittee, for its part, drafted Bill S. 3379 requiring disclosure of all overseas payments made by US corporations, annual reports by the State Department to the House and Senate listing the nations to which these payments were made, the particulars of US foreign policy objectives in these states, and payment disclosures to the stockholders of the applicable corporations. The Ford Administration opted for a disclosure bill that would require the reporting of payments to the Department of Commerce with subsequent reporting (at the discretion of the State Department) to the foreign governments in question, which in turn could choose to initiate prosecution against offenders under its own laws.

The Ford administration proposals, with their emphasis on disclosure, were repudiated by Senator William Proxmire, the chairman of the Senate Committee on Banking, Housing, and Urban Affairs. Proxmire argued that Ford's 'Foreign Payments Disclosure Act' would grant to multinational firms the US government's tacit approval of overseas bribery practices.[23] Proxmire then advanced his own legislation, Bill S. 3133, which advocated criminalizing bribery payments and amending the 1934 Securities Exchange Act to include bribery as a prohibited practice.. These amendments included a disclosure requirement for all payments over $1000 to foreign officials. The SEC protested this requirement on the grounds that it would make the revised Act impossible to monitor. Proxmire then revised his bill into the form that would become the FCPA and agreed to drop his disclosure provision, favouring the SEC's proposal to make companies legally responsible for establishing accounting controls and detecting suspect transactions. The result was shared responsibility for enforcement, since suspect payments by firms not covered by securities laws would now become the responsibility of the Justice Department.

Proxmire was quite explicit about the reasons for his approach to anti-bribery legislation. Mere disclosure, in his view, was insufficient. What was required, he argued, was 'a national policy against corporate bribery that transcended the narrower objective of adequately disclosing material information to investors'.[24] '[A] strong anti-bribery law' that criminalized the bribery of foreign public officials, he reasoned, 'would help US multinational companies resist corrupt demands'.[25]

Proxmire's position irritated some business leaders, who felt that the proposal by the Ford administration for a multilateral agreement by U.N. member states, that is to say, an international anti-bribery treaty, was a preferable option. It was their view that a multilateral agreement or treaty would bolster the existing 'Foreign Payments Disclosure Act' and provide legal uniformity to international markets, while allowing multinationals to avoid the dilemma of risking US government prosecution in situations where they followed local practices with a view to gaining or retaining market share. Top US government officials, including Henry Kissinger and Elliot Richardson, disagreed. They argued that the proposals for an international treaty were not practical and would never garner approval from all members of the international community.[26]

A code of conduct drafted by the OECD as well as a code developed by the United Nations Commission on Transnational Corporations containing anti-bribery provisions also met with resistance from multinationals,[27] as corporate leaders believed that any uniform code of a general nature was unrealistic and would be too restrictive.

Proxmire himself was also sceptical that a general OECD code would do much good,[28] arguing that bilateral treaties would be more likely to complement his criminalization proposals.[29] He concluded: 'The Committee [on Banking, Housing and Urban Affairs] firmly believes … that an American anti-bribery policy must not await the perfection of international agreements, however desirable such arrangements may be'.[30] The urgency lay not in the enforcement of US securities laws. Rather, the crucial importance of the FCPA lay in the domain of US policy:

> Bribery of foreign officials by some US companies casts a shadow on all US companies . . . [and] creates severe foreign policy problems. The revelations of improper payments inevitably tend to embarrass friendly regimes and lower the esteem for the United States among the foreign public. It lends credence to the worst suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems.[31]

The link to US foreign policy objectives was therefore a central feature of the FCPA from its inception.

The Foreign Corrupt Practices Act became law in 1977 at the conclusion of deeply disturbing hearings whose effect was to challenge the moral authority of American political institutions and leadership. The Act prohibited payments made directly or through an intermediary with a view to influencing a foreign official in the performance (or non-performance) of authorized duties and functions in exchange for unwarranted benefits or considerations. Prohibited bribe recipients included foreign government officials and all foreign political parties and candidates (as well as all intermediaries for people in these positions). Officers of foreign businesses without political or governmental connections were excluded from these provisions. The Act's proscriptions against bribery were accompanied by accounting stipulations regarding transaction recording and internal control as well as disclosure requirements respecting changes in ownership of businesses subject to FCPA jurisdiction. These provisions were designed to prohibit corporate slush funds that had been discovered to be instrumental in disbursing irregular payments to agents, government officials and political parties.

The original Act was focused on criminalizing payments to high-level foreign officials, rather than those who performed 'clerical' or 'ministerial' functions. Thus, so-called 'grease' payments or facilitating payments were not excluded as such, but excluded by means of association with the position descriptions of low level officials whose job responsibilities would centre on routine duties.[32] This focus on the stature of the foreign officials in question allowed the Act to facilitate prosecution based on 'reason to know' standards. Corporate officers could be deemed, by virtue of their position in management, to have a reason to know that payments were being made for the purposes of bribery.

Finally, the original Act was divided between corrupt practices by companies registered as issuers of securities and those 'domestic concerns' that did not issue securities. This division facilitated a division of responsibility with respect to the enforcement of the Act. The Securities and Exchange Commission (SEC) would be responsible for civil enforcement of accounting standards with respect to issuers of securities while the Justice Department would be concerned with criminal violations of the Act.

The Act was subsequently amended in 1988 as part of the Reagan administration's Omnibus Trade Act. New 'corporate friendly' provisions in this Act made prosecutions more difficult first by stipulating that officers of firms offering bribes must be proved to have direct knowledge that payments were being used for illicit purposes (as opposed to the old 'reason to know' standard) and second by allowing payments lawful in host countries or made contractually to agents in reasonable exchange for legitimate promotional services. Facilitating payments were also explicitly defined and were excluded regardless of the stature, position or role of the foreign official receiving them. Although these changes restricted the scope of the FCPA, the actual number of potential FCPA cases investigated increased after passage of the Omnibus Trade Act,[33] in part because the amendments defined more clearly the legal obligations of corporations. Changes in the foreign policy priorities of the George Bush Sr.

administration also had an impact in this regard, a subject we discuss in some detail below.[34]

Designed to maximize the disclosure of relevant information to stockholders in US corporations and to establish an elevated standard of business practice for US firms overseas, the 1977 Act was grounded in the belief that the twin disasters of the Vietnam War and Watergate had cost the US the moral authority that went with its role as the leader of the free world. The tone of moral outrage and the urgency of moral reform would constitute a major theme of the Carter administration.

THE SEC, SELF-REGULATION AND THE FCPA

Time and again in pre-FCPA hearings, the SEC made it clear that its chief motivation in placing the burden of enforcement on the self-regulatory activities of corporations themselves rested on the fact that it lacked the resources to effectively enforce the anti-bribery requirements of the amendments to securities laws that were to be incorporated into the FCPA. The agency was only too happy to enthusiastically promote corporate principles of 'new governance' requiring high standards of accountability grounded on the work of independent audit committees that would oversee stricter policies using enhanced systems of internal control for monitoring international business conduct. Hence, the SEC was not reluctant to support amendments to securities laws requiring higher standards of self-regulation that depended upon effective systems of internal control.

Corporations, on the other hand, had little reason to share the SEC's enthusiasm for 'the new governance'. Given unremitting pressure for improved profitability, US multinationals could not afford to treat their overseas operations as a minor theatre of operations where experiments in morality could be conducted. Because of tax and cost differentials, there was too much profit to be made from foreign operations at a time when domestic profits at home were under siege. American corporations were generally opposed to the FCPA because of the belief that it would result in the loss of business to less scrupulous foreign competitors.[35] The FCPA legislation would also complicate established provisions in securities law with respect to suspect transactions. Although the use of agents to transact business with foreign governments was not prohibited, the FCPA also held corporations using agents responsible for ensuring that these agents respected the anti-corruption provisions of the US legislation. This burden was made explicit by the 'reason to know' provisions of the 1977 Act, the purposes of which were to

> . . . create a standard of negligence that imposes a duty on corporate management to inquire about possible improper or illegal payments. It is thus hoped that the anti-bribery provisions would produce accountability, and that to avoid criminal accountability, self-enforcing preventative mechanisms would be introduced at the corporate level.[36]

The ‘reason to know’ provisions were thus integral to Senator Proxmire’s original vision of the purpose of the FCPA. The goal was to block the use of ‘plausible deniability’ as a defence for questionable transactions that slipped past ‘reasonable’ internal control mechanisms required by the Act.

The FCPA’s unilateral ‘supply side’ approach to controlling corruption placed a considerable legal and moral burden on US multinational corporations,[37] as an analysis of early SEC investigations and legal actions reveals. Members of the business community criticized this burden as unfair, since it placed anti-bribery restrictions on American companies in increasingly competitive international markets under conditions of corruption over which many believed they had no control.[38] It is not surprising, therefore, that many in the US business community supported the efforts of the Reagan administration throughout the 1980s to soften the application of the FCPA by eliminating the ‘reason to know’ provisions of the Act.

It is clear that the FCPA posed both competitive and control challenges for US corporations competing in international markets. The nature of those challenges is revealed by enforcement measures undertaken by the SEC. *SEC v Katy Industries, Inc.,*[39] which was brought within six months of the passage of the FCPA, established ‘reason to know’ as an important principle and set the stage for later significant SEC cases, the most important of which was *SEC v Ashland Oil, Inc.,*[40] in 1986.

Ashland Oil first came to the attention of the SEC as a result of investigations conducted by the Office of the Special Prosecutor in connection with the Watergate hearings.[41] From the early 1960s to detection in 1973, Ashland was found to have made extensive political contributions (estimated at $300,000[42]) to the ruling party of the African nation of Gabon, a former French colony with a long history of corrupt activity.[43] These payments were made primarily to gain access to authorities for the purpose of gaining normal permits for business operation. Company officers were aware that the payments were illegal; however, they believed that the relevant laws would not be enforced because such payments were an accepted business practice.

The SEC cited Ashland for breakdowns in internal control procedures and accounting practices, which were attributed largely to rapid corporate growth and expansion of operations overseas. The commission recognized that demand determinants constituted a key factor in the initiation of payments, acknowledging that '… political contributions … in some instances were made in response to real or apparent pressure from public officials or their close political associates'.[44] The SEC found, nonetheless, that the specific actions of company officers were serious enough to warrant dismissal, even while acknowledging that violations of federal prohibitions against political contributions had become a common corporate practice. The commission recommended against dismissal, however, on the condition that the officers in question provided an appropriate settlement with the corporation to compensate shareholders for these unwarranted expenditures. This outcome reflected the fact that the SEC was in the end satisfied with the effectiveness of the internal control procedures that were implemented by Ashland to prevent any recurrence of such payments. To use their words: 'We believe that the policies, operating procedures and structural changes recommended in this Report provide such safeguards and that the monetary settlement recommended herein provides a reasonable recovery for the Corporation'.[45] Subsequent events belied this confidence, for, five years later, the Company found itself again the subject of an SEC investigation.

This second investigation determined that, in 1980, Ashland purchased a majority interest in Midlands Chrome Inc., a mining firm operating in Zimbabwe (a purchase made shortly after that nation's independence) that proved to be unprofitable. The purchase price of $29 million was made to an organization controlled by an official of the government of Oman. In December 1982, Ashland contracted with the government of Oman for the delivery of 20,000 barrels of crude oil per day at a discount of $3 per barrel below the spot market price. This concession in itself would have generated some $40 million in profits for Ashland. The company claimed that the contract was granted in exchange for 'technical services rendered' to the Omani government, but the company's CEO had allegedly told his board of directors in 1980 that the Midlands Chrome acquisition 'had the potential for being more than offset by a potential crude oil contract'.[46]

The SEC investigation concluded that Ashland was guilty of improper accounting and defective internal control mechanisms that failed to detect the illegitimacy of what the company purported to be *bona fide* transactions under the terms of the Omani contract. It would seem that little had changed over the five years intervening between the two investigations.

A second case, *SEC v Montedison*, which was filed as a civil injunctive action in November 1996, offers additional insights into enforcement of the accounting provisions of the FCPA.[47] Montedison, an Italian company with listings on the New York Stock Exchange and 6% ownership by US investors, was charged with failure 'to devise and maintain a system of internal control'[48] and with materially misstating its financial condition for fiscal years 1988-1991. The company had attempted to conceal payments of $398 million, much of which, according to the SEC, was intended for bribes to Italian politicians. It was alleged that Montedison's financial statements and records materially overstated the company's assets with the consequence of misleading investors. Although in violation of the FCPA, the company's conduct was consistent with current business practices of other Italian firms involving misstatement of assets for tax purposes and covert payments to Italian politicians.

Montedison was charged under the accounting provisions of the FCPA and not under the anti-bribery provisions, since Italian officers of an Italian company were bribing Italian politicians. However, since the American Depository Receipts (ADR's, namely that portion of Montedison stock registered for sale to US investors under the provisions of the 1934 Securities Exchange Act) represented 6% ownership of the company by US investors, the SEC could claim that the concealment of bribes in Italy resulted in a misstatement of its financial condition, thus misleading US investors. Under accounting provisions of the FCPA, Montedison had a legal obligation to maintain internal controls required to identify any material irregular transactions ($398 million) and report them to the SEC.

Two other cases investigated by the SEC involved outright falsification of financial records. *SEC v Triton Energy Corp. et al.*[49] revolved around the payment of $450,000 in bribes to independent agents in order to influence Indonesian officials on the company's behalf using false invoices for non-existent services.[50] In another case, American Eurocopter was discovered to have paid $10 million to an Israeli agent through the outright falsification of company records. Payments involving the improper transfers of funds through corporate affiliates had been concealed by the destruction of records.

This review of the application by the SEC of the accounting provisions of the FCPA raises two questions. First, did the accounting provisions of the FCPA effectively deter companies falling under its provisions from engaging in corrupt business practices in their international operations? Second, did the self-regulation requirements of the accounting provisions lead companies falling under its provisions to establish effective approaches to self-regulation?

Because of the nature of corruption, evidence relevant to answering the first question must by necessity be indirect. The only clear evidence pointing to the effectiveness or ineffectiveness of the FCPA in discouraging the use of bribery by US corporations in international business transactions is the Transparency International Bribe Payers Index. That study, reported in 1999, suggests that from the perspective of those surveyed, the reputation of US companies falling under the Act was not significantly different from companies not facing similar legal restraints.[51]

Nothing arising from this review of the accounting provisions of the FCPA would suggest that the results of the Transparency International survey are inaccurate or misleading. Confidence that accounting provisions could be an effective mechanism of enforcement was based on the experience of the SEC with the self-regulatory provisions of securities laws dating to the 1930s. The effect of the FCPA, however, was to change radically the context in which the law would apply. As Howard J. Krongard notes:

> The FCPA . . . included substantial 'accounting provisions' the application of which was unrelated to 'foreign' or 'corrupt' practices. Despite efforts by some commentators at the time the legislative and rule-making proposals were first made to call attention to these provisions, to the enormous interpretive problems they presented and to the need for thoughtful comment and discussion, very little careful analysis was had.[52]

First, the FCPA put the burden of compliance squarely on the shoulders of the companies falling under its authority while giving those companies wide latitude in establishing the accounting provisions required in their own particular case. Second, unlike other securities laws, the FCPA required that American companies regulate their conduct in settings where foreign competitors were not similarly constrained. US corporations were virtually unanimous in their opposition to the unilateral character of the legislation.[53] The setting was, as a result, not particularly conducive to effective self-regulation.

The pattern of enforcement of the accounting provisions that emerged did little to counteract initial lack of enthusiasm for the law on the part of the business community. Between 1977, when the FCPA was enacted, and 1995, only seven charges were laid under the accounting provisions and only three cases under the revisions to Section 30A of the revised Securities Exchange Act (made part of the FCPA), which prohibited payments to foreign officials by issuers of securities (under 'reason to know' provisions). It seems implausible to suggest that the circumstances under which the companies that were charged operated were unique or that the companies in question were significantly different from other US companies similarly engaged in international markets. Neither is there any indication that the FCPA deterred US companies from doing business in notoriously corrupt countries.

In short, there is nothing about the history of the enforcement of the accounting provisions of the FCPA that would suggest that they constituted a significant general deterrent to corrupt business practices on the part of US companies engaged in international markets.[54]

Did the self-regulation requirements of the accounting provisions lead companies falling under its provisions to establish effective approaches to self-regulation? In the previously noted 1981 survey by the US General Accounting Office of 250 companies selected randomly out of *Fortune* magazine's top 1000 companies, it was revealed that 60% of them had made explicit changes in their codes of conduct because of the FCPA, while 75% had updated their internal accounting controls.[55] But a 1995 study by Wayne State University in Detroit, Michigan, raises doubts as to the effectiveness of these enhancements.[56] From a survey of 109 randomly selected companies listed on the New York Stock Exchange, it was found that while 93% of firms had a code of conduct, only 36% had anti-bribery provisions in their code and less than 9% had internal control or monitoring procedures designed to ensure that the code was adhered to.[57] In stressing the need for corporate boards to ensure FCPA compliance through audit committees, the authors note: 'While management is responsible for establishing internal controls, most violations of the FCPA occur when management overrides these controls'.[58] The authors of the Wayne State study concluded that it is not sufficient to merely establish such controls as part of operating procedures. Rather, 'audit committees (established in each corporation and including outside directors as members) should obtain management's written assurances that they have met the FCPA's requirements'.[59] Clearly, the accounting provisions of the FCPA were not successful in persuading American companies to adopt these kinds of operating provisions.

Our story, however, is as yet incomplete. The FCPA had very significant political dimensions and these must now be considered in order to fully assess its effectiveness as a tool of law enforcement, as well as a means of corporate self-regulation.

THE POLITICAL ECONOMY OF FCPA ENFORCEMENT

As we have seen, available evidence provides little reason to believe that the FCPA led American companies collectively to adopt standards of conduct with respect to the bribery of foreign public officials that were significantly different from their international competitors. We have also seen that there is little about the history of the enforcement of the accounting provisions by the SEC that would cast doubt on this conclusion. Is there any reason to believe that the enforcement efforts of Justice Department officers were more vigorous or effective than their SEC counterparts? And if not, why was enforcement so ineffective?

There is little evidence to suggest that the pattern of enforcement by the Justice Department deviated significantly from that of the SEC. Only sixteen prosecutions for bribery were initiated between 1977 and 1995. It would appear that significant efforts at enforcement did occur in the two years immediately following enactment. Following the inauguration of President Reagan, enforcement patterns changed. Enforcement of the FCPA was relaxed,[60] funding for the two principal enforcement agencies was considerably reduced, and efforts by the Reagan administration to alter the 'reason to know' provisions of the Act were initiated. How are these events to be explained and what was their impact on the effectiveness of the FCPA and on the standards of conduct of American companies in the international business arena?

It is clear from the hearings of the Church Committee and the Watergate investigations that it was widely assumed by the American public and their leaders that the international business activities of American corporations would conform to high standards of conduct while aligning with the national interests of the United States and the expression of those interests in American foreign policy. Comments made by the Undersecretary of State, Robert S. Ingersoll, and Senator Proxmire illustrate the central role of this view, though from opposing political perspectives. In the course of expressing in Senate hearings deep concern that congressional testimony would damage America's international image, Ingersoll commented:

> I wish to state for the record that grievous damage has been done to the foreign relations of the United States by recent disclosures of unsubstantiated allegations against foreign officials . . . [I]t is a fact that public discussion in this country of the alleged misdeeds of officials of foreign governments cannot fail to damage our relations with these governments.[61]

Proxmire similarly was explicit about foreign policy considerations in justifying the need for legislation that would impose anti-bribery obligations on American corporations as indicated by his observation that:

> Bribery is simply unethical. It is counter to the moral expectations and values of the American public, and it erodes public confidence in the integrity of the free market system. Bribery of foreign officials by some US companies casts a shadow on all US companies. It puts pressure on ethical enterprises to lower their standards and match corrupt payments, or risk losing business . . . Bribery by US companies also undermines the foreign policy objectives of the United States to promote democratically accountable governments and professionalized civil services in developing countries.[62]

It is not surprising, therefore, to discover foreign policy considerations also played a significant role in the FCPA's subsequent enforcement.

The Watergate revelations led to increasing surveillance of American multinationals by the SEC and to the subsequent establishment of the Foreign Corrupt Practices Act. But it also led to the desire, both in Congress and more widely among the American public, to re-establish America's moral authority both at home and abroad. The resignation of Richard Nixon under the shadow of impeachment and the election of Jimmy Carter reflected this mood. The Carter administration issued a 'moral equivalent of war' against corruption and on behalf of human rights around the world. American firms were pressured to follow environmental and safety standards with respect to products and equipment shipped to developing nations, while Carter cut off aid and curtailed trade with nations with poor human rights records such as Guatemala, Nicaragua, Honduras and the Philippines.

But Carter's administration also became associated with the questionable management of the US dollar, which fell victim to a severe currency crisis during late October 1978.[63] The crisis was averted and the dollar's recovery was engineered under the stewardship of Paul Volcker as head of the US Federal Reserve. Jimmy Carter was subsequently defeated by Ronald Reagan in the presidential elections of 1980, which were again dominated by a debate about regaining international respect and reasserting American leadership internationally. Under Ronald Reagan, however, American foreign policy shifted to a focus on financial and military concerns governed by an intense preoccupation with defeating communism and winning the Cold War based on a strategy of *realpolitik*.

Privileging *realpolitik* over human rights and other ethical concerns meant that the Reagan administration was prepared to overlook the failure of its foreign allies to maintain a strict division between private and public interests (a *sine qua non* in the war against corruption), just as the Nixon administration had failed to maintain a clear distinction between its political interests and its responsibilities for public administration during the Watergate debacle.

The extent to which Reagan's subordinates were prepared to push their *realpolitik* agenda was amply demonstrated by the Iran-Contra affair. Frustrated by the provisions of the Boland Amendment, by which the US Congress officially prohibited funding of the Contra insurgents in Nicaragua, the Reagan administration circumvented constitutional prohibitions against appropriations of government funds by the Executive branch without Congressional approval. Under a covert scheme directed by members of the National Security Council, the US sold weapons to Iran (which was officially considered to be a pariah nation at the time) and secretly diverted the sales of these weapons to the Contras.[64] The transactions involved payoffs to Saudi and Iranian arms dealers, who in turn procured financing for the deals through bribes paid to a branch manager of the Bank of Credit and Commerce International.[65] Two major principals in the affair, Richard Secord and Albert Hakim, were alleged to have used over $2 million out of the inflated commissions paid for the arms sales for their personal benefit.[66] Lt. Col. Oliver North, who headed the operation, was able to destroy much of the documentation pertaining to the case (records that it was alleged might have directly implicated President Reagan in the scandal), once it was clear that the operation was losing its cover. Despite legal requirements that accountability in government operations was to be maintained through provisions that all covert operations conducted by US intelligence agencies must be directly authorized by the President and funded by Congressional appropriations, North's operation proceeded without Presidential or Congressional authorization and without disclosure to the appropriate Congressional committees as stipulated in Section 501 of the National Security Act. North and his operatives then sought to obstruct Congressional investigations and made false and misleading statements to Congressional committees. As the Congressional report on the matter notes: 'These were not covert actions, these were covert policies; and covert policies are incompatible with democracy'.[67]

The relevance of the Iran-Contra Affair for our study lies in the fact that government agents violated many of the principles of the Foreign Corrupt Practices Act by conducting overseas business transactions facilitated by bribery and then falsifying the accounting transactions and destroying records to prevent appropriate disclosure. The FCPA did not in any way forbid the executive branch of the US government from proffering bribes to foreign government officials and agents as it saw fit; the true issues in Iran-Contra (and by extension in all covert operations overseas) were the obstruction of Congressional oversight and the circumvention of executive authorization. Nonetheless, Secretary of State Henry Kissinger clarified the status of bribery in foreign policy when he requested a federal court order in November 1975 prohibiting the disclosure of corporate funds paid to foreign government officials. Kissinger argued that, 'the making of any such payments and their disclosure could have grave consequences for significant foreign relations interests of the United States abroad'. As John T. Noonan describes Kissinger's position: 'Bribery overseas was foreign policy, not domestic crime'.[68]

It is hard to believe that a political environment that harboured policies and activities of this nature had no impact on the enthusiasm with which the FCPA was enforced and adherence to its underlying principles was encouraged. It is therefore unsurprising that, under the Reagan administration, very few prosecutors in the Justice Department fraud section were authorized to conduct FCPA cases.[69] Cutbacks in funding to the principal enforcement agencies (the SEC and the Justice Department) no doubt also served to strengthen prevailing attitudes.

Is there evidence that foreign policy considerations intersected with the few FCPA cases that were prosecuted under Reagan's tenure? While the evidence is inevitably circumstantial, one cluster of cases in which prosecution did occur, and two cases in which it did not, suggest a pattern that is hard to ignore.

The interlocking cases of Ruston Gas Turbine and Crawford Industries,[70] involving company efforts to bribe officials of Pemex, Mexico's national oil monopoly, with respect to the sale of compression equipment systems, were brought to trial almost immediately after the American government concluded a massive bilateral agreement in August 1982 with the Mexican government. Is there a connection between these temporally parallel sequences of events?

On July 14, 1981, a Federal Grand Jury subpoenaed transaction records between Ruston and Pemex. On September 22, 1982, one month after the Mexican agreement, Ruston pleaded guilty to one count of violating the FCPA and agreed to pay a $750,000 fine. Two weeks later on October 2, 1982, the grand jury indicted Crawford Industries, International Harvester, Ruston's president and seven others on FCPA violations, all of whom (except for International Harvester, which was guilty only of conspiracy charges with respect to the activities of its division, Solar Turbines International) would later be found guilty. Crawford, Ruston and International Harvester were also charged with conspiracy to violate the FCPA, to which charge International Harvester would later plead guilty.[71]

On December 15, 1982, after Ruston requested the return of documents subpoenaed by the Grand Jury, it was disclosed that the US government had released the contents of these documents to the Mexican government without Ruston's permission. These documents then provided the foundation for a civil action suit that was launched on October 23, 1983, by Pemex against Ruston and eighteen other defendants with claims to damages totalling more than $45 million. The documents related to charges raised in the US District Court, Texas that included the violation of anti-trust laws, conspiracy to commit fraud and bribery and violations of the Racketeering and Corrupt Organizations Act.

Ruston responded by claiming that the US government had violated federal rules of criminal procedure. The District Court denied Ruston's motion for discovery and Ruston appealed. The US government then distanced itself from the case and avoided formally addressing Ruston's complaint that rules of criminal procedure had been violated by the government.[72] The Appellate Court took note of the curious fact that the US government 'had not taken a position with respect to the District Court order'[73] dismissing Ruston's motion. Neither could the Appellate Court understand the grounds taken by the District Court in not ruling on Ruston's behalf, given that all the precedents relevant to the issue were favourable to Ruston. Because of vagueness with respect to the full presentation of evidence by the District Court, however, the Appellate Court did not grant Ruston's motion for discovery but remanded it back to the District Court requesting that it supply reasons for not ruling on Ruston's behalf. Most significantly, the Appellate Court noted that the US government had released this privileged documentation to Pemex 'pursuant to both an order of the District Court and **an agreement between the government and the Federal Republic of Mexico** (our emphasis)',[74] thereby flagging the conjunction of a major foreign policy initiative with a complex legal action linked to an FCPA prosecution.

The foreign policy initiative was a response to the 1982 Mexican peso crisis. A sharp decline in export earnings, a rapid increase of flight capital and a 40% rise in external debt in 1981 had forced the Mexican government to double the price of certain food staples and to accept an IMF dictated peso devaluation of 40%. The US government, deeply concerned about the possibility of domestic discontent in Mexico and the spectre of a massive increase of illegal aliens into the southern American States, organized an agreement that was an exemplar for President Ronald Reagan's new policy of bilateral relations. To end Mexico's currency crisis, the Americans advanced $3 billion in new credit: $1 billion as an advance on future oil purchases from Mexico (at a price discounted well below OPEC benchmarks), $1 billion to finance desperately needed imports, and a further $1 billion in loan agreements from the Federal Reserve that would help Mexico service its foreign debts. Statements by US Assistant Secretary of State for Inter-American Affairs Thomas Enders in August 1982 clearly indicated that Mexico would now be expected to follow US foreign policy more closely. (Mexico had been providing Nicaragua's Sandinista government with oil on credit.)[75]

Is this an instance where the foreign policy interests and enforcement of the FCPA did in fact intersect? The evidence is circumstantial. It is, nonetheless, persuasive. The fact that the agreement between the American and Mexican governments was cited by a court in legal proceedings directly related to an FCPA prosecution highlights this intersection. There is little doubt that the transaction records between Pemex and Ruston released to the Mexican government played a role in subsequent civil proceedings involving a financially significant claim for damages against Ruston and the other defendants involved. Ironically, the action was brought by a government that was itself thought to be seriously corrupt. Not surprisingly, therefore, the role of corruption in the peso crisis was publicly debated.

Taking American companies to court on grounds of corruption would, in these circumstances, have the potential for shifting blame for corrupt business practices from the Mexican government to foreign multinational corporations prepared to corrupt Mexican officials in the pursuit of business opportunities.

It is true that any shifting of blame would point back to American corporations. But it is also possible that the shapers of government policy were becoming aware of the potentially destabilizing impact of corruption on development and political stability in Mexico.[76] If that is so, then prosecuting American corporations under the FCPA and releasing information with damaging implications for their financial liabilities would also have a place in a policy framework designed to stabilize a government and economic system seriously threatened by a financial crisis. The intervention in the peso crisis was a clear indication of the importance attached to relations with Mexico by the American government. A strong signal to the American business community with respect to activities likely to exacerbate Mexican problems would clearly not have been out of place in that environment.[77]

Another factor influencing enforcement of the FCPA may have been the explicit exemption from prosecution provided for firms collaborating with agencies such as the CIA or the DEA (Drug Enforcement Agency) on matters affecting the interests of the United States. The Act reads:

> With respect to matters concerning the national security of the United States, no duty or liability . . . shall be imposed upon any person acting in co-operation with the head of any Federal department or agency responsible for such matters . . . [78]

Inserting this provision was not inconsistent with past practice. At the time the FCPA was enacted, US multinational corporations had had a long history of involvement with the CIA, by providing their facilities for international transfers of funds to finance CIA operations, for example.[79] The history of activities on the part of the American multinational oil company Exxon in Italy is a good illustration. Investigations of questionable payments by Exxon's Italian subsidiary, Esso Italiana, conducted by Exxon as part of the SEC disclosure program, led to the admission by senior executives of the US parent that $27 million in secret contributions had been advanced to Italian political parties between 1964 and 1971. Further investigations revealed the previously unknown fact that an additional $29 to $31 million in secret payments had been advanced by a former managing director of Esso Italiana using secret bank accounts and other off-book record keeping. (Exxon was then cited by the SEC for deceptive accounting practices and inadequate internal controls.) It is likely that the bulk of these secret payments went directly or indirectly to the Italian Christian Democratic Party to counter the strong influence of the Italian Communist Party, a battle that had received constant and concerted assistance from the CIA since the end of World War II.[80]

In his book-length study of questionable payments to foreign political officials (written in 1976 at the time the FCPA itself was being formulated), Neil Jacoby concluded that the fact that Exxon's senior management approved of the use of deceptive accounting practices (measured against prevailing American standards) in order to make campaign contributions in Italy opened the door for abuses in accounting practices in Italy to occur. That is to say, the managing director of Esso Italiana was able to advance additional funds clandestinely following precedents established when the company had violated its internal control procedures to allow the original payments.[81]

Whether CIA involvement with American multinational corporations continued after the passage of the FCPA in 1977, and when and how often the 'national security' exemption clause was clandestinely invoked to protect US multinational firms from FCPA prosecution can only be a matter of conjecture. However, there are cases where prosecution did not take place for which the national security exemption clause is a plausible explanation. For example, in the early 1970s, prior to FCPA passage, Lockheed, which had employed Yoshio Kodama as an agent for procuring business in Japan at the same time that Kodama was a CIA agent (1958-1972),[82] was implicated in bribery scandals with the Japanese government. This was not an isolated event for a company that in the early 1960s was implicated in alleged payments of $1.1 million made to Prince Bernhard of the Netherlands. There were no FCPA prosecutions against Lockheed during Reagan's tenure. However, in June 1994, almost as soon as FCPA enforcement activity was revived by the Clinton administration, new charges were levelled against Lockheed Martin with regard to $600,000 in bribes paid to an Egyptian parliamentarian over the sale of C-130 aircraft to that country.[83]

A second, more significant possible example can be found in the case of Westinghouse Corporation and its construction of a nuclear reactor facility in the Philippines. The story provides a cautionary tale illustrating how US bilateral and multilateral relations with deep historical roots with a developing nation could, and apparently did, profoundly impact on the norms of business conduct for multinationals operating there.

A US colony since 1898, the Philippines was granted independence in 1946 after being occupied by the Japanese during World War II. The Americans, who strongly valued the military importance of the Philippines, had, during their administration of the islands, supported a highly autocratic government and, by implication, the nation's regimented, class-based, land tenancy social system. They were thus deeply concerned with the possibility that the government they supported might be overthrown following independence. The significance of US government concerns is conveyed in a 1950 National Security Council memorandum addressed to President Truman, which read:

> Failure of the Philippines to maintain independence would discredit the US in the eyes of the world and seriously decrease US influence, particularly in Asia . . . Denial of the Philippines to communist control depends not only upon military measures but even more upon prompt, vigorous political and economic action . . . The deterioration of the economic system has caused widespread feelings of disillusionment . . .[84]

Truman's government responded with the establishment of a strong CIA presence in the Philippines, to the point where the islands eventually provided the agency with its largest telecommunications base in the Far East.[85] The strategic importance of the country was heightened during the Vietnam War with the result that a corrupt Marcos regime received strong bilateral support from both the Johnson and Nixon administrations. After the declaration of martial law in 1972, bilateral aid declined. World Bank support continued, however, throughout the 1970s in spite of allegations of growing corruption. This support gave the Philippines credibility with US multinational banks and lending agencies, which in their turn ended up financing the most ambitious industrial project attempted by the Marcos regime.

In return for its support, the World Bank demanded export-oriented growth, which in turn required the development of a reliable supply of electric power. Both General Electric and Westinghouse Corporation, the two key players in the US nuclear industry, stepped forward with proposals for two 600-megawatt nuclear power plants. Both firms had broad experience in building nuclear facilities in Europe and Asia. General Electric, the more prosperous of the two firms, had developed a code of conduct that addressed FCPA requirements in an exemplary manner.[86] Subsequent events suggest that Westinghouse, a company struggling at the time to improve its overall revenues and profits,[87] was not averse to using questionable payments in winning the support of the Marcos government.

After nine months of researching the Philippine situation, General Electric submitted its proposals to the country's National Power Corporation. However, the decision then came from Marcos that the contract was to be awarded to Westinghouse without competitive bidding, even though subsequent analysis of the two offers led National Power (a Philippine government agency) to the conclusion that GE's proposals were superior on all counts.[88] Of concern was the decision of Westinghouse to retain the services of a Marcos insider, Herminio Disini, as an agent for a 'commission' of $17 million.[89]

Once again, the United States government worried about the impact of Philippine affairs on its own national image. The US Ambassador to the Philippines, William Sullivan, warned Secretary of State Henry Kissinger:

> I stressed that the embassy considered that a great deal of American prestige was riding on the Westinghouse performance, and that therefore we intended to follow the project closely. I pointed out that this was in effect the Filipino Aswan Dam, being the largest and most expensive construction project ever undertaken in this country.[90]

When the contract was signed in March 1976 the cost of construction had spiralled to $1.1 billion.[91] The US Export-Import Bank, which had already financed the construction of nuclear power facilities overseas on numerous occasions, stepped in with $272 million in direct loans and $367 million in guarantees on National Power Corporation bonds. (The bank would ultimately provide $900 million in loans to the project.[92]) The US embassy proved true to its word and sent warnings to Washington that the cost overruns were inflated and that there was evidence of payoffs.[93]

Irregularities began to surface publicly when Marcos selected the Bataan peninsula, site of an industrial zone largely controlled by his associates, as the location for the plant, despite warnings that the area was located near major geological fault lines and a dormant volcano. Westinghouse began construction on the site before technical reports on potential risks were finished. The International Atomic Energy Commission advised a moratorium on construction in 1978 pending a further safety study, but both Marcos and Westinghouse pressed the Philippine Atomic Energy Commission to authorize continuing construction.[94] After the Three Mile Island episode in the US in 1979, Marcos himself ordered a halt to the project (June 1979), and a new review concluded that the project was unsafe. Once Westinghouse agreed to needed changes in line with those put into effect in the US by the Nuclear Regulatory Commission after Three Mile Island, project costs soared to $1.8 billion. The US Commission refused to issue Westinghouse an export license for nuclear components until May 1980, due to safety concerns at the plant. The license was finally issued after Westinghouse launched a lawsuit against the Commission. [95]

Events surrounding the Philippine project were of concern for the Carter administration because of newspaper reports in early 1978 linking the Westinghouse contract with the cronyism and corruption of the Marcos regime,[96] whose human rights violations had already been the subject of

Congressional investigations. Since the reports were published so shortly after the passage of the FCPA, it seemed that the effectiveness of the law would shortly be put to the test. However, a joint investigation by the SEC and the Justice Department concluded that there was no evidence of irregularities in Westinghouse's relationship with the Philippine government, even though the SEC reported that a Westinghouse district manager in the Philippines had destroyed six volumes of documents pertaining to the project.[97]

The appropriateness of the commission payments made by Westinghouse throughout the life of the contract has been the subject of on-going speculation. In reports filed in 1976 with the Securities and Exchange Commission under its disclosure program, Westinghouse claimed that during the fiscal years 1971 to 1975 it expended only $243,000 in questionable payments set against total 1974 revenues of $5.838 billion and gross 5 year revenues (1971-1975) of $25.729 billion. Yet, in 1978, Westinghouse reached a plea agreement with the Justice Department with respect to misrepresentations of payments to foreign officials regarding 'matters within the jurisdiction of the Export-Import Bank,' and it is difficult not to speculate that this plea agreement directly pertained to the Philippine nuclear plant.[98] It took almost a decade for Westinghouse to disclose the $17 million payment to retain the services of Herminio Disini. Westinghouse has claimed that the commissions paid in the course of its contract for the nuclear generating facilities were proper and that no US laws were violated, but the company's assertions have been challenged by other sources within the Philippine government who claim that commissions of $50 million were actually paid, out of which Marcos himself received $30 million.[99] In a later action initiated by the Aquino government in Federal District Court in Newark, N.J., in December 1988, it was claimed that Westinghouse ultimately paid Disini and his companies $80 million for work that was never completed.[100]

The plant was finally completed in February 1985 under a cloud of charges that final construction was rushed leaving the plant in an unsafe condition. The charges were the subject of two UN International Atomic Energy Agency investigations that reported contradictory conclusions. The divergent reports led to an investigation into the plant's financing and construction, which in turn prompted the Aquino government to file suit against Westinghouse in US courts.[101] Westinghouse appealed for arbitration, which was granted by the federal judge. The arbitration case was heard by the International Chamber of Commerce, which ruled in December 1991 that there was insufficient evidence to support charges of bribery against Westinghouse.[102] The federal court refused a Westinghouse petition to dismiss the case, however, arguing that the arbitration was not binding and that the court would judge the case on the 'preponderance of evidence,' rather than 'clear and convincing proof', the standard that had applied in the ICC arbitration.[103] Westinghouse then opted for an out of court settlement, agreeing to pay the Philippine government $100 million under an agreement that allowed Westinghouse to claim that the taint of bribery had been removed from the company.[104]

The Philippine government, for its part, agreed to pay $400 million to upgrade the plant to full safety standards, for which Westinghouse would rebate $300 million out of revenues generated by plant operations. However, the successor government of Fidel Ramos decided to take the case back to federal court with the result that the final plant cost was pushed to $3 billion. The government finally abandoned its legal claims in 1999 when it decided to dismantle all the nuclear components of the plant and sell the assets, with the plant itself to be converted to a science park. The plant never produced electricity and it is estimated that it will take until 2018 for the Philippine government to retire all outstanding debts incurred by the project.[105]

Throughout this long series of events, Westinghouse managed to side-step FCPA prosecution despite strong evidence presented in US federal court by the Philippine government based on Westinghouse documents that referred to Disini as 'the front man for Marcos' and made reference to 'the fix being in'.[106] Neither can the failure to initiate legal action under the FCPA be explained by the FCPA's five year statute of limitations since evidence, including events cited during the federal trial, as well as the company's reluctance to disclose commissions, indicates that questionable payments continued well into the FCPA period.

What then explains the failure of both the SEC and the Justice Department to test accusations against Westinghouse in court? Is it possible that the security provisions of the FCPA were invoked to protect Westinghouse from prosecution? The answer to this question can only be a matter of speculation since any decisions in this regard are not a matter of public record. However, there is circumstantial evidence suggesting grounds for CIA involvement. An offer by the Soviet Union to take over the plant from Westinghouse during the late 1970s, an offer rejected by Marcos, would certainly have raised national security issues. William Casey, the CIA director during the Reagan administration, was also the head of the US Export-Import Bank when it approved the original loans to the Westinghouse project in the Philippines. As director of the CIA, Casey took full advantage of President Reagan's predilection to give his cabinet members and agency directors wide latitude in running their own operations.[107] During his tenure, the CIA expanded from a mere intelligence gathering service into an organization that played a strong role in formulating foreign policy. These incursions into the foreign policy domain created acrimony with the State Department, which frequently questioned the reliability of CIA reports to President Reagan.[108] Casey's contempt of congressional restrictions on foreign policy played a major role in the Iran-Contra scandal and in the questionable relationships the CIA established with the Bank of Credit and Commerce International, which subsequently collapsed amid charges of rampant corruption.[109] With respect to the Westinghouse affair, it is at least possible that Casey used his considerable influence to block FCPA prosecution and might well have granted the company an authorized, if covert, exemption from prosecution according to the terms of the Act itself. It is possible, therefore, that Westinghouse escaped prosecution under the FCPA for reasons of national security. In any event, the Westinghouse story illustrates the complex economic and political environment that surrounded FCPA enforcement.

REVIEWING THE EVIDENCE

Available evidence suggests that while the FCPA together with other influences[110] have resulted in more comprehensive codes of conduct and enhanced scrutiny of standards of corporate governance, the FCPA has not had a significant positive impact on actual standards of international business conduct of American corporations collectively, at least with respect to the bribery of foreign public officials. That evidence is complex and many faceted. It includes:

- Transparency International's Bribe Payers Index that places the US ninth with Germany. What the Index indicates is that US companies are not seen as less prone to offer or acquiesce to demands for bribes than companies from countries like Germany that at the time of the survey had not criminalized the bribing of foreign public officials and indeed allowed bribes to be deducted as legitimate business expenses for tax purposes;
- the fact that American companies have managed to compete effectively in even the most corrupt markets and in areas of the economies in those markets that are widely acknowledged to be most prone to corruption;
- the patterns and history of SEC enforcement of the accounting provisions of the Act;
- the patterns and history of Department of Justice enforcement of the FCPA provisions criminalizing the bribery of foreign public officials;

- extensive bilateral support for notoriously corrupt regimes in countries heavily involved in trade with US companies that were in some cases strongly supported by government financing, in some cases in the face of expressed concern that corruption was involved;
- the 1995 Wayne State University study of the impact of the FCPA on the codes and compliance provisions of American corporations; and
- the sharp increase in prosecutions following the election of Bill Clinton as President of the United States.

How is this outcome to be explained? Several reasons emerge from this and other studies to which we have referred. Review of the debates leading to the passage of the FCPA indicates clearly that support for legislation was motivated by two distinct but related considerations: standards of international business conduct and American national interests. Under the imperatives of Watergate and the mandate of the Carter administration, these concerns were seen as justified and mutually reinforcing. It would appear in retrospect, however, that high standards of business conduct were not always compatible with the protection of national interests as they found expression in the foreign policy of ideologically diverse presidential administrations.

Division of enforcement responsibilities between autonomous agencies may also have been a complicating factor. A related consideration was the decision to rely on self-regulation in an intensely competitive international business environment in which sharply conflicting standards of conduct were clearly in play. Self-regulation with respect to American securities law evolved in a relatively stable legal environment, with uniform rules for all players for reasons widely accepted as fair and reasonable. None of these factors was clearly applicable to the FCPA between 1977 and 1995. The standards imposed were not a part of an overarching international legal framework. There was no pretence at creating a level playing field. There was little support for the legislation in the business community at the time. And there was neither national nor international consensus on the reasonableness of the rules.

It is arguable that the FCPA would have been an ideal piece of legislation during the 1950s. It was consistent with the Bretton Woods agreements requiring that the United States play the role of impartial enforcer of international finance, responsible for providing a sound currency as the basis of an international monetary system built on a regime of fixed exchange rates and the internal fiscal discipline that such a regime demanded from each nation, particularly the United States. Unfortunately, the historical record shows that the United States was not successful in achieving a standard of impartiality that could be made compatible with its own foreign policy objectives. The efforts of the Carter administration to re-establish this moral standard through the FCPA and other policy objectives were undermined by its failure to re-establish the strength of the US dollar in international finance. The Reagan administration succeeded in this latter endeavour, but in the process instituted a policy of *realpolitik* that abandoned all pretence of exporting any US standards of human rights or ethical business practices. Indeed, it would appear that the Reagan administration effectively abandoned enforcement of the FCPA except in cases like Ruston, where *quid pro quo* in US bilateral relations with foreign governments was at stake.

In conclusion, our study indicates that the FCPA was not effective at raising the general standards of American business conduct either at home or abroad with respect to the bribery of foreign government officials or in encouraging the voluntary establishment of accounting and internal control standards. During the Reagan era, enforcing the criminalization of bribery would appear to have been compromised in cases where bilateral relations with an important anti-communist ally meant turning a blind eye to corruption in that country. American multinational corporations did establish important, profitable operations in countries where it is widely thought to be the case that bribery was tolerated and possibly encouraged. Foreign policy considerations may well have resulted in a reordering of corporate priorities away from the ideals of 'new governance' set by the SEC during the 1970s, encouraged in some instances, this analysis suggests, by the national security exemptions of the FCPA. A lack of uniform standards resulting from the self-monitoring character of the accounting provisions of the FCPA would have been facilitated by this reordering.

CONCLUSIONS AND OBSERVATIONS

It is possible that this has all changed. The new wave of FCPA prosecutions during the second term of the Clinton administration, due in part, no doubt, to the efforts of the OECD and other international organizations to join the war on corruption through the establishment of multilateral conventions and guidelines, suggests that a more optimistic view of the future effectiveness of the FCPA may now be warranted. It is true that international markets have become even more intensely competitive. Sharply conflicting standards of conduct remain in play. However, the OECD convention is a step toward a more uniform international legal framework for responding to bribery. The new rules are widely endorsed as reasonable and fair and have the support of large segments of the international business community. A new standard of monitored self-regulation has also been put in place by the OECD convention though its target is national governments, not multinational corporations.

Whether these developments will have a decisive impact on standards of international business conduct remains to be seen. What history tells us, it is now widely recognized, is that the cost of failure for human development is likely to be very high and the path to success painstaking and complex.

A final word with respect to the FCPA is also in order. We have concluded that as a unilateral attempt to raise general standards of business conduct in the global marketplace, the FCPA has had little general positive impact. It would be a mistake to conclude, however, that it was therefore either a failure or a mistake. It might rather be seen as a striking and perhaps even bold and courageous first attempt to address a problem the seriousness of which the American business community, the international business community and other governments at the time were not prepared to acknowledge. Neither was the FCPA without effect. Almost certainly it encouraged some American companies to implement strict anti-bribery policies. General Electric[111] and Colgate-Palmolive (which cited the FCPA in successfully resisting demands for bribes from Chinese officials[112]) may well be examples. This impact on individual companies is also part of the experiment from which there are lessons to be learned. For those companies that responded in the spirit of the Act as well as their managers and agents, the FCPA quite possibly provided a useful reference point for explaining and justifying, in a morally inoffensive fashion, their refusal to offer bribes in environments where bribery was expected, demanded or commonly practised.

Other lessons are also forthcoming. It is not at all clear that companies that respected the spirit of the FCPA were placed at a competitive disadvantage, all things considered. It is true that, almost certainly, contracts were lost as a result. But it is also possible that setting high standards of conduct was a competitive advantage in some instances. For governments, civil servants and other companies anxious to ensure that moneys expended purchased the quality of goods and services specified in contracts, turning to companies with a track record of integrity would have obvious advantages. In the end, a hard and fast balance sheet recording the costs and benefits of observing or failing to observe the standards pointed to by the FCPA is out of reach. Nonetheless, what should be clear is that failure to respect the spirit of the law was not without its costs; and the decision to respect the law was not without its benefits for the companies involved.

It would also be hard to deny that the existence of the FCPA gave the issue of corruption a public profile for almost two decades that almost certainly it would not otherwise have had. Whatever their attitude to the acceptability of bribery, American corporations operating internationally could not simply ignore the Act's existence or its objectives. Whatever the complications it created for their operations, it ensured continuing awareness of a growing problem and considerable political pressure to address it in international *fora*. The resulting political pressures were not homogeneous or unidirectional. In some cases their effect was to encourage modifications designed to weaken the Act's rigour as the amendments of 1988 evidence. However, the Act also created pressure to extend the law through international treaties and UN action. There can be no doubt that these pressures played a significant role in negotiations leading to the OECD anti-bribery convention of 1997 and its subsequent entry into force in 1999.

Finally, the FCPA has served as a testing ground for efforts designed to improve standards of conduct in global markets. It is true that the FCPA generated remarkably little critical research in the first decade of its operation. However, with the passing of the Cold War, attention has refocused on the economic and social dimensions of standards of international business conduct. Resulting research has led to increasingly firm conclusions about the damaging impact of grand corruption on international development. Much of this research has almost certainly been stimulated by political pressures designed to see anti-corruption legislation in the US either scrapped or internationalized. Patterns of research are affected by political and legal initiatives. Once again, it would be hard to deny that research into the effects of corruption is one of the beneficiaries of the FCPA.[113] [114]

In looking forward towards the future, it will, however, be necessary to acknowledge the dark clouds on the horizon. These will come in two forms: concerns over governance practices within the United States and concerns over the effects of the war on terrorism on corporate behaviour on the international stage. In the mid-1970s, the SEC had hoped for a favourable corporate response in terms of increased self-regulation and improved corporate governance practices. When the Gulf Oil Corporation was implicated in payoffs to both US Congressmen and South Korean politicians in the wake of the Watergate scandal, the company's own internal investigative committee recommended increased reliance on managers, accountants and lawyers, the professional guardians upon whom corporations are entirely dependent. It was explicitly argued that Gulf's General Counsel should act as 'the keeper of the company's legal conscience'.[115]

Unfortunately, despite well-argued academic exhortations on behalf of professional ethics,[116] the recent round of corporate scandals have shown how incentives line up to produce the opposite result. It is far more lucrative (for both the company and its professionals) for corporations to engage accountants and lawyers as consultants able to use their expertise to help their clients finesse their way around the letter of the law than as senior managers with moral and fiduciary responsibilities to respect the spirit of the law. Enron provides the most egregious example of abuses by professional consultants, but other examples point to potential abuses related to bribery in international contexts. Unocal was in the process of negotiating a pipeline deal with the Taliban government (prior to the Sept. 11 attacks) by using lobbyists to persuade the US State Dept. to grant diplomatic recognition to the Taliban regime in Afghanistan. The Saudi Ambassador to the United States, Bandar bin Sultan, admitted on US television that out of $350 billion in development funding spent in Saudi Arabia, roughly $50 billion represented bribes paid to Saudi officials. Not only are US corporations operating in Saudi Arabia now under suspicion for having violated the FCPA, but the integrity of many prominent Americans who have served as consultants to the Saudi government (including George Bush Sr. and Henry Kissinger) can be questioned as well. Thus, our earlier observations on the use of highly specialized legal firms by multinational corporations to ensure FCPA compliance have to be reconsidered. Do such firms strive to become 'the keepers of the company's legal conscience?' Or do they merely ensure compliance with the letter of the law?

The global war on terrorism may also turn out to be a complicating factor. In his excellent study of bribery, John T. Noonan makes the important point that bribery is not necessarily morally suspect in times of war. ('In actual warfare, bribery is a weapon, less lethal than a bomb, which may justly be employed'.[117]) It is quite possible that such a justification may have been used to explicitly exempt US corporations from prosecution under FCPA when specific cooperation was being given to US government agencies. Since Sept. 11, the Bush administration has in fact struck up new bilateral relationships with nations with suspect human rights records (e.g., Uzbekistan, Mauritania, Equatorial Guinea), some of which are being prospected by US oil companies. But Noonan's point does seem to be extremely relevant given that actual FCPA prosecutions increased dramatically after the end of the Cold War. Since the start of the global war on terror they have again gone into decline.[118] However, Bush administration officials have argued that the war on terror, with all of its prerogatives of unilateralism and pre-emption, does not have definitive time lines. In that sense, it takes on an Orwellian character: the permanent war that becomes the same as a permanent peace. Thus, the moral exception that Noonan is willing to grant only during times of war is lost. In the worldview that has now been assumed by the Bush administration, US national interests are to be protected at all costs, and it is clear that the philosophy of *realpolitik* will be extended into global issues of trade and international finance. The war on terror will engage the concerns of US multinational corporations in numerous contexts and along several fronts.

In the final analysis, we believe that the corporate proclivity for self-regulation will become the decisive factor. Although it is possible that there will be future cases such as Ruston/Crawford, where corporate interests could be sacrificed to serve larger concerns of US national security, the more significant cases are likely to follow the pattern of Lockheed in Japan, Gulf in Korea, Exxon in Italy, or Westinghouse in the Philippines.[119] The US government must, of course, provide the larger frameworks needed to direct both foreign and domestic policy.[120] But corporations, functioning more in the capacity of corporate citizens rather than business enterprises, can exert a positive influence on such policy frameworks. Despite the 'dark clouds on the horizon', we must look to corporations to set the example and survey an ethical path into the globalized future.

NOTES

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1. The Swedish penal code did, however, outlaw the bribery of foreign officials at the same time as the passage of the FCPA. Swedish Penal Code, SFS 1977; 103 (Janurary 1, 1978).
2. See note #52 for details.
3. In the 2002 Corruption Perceptions Index published by Transparency International, the United States had fallen to sixteenth place, Germany to eighteenth.
4. The report was entitled 'Impact of the Foreign Corrupt Practices Act on US Business' (Comptroler General 1981) prepared by the General Accounting Office of the United States.
5. Geo-JaJa and Mangum (1999)
6. *Ibid*., p. 7.
7. *Ibid*., p. 8.
8. *Ibid.*
9. Rossbacher and Young (1996)
10. We do not comment in what follows on the impact of increased expenditures on legal and accounting services reported by American companies as resulting directly from the existence of the FCPA. Like Rossbacher and Young (see endnote #8 above) we acknowledge that determining the actual impact of those expenditures would require detailed and intensive investigations of each of the many companies who reported those increased expenditures. Current FCPA investigation into the activities of James H. Giffen, a US lawyer with extensive connections to high-powered Washington law firms, lobbyists, CIA officials, politicians and other power brokers suggest a cautionary note, however. Among his many roles and functions, Giffen is a financial advisor to the government of Kazakhstan (a government notorious for requiring multinationals doing business there to sign confidentiality agreements forbidding them to criticize the

government in the press), and a liaison to major US oil companies seeking to develop the major oil reserves located beneath the Caspian Sea. The Justice Dept., at the instigation of Swiss authorities, has initiated an investigation of approximately $60 million in 'signature bonuses' that were purportedly paid to the Kazakh government, but which ended up in numbered Swiss escrow accounts operated by Liechtenstein foundations and companies registered in the British Virgin Islands. The *Giffen case raises considerable* scepticism against arguments cited earlier in this paper that the extensive time, attention and money expended by US corporations on top flight legal and accounting talent to ensure FCPA compliance proves that the Act has, in fact, been effective. 'Signature bonuses' payments normally made by US oil firms to host governments for exploration and drilling rights, production partnerships, etc., can be transacted to meet the criteria of the 1988 FCPA revisions that permit legitimate business expenses necessary for the fulfilment of a foreign government contract. Yet, as the Giffen case proves, such payments do not require direct disbursement to the treasury of the host country. Even if the bonuses in this case were disguised bribes (and nothing in this regard has been established to date) prosecutors might well have difficulty proving that Mr. Giffen knew and intended that these signature bonuses were bribes, the 'reason to know' provisions of the original FCPA having been abandoned in the 1988 revisions (as will be explained later in the paper). One of the Washington lawyers acting on Mr. Giffen's behalf claimed that 'the Caspian transactions were documented in broad daylight by some of the most prominent law and accounting firms in America.' Thus, it remains an open question as to whether increased legal and accounting costs have in all cases been used to secure respect for both the spirit and the letters of the FCPA.

11. US Senate (1973)
12. Asserted by former US Ambassador to Chile, Edward M. Korry, in testimony before the Senate Subcommittee on Intelligence Activities, also chaired by Senator Frank Church. *Wall Street Journal*, Jan. 12, 1977.
13. The Counter Intelligence Corps (CIC) had established the practice of financial contributions to pro-US politicians in Japan, Korea, Thailand and Indonesia as early as 1948.
14. The Church subcommittee investigation was focused largely on five US multinationals: Lockheed, Northrop, Exxon, Gulf and Mobil.
15. US Senate (1975, pp. 356-359, 366-368)
16. Jacoby et al. (1977, p. 107)
17. US corporations were prohibited by Section 162(c) of the Internal Revenue Code from deducting out of taxable income specific types of payments that would, in effect, include kickbacks or payments to government officials. Moreover, under the Tax Reform Act of 1976, any US corporation deriving income from such questionable payments was denied certain foreign tax credits and deferrals (Jacoby et al. 1977, p. 68-69).
18. Practices such as transfer pricing between foreign subsidiaries made globalization even more profitable for vertically integrated firms able to exploit the advantages of tax policy differences between nation states.
19. Surveys of businessmen conducted in 1975 by the Conference Board and the Opinion Research Corporation showed that fifty percent of them accepted foreign payments as necessary in countries that accepted the practice (Kugel and Gruenberg 1977, p. 5).
20. At the time of the Watergate hearings, some 9000 corporations regularly filed disclosure documentation with the SEC pursuant to the 1933 and 1934 Securities Acts. These disclosure requirements entailed reporting material information (e.g. executive salaries, significant transactions, etc. deemed important to disclose to shareholders).
21. Securities and Exchange Commission (1976, pp. 6-13)
22. *Wall Street Journal*, May 19, 1976, p. 5, and June 23, 1976, p. 2.
23. *Los Angeles Times*, June 15, 1976, p. 2.
24. US Senate (1976, pp. 1-9)
25. *Ibid*.

26. In a speech to the American Bar Association in Montreal on August 11, 1975, Kissinger noted: 'A multilateral treaty establishing binding rules for multinational corporations does not seem possible in the near future' (Jacoby et al. 1977, pp. 223-224).
27. UN ESCOR (1983). In 1979, a UN Committee, formed for the purpose of drafting an International Agreement on Illicit Payments, drafted a treaty prohibiting overseas bribery that had the backing of the Carter administration. Neither the treaty nor the conduct code was ever adopted.
28. The following quotation from the report of his committee comments on the option as follows:
'The recent OECD code of conduct, for example, provides that "Enterprises should not render, nor should they be solicited or expected to render, any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office." While this code might prove marginally useful, the Committee notes that bribery of public officials is already illegal under the laws of most countries. Clearly, where countries do not vigorously enforce their domestic bribery laws, there is little likelihood that a redundant, voluntary code will have significant impact. In order to facilitate enforcement of the proposed anti-bribery statute, the Committee does expect the State Department to continue efforts to negotiate treaties and bilateral agreements providing specific co-operative law enforcement arrangements, including exchange of information and records, and extradition of fugitives. Binding bilateral enforcement agreements will produce more results than voluntary codes' (US Senate 1976, pp. 1-9).
29. The US had at the time mutual assistance treaties with Holland, Switzerland, Greece, Nigeria, and Colombia. These agreements provide for co-operation in investigations, document sharing and compelling witnesses to testify in foreign jurisdictions.
30. US Senate (1976)
31. *Ibid.*
32. The Act reads: 'As used in this section, the term "foreign official" means any officer or employee of a foreign government or any department, agency or instrumentality. Such term does not include any employee of a foreign government or any department, agency or instrumentality thereof whose duties are essentially ministerial or clerical' (FCPA, Sec. 103 (b)).
33. cf. *Foreign Corrupt Practices Reporter*, Business Laws Inc., Chesterland, Ohio. In short, prosecutions became more difficult because 'reason to know' could not be as easily ascribed to corporate officers as before. On the other hand, ambiguities pertaining to the interpretation, jurisdiction and/or enforcement of the 1977 Act were clarified.
34. In a later section of the paper entitled 'The Political Economy of FCPA Enforcement'.
35. A vigorous academic debate has been conducted over the years as to how much business has actually been lost to US firms because of FCPA restrictions. There is no room in this paper to pursue the issue here. A report issued by the US Information Agency estimates that in a two-year period from 1994 to 1996 bribery was a factor in 139 international commercial contracts valued at $64 billion. The USIA estimates that American firms lost 36 of these contracts worth $11 billion. The agency believes that these numbers are conservative and that bribing companies win approximately 80% of contract decisions (US Department of Commerce 1996).
36. Shaw (1988, p. 792)
37. In fact, the FCPA governed not just corporations headquartered in the US. Its provisions also extended to companies whose shares traded on American stock exchanges though its actual reach in this regard remained a matter of controversy up to the entry into force of the OECD legislation which has had the effect of making this aspect of the FCPA a dead letter.
38. For a contrary view, see the analysis of Richard de George (1997, pp. 545-555).
39. No. 78C-3476 (N.D. I11. August 30, 1978). Settled by consent decree.
40. 18 Sec. Reg. & L. Rep. (BNA) 1006 (July 11, 1986).
41. Securities and Exchange Commission (1975, pp. 160-166)

42. Kugel and Gruenberg (1977, p. 6). Ashland's revenues in fiscal 1974 were reported as $3.45 billion.
43. Gabon had invested its entire social security fund in the corrupt Bank of Credit and Commerce International. The entire fund was lost when regulators closed the bank in 1991 (Passas 1994).
44. Securities and Exchange Commission (1975)
45. *Ibid.*
46. Shaw (1988, pp. 789-790). Another description of the Ashland case is found in Rossbacher and Young (1996).
47. *SEC v Montedison*, Civ. A. No. 1:96 CV 02631 (D.D.C. Nov. 21, 1996).
48. Quoted from Aronoff (1998)
49. *SEC v Triton Energy Corp. et al.* No. 1:97 CV 00401, 1997 WL 94141 (D.D.C. Feb. 27, 1997)
50. Zedlin et al. (1997, p. 7)
51. The Bribe Payers Survey was commissioned by Transparency International and carried out by Gallup International Association, which conducted in-depth interviews with private sector leaders in 14 emerging country economies. Detailed information about the survey is available on the Transparency International website (www.transparency.org).
52. US Senate (1976)
53. 'Whatever their various views of the FCPA, executives of American multinationals have been all but unanimous in their wish for a level playing field, repeatedly urging the US government to take actions to internationalize the FCPA prohibitions or to persuade other nations to adopt similar laws' (Glynn et al. 1997, p. 19).
54. The emphasis here is on the impact of the FCPA as a general deterrent. As we acknowledge in the final sections of the paper, there is evidence that the FCPA did both motivate some companies to avoid bribing to gain or retain business and did serve to strengthen the hand of others determined to resist the practice quite independently of the existence of legal sanctions.
55. Geo-JaJa and Magnum (1999); also see Romeneski (1982, p. 5).
56. Spalding and Reinstein (1995)
57. *Ibid*.
58. *Ibid*.
59. *Ibid.*
60. When the complete listings of enforcement actions, administrative proceedings, etc. (as well as actual FCPA cases prosecuted) are examined, an interesting trend emerges. Twelve cases were initiated during the last three years of the Carter administration (after the passage of the Act), despite the apparent ambiguities in the law and despite the difficulties encountered by the SEC and the DOJ in working out their joint enforcement responsibilities. During the 8 years (1981-1989) of the Reagan administration, only 23 cases were initiated (allowing for the overlap of Pemex and other cases). The totals pick up during the Bush administration (35 cases), but really explode during the Clinton years, when 225 cases were initiated (February 1993 - October 1999). The pace picked up during Clinton's final year in office (November 1999 - January 2001) when 77 cases were raised. This rate increased again under the administration of George W. Bush. In the first two years of his administration (February 2001 - January 2003) 196 cases were initiated. However, very few cases actually went to prosecution and most cases were simply the subject of SEC investigation or administrative proceedings. Cases were raised with respect to high profile corporate corruption cases (Dennis Kozlowski and Andrew Fastow, as well as major accounting firms), but none on large multinational corporations involved in suspect activity with foreign governments that was significant enough to warrant major media coverage. (No file was ever raised on Westinghouse, James Giffen or Unocal's operations in either Myanmar or Afghanistan. No investigation was ever initiated into a major American oil company, although Baker/Hughes, a small oil field services company was investigated and charged under FCPA in 2002 for $75,000 in payments allegedly made to reduce taxes in Indonesia.)

61. Robert S. Ingersoll, Statement before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, US Congress, March 5, 1976.
62. US Senate (1976, pp. 1-9)
63. An excellent account of the crisis is found in Mayer (1981, pp. 228-264).
64. These were among the facts revealed in the course of the Irangate inquiry.
65. The particulars of this bribery came out in 1992 during Senate testimony on the BCCI affair. See Truell and Gurwin (1992, p. 136).
66. 'The Iran-Contra Affair: Executive Summary of the Report of the Congressional Committees Investigating the Iran-Contra Affair' (US Senate 1992, p. 105).
67. *Ibid*., p. 107.
68. Noonan (1984, p. 661, 579). Kissinger was one of the principal architects of *realpolitik* in US foreign policy, of the increased focus on bilateral rather than multilateral relations as a way of advancing American interests overseas. By forging relationships with authoritarian, militaristic third world regimes, the United States could gain the benefits of staunch local resistance to communist infiltration. Foreign aid and the tax revenues from increased investment of US corporations operating within these countries would be redirected back to the United States to purchase American military equipment or for investment in US capital markets. Bribery would often be the price of such cooperation, but it served to cement the bilateral relationship and thus protect the corporations operating in these countries from the danger of expropriation. Human rights of the local populations were often sacrificed as a cost of these relationships, as dictators exercised severe repression to protect their own authority in the name of 'anti-communism'. As many as 100,000 Guatamalans are believed to have been killed by government death squads in the years following the CIA organized coup in 1954. Many thousands of others were killed in Iraq, Iran, Zaire, El Salvador, and Indonesia, among many other countries. Thus, such bilateral alliances with the United States undercut the legitimate sovereign authority of these third world states and violated the explicit principles of U.S policy established in the wake of Bretton Woods, policies that were directed towards promoting democracy, civil society and economic development in the third world. Such bilateral relationships can also be seen as ways of mollifying third world dictators, many of whom, like Peron in Argentina, were incensed that Latin American nations were not to be granted Marshall Plan assistance.
69. Geo-JaJa and Mangum (1999, p. 3). By way of contrast, under the Clinton administration, all prosecutors in the Justice Department fraud section were given this authority (Schmidt and Frank 1997, B18). It should also be pointed out that the Reagan administration dismissed a long outstanding anti-trust suit against IBM early in Reagan's first term, as well as minimizing the role of the Export-Import Bank in financing exported goods manufactured in the US.
70. FR-735-2d-174; FR-754-2d-1272; FR-720-2d-418.
71. International Harvester owned a company, Solar Turbines International, that was implicated with Ruston and Crawford in the bribery of Pemex.
72. FR-735-2d-174.
73. *Ibid.*
74. *Ibid.* Other court records indicate that Pemex 'was co-operating with the United States Justice Department in the investigation and prosecution of these defendants' (643 F. Supp. 3d 922). Nonetheless, Pemex itself was found in contempt of US court requests to release documentation required by Crawford Enterprises for its own defence. For its part, Ruston, as part of its plea agreement, agreed to provide any and all documents pertaining to the offshore movement of funds involved in the Pemex transaction.
75. Naylor (1987, pp. 63-64)
76. The negative impact of corruption on economic development and political stability in developing countries has now been well established.
77. It should be noted, on the other hand, that the US government did not hesitate to protect the interests of US corporations operating overseas. The most significant example of this took place in June 1954, when the CIA organized a coup in Guatamala after the

government proceeded with agrarian land reform that entailed expropriation of properties owned by the United Fruit Company. Officially, the US government was concerned about the possibility of a domino effect of expropriations in other Latin American nations, as well as the spread of communist insurgency. A number of senior officials in the Eisenhower administration were former executives of United Fruit or were major stockholders in the company. The company was later reorganized as United Brands and was implicated in the bribery of Honduran government officials in the wake of the Watergate investigations.

78. Foreign Corrupt Practices Act of 1977, Section 102 (3) A.
79. Naylor (1987, pp. 312-313)
80. Pope Paul VI had a longstanding fear of Communist influence in Italian politics, dating back to his tenure as Bishop of Milan after World War II. He maintained close ties to the CIA during his own pontificate. The Vatican and the CIA collaborated in supporting Italy's Christian Democratic Party (Naylor 1987, p. 78).
81. It may be just a coincidence that large multinational American companies like Exxon and Mobil were making payments to Italian political parties at the same time that the American government was directly supporting the Italian Government and its ruling party (Naylor 1987, p. 78). Church, however, was critical of this explanation offered in evidence given to the Senate Subcommittee on Multinational Corporations by Mobil Executive Vice-President Everett S. Checket, claiming that the political contributions of Mobil's Italian affiliate were intended to obtain special favours, not to support the democratic process in Italy (Jacoby et al. 1977, p. 168). The fact that the US Embassy in Italy was apparently already well aware that Esso Italiana was making political contributions, well before it became an issue for the Church subcommittee, would seem to support Church's scepticism in this regard. The fact that the US Embassy knew that Esso Italiana was involved in prohibited activity in Italy may also suggest CIA involvement. In this case the CIA might well have been aware of the extra contributions that were not disclosed to Exxon's executive management.
82. Seagrave (1988, p. 363, pp. 374-375); Jacoby et al.(1977, pp. 162-164)
83. Rossbacher and Young (1996, p. 13)
84. National Security Council memorandum to President Truman, cited by Seagrave (1988, p. 140).
85. After Marcos' downfall in 1986, the CIA received $10 million from the Reagan administration, earmarked specifically for Philippines operations (Seagrave, 1988, p. 410, 422).
86. cf. fn. 100.
87. William Beaver reports on Westinghouse's troubles as follows: 'An obvious question is why did the two companies approach the Philippines so differently? Was GE simply a more ethical firm that refused to make grease payments? Perhaps, but a more basic explanation might be that Westinghouse simply needed the business more. Nuclear power had turned out to be an enormous success for the Pittsburgh firm – supplying about one-quarter of the company's profits at a time when the corporation, as a whole, was in trouble. A series of miscalculated ventures into such areas as low income housing, record clubs, and long-term uranium contracts had not panned out. For instance, in 1975 Westinghouse barely made a profit at all, with only a 2.8% return on sales. If the company's nuclear business went sour things could have been worse. On the other hand, business could not have been better at GE Revenues were more than double those of Westinghouse, while GE's earnings were nearly triple those of its arch-rival. *Business Week* attributed GE's lead over its arch-rival to aggressive international expansion and sound acquisitions, all tied to first rate strategic planning' (Beaver 1994, p. 273).
88. Seagrave (1988, p. 290)
89. The initial budget for the project in 1974 was $500 million.
90. *Ibid.*
91. Beaver (1994, p. 272-273)
92. Boyce (1993, p. 321)

93. *Ibid*., p. 343, fn. 30.
94. Seagrave (1988, p. 292)
95. Beaver (1994, p. 275)
96. *Ibid.,* p. 274.
97. It has been suggested that this outcome is due in no small part to a desire to avoid embarrassment to both the US government and its nuclear industry (Seagrave 1988, p. 291).
98. Based on 8K and 10K reports submitted to the SEC for this period. This was the 5th lowest amount of questionable payments of the 34 companies with revenues of $1 billion or more that did report questionable payments to the SEC. (GTE, with just slightly lower revenues, reported questionable payments of $13.075 million.) cf. Jacoby et al., *op cit.,* 120. It should also be noted that on November 11, 1978, a notice of plea agreement was filed whereby Westinghouse agreed to plead guilty to undisclosed FCPA related charges on the condition that the Department of Justice waive all further criminal charges on the matter (*FCPA Reporter*).
99. Seagrave (1988, p. 291)
100. This action was part of a civil suit raised against Westinghouse in Federal District Court in Newark, New Jersey in December 1988 which claimed damages of $6.6 billion, or three times the final cost of the nuclear plant.
101. In its US court action, the Aquino government claimed that the bribery had effectively nullified the contract.
102. Fritz Heimann notes in correspondence to Wesley Cragg, dated December 18, 2000, that 'the ICC ultimately decided that the Westinghouse payment to the brother of Imelda Marcos was not a bribe because he was not a government official and the Philippine government had produced no evidence that any of the money had been paid to a government official'. It should be noted that the US courts refused Westinghouse's attempt to throw out the case based on the ICC decision. We replied to Fritz Heimann that Mr. Romualdez served in various government posts and could hardly claim to have an arm's length relationship to the Marcos family.
103. Beaver (1994, p. 277)
104. In William Beaver's words: 'Westinghouse would pay the Philippine government $100 million in cash, goods, and services. "The bottom line is we got $100 million to deal with the bribery issue", stated an American lawyer for the Filipinos. Westinghouse denied that the payment had anything to do with bribery, noting that the International Chamber of Commerce had cleared the company of such charges' (Beaver 1994, pp. 277-278).
105. Manchester Guardian, Sept. 7, 1999.
106. Beaver (1994, p. 277)
107. Sloan (1999, pp. 94-102)
108. Fischer (1997, pp. 88-90)
109. *The Iran-Contra Affair Executive Summary,* 98; Truell and Gurwin (1992, pp. 126-128); Fischer (1997, pp. 88-90)
110. For example, the implementation of the Federal Sentencing Guidelines.
111. General Electric is an interesting case. Patrick Glynn et al. note: 'General Electric has produced what US officials regard,' according to a State Department official interviewed by one of the authors, 'as a model company ethics code, designed to insulate the firm completely from FCPA violations' (1997, p. 19). Jack Welch, the company's CEO has been quoted as claiming that it was a mistake to think that a willingness to bribe was essential to success in international markets. It is no doubt possible to trace an element of this stance to GE's involvement in a very serious corruption case involving one of its international sales managers: *US v. Herbert B. Steindler, Rami Dotan, and Harold Katz*, Cr. No. 1-94-29, S.D. Ohio, March 1994. General Electric agreed in July 1992 to a settlement with the Justice Department of $59 million in civil damages and $9.5 million in criminal penalties with respect to $41 million in US military funding to the government of Israel which was embezzled and

laundered through European banks by Steindler (a senior GE employee), Dotan (an Israeli Air Force general) and Katz (their lawyer). The 89-count indictment levelled against these three individuals included only 6 that pertained to the FCPA, and these involved GE company funds that were fraudulently disbursed through subcontractors for testing of jet engines that was never actually conducted. (Dotan was paid out of these funds to exercise his influence with the Israeli government to use GE in future contracts, but there was no evidence that GE was aware of this.) GE's settlement with the Justice Department thus pertained entirely to the embezzlement of US government funds and not to the FCPA. GE's internal response as a company to the scandal was to fire several senior level managers for their failure to ensure that the anti-corruption policies of the company were adhered to. In the intervening period, GE has become one of the strongest multinational corporate voices for the development of corporate, national and international anti corruption programs, policies and laws.

112. In January 1992 Colgate-Palmolive opened a plant in Guang Dong China without resorting to bribery (Rossbacher and Young 1996, p. 12).
113. An earlier version of this paper appeared in Jain (2001).
114. The authors would like to thank the organizers and those who attended our session at Santa Clara University Conference entitled 'At Our Best: Moral Lives in a Moral Community' sponsored by the Markkula Center for Applied Ethics February 22-24. Your observations and comments have played a helpful role in the development of this paper.
115. Special Review Committee of the Board of Directors of Gulf Oil Corporation (McCloy et al. 1976, pp. 285-292).
116. Brunk (1991, pp. 122-137)
117. Noonan (1984, p. 694). Noonan also cites a historical example from World War I, when the British government was compelled to offer bribes to government officials in Chile, a neutral government, in exchange for their cooperation in hunting down the German warship *Dresden* (pp. 652-653).
118. Although actual administrative proceedings by the SEC in FCPA related investigations continue to increase. (Cf. fn. No. 61.).
119. The authors have taken a strong 'supply side' approach to bribery. But a new work by Yale law professor Amy Chua makes the case that many third world nations are dominated by ethnic minorities that effectively control local market operations and may effectively influence and manage corrupt practices within these markets (Chua 2002).
120. In a recent speech to the US Senate that explicitly recalls William Proxmire's exhortation with respect to the imperatives of faultless business practice by US corporations operating overseas, Senator John McCain argued against any assertions by Congress that Iraq's oil should be used to pay for the war effort or any other claims of the US government. Echoing Proxmire, McCain argued that any such claims would bring the motives and honour of the US government into disrepute among Arab citizens.

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