INTERNATIONAL ASPECTS OF THE CONTROL OF ILLICIT PAYMENTS

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I. INTRODUCTION

My assignment is to talk about the international aspects of control over illicit payments. The course of events in this particular area has been long, but it has not yielded much in the way of results. Whether the Foreign Corrupt Practices Act[1] has yielded a great deal in the way of results, I leave to all of you who have considered the matter. Certainly it has yielded much in the way of instruction to people in various corporations. I am somewhat impressed by the amount of paper which has been produced on this subject. It reminds me again of the old saying to the effect that when the weight of the paper equals the weight of the airplane, the airplane will fly. I do not, however, think that is likely to be the case here. The weight of the paper must be extremely large before any United Nations action that will have any degree of effectiveness in this area takes place.

Before discussing the United Nations and its efforts, as well as other international efforts, I would like to address one issue which has not been mentioned previously. Several references have been made to the fact that every country in the world has a law against bribery; obviously there is no question about that fact.[2] It is also true that most of the world's developed countries, e.g., the Western European countries and countries belonging to the Organization for Economic Cooperation and Development (OECD), also have laws which permit tax deductions for bribes. These nations obviously have some difficulty in reconciling the two concepts. There is, however, a notion currently circulating in

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 102-104, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. V 1981)), *reprinted in* Appendix I, *infra*.

2. *See generally* 61 U.N. ESCOR (Agenda Item 3) at 5-14, U.N. Doc. E/5838 (1976); Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 235 (1977).

Washington about cognitive dissonance, namely the ability to hold simultaneously two inconsistent ideas without ever letting the two conflict. Nonetheless, it is difficult to understand exactly how a nation can have a meaningful law against bribery when it also permits corporations to deduct such illicit payments as a legitimate business expense.

II. EFFORTS TOWARDS ACHIEVING AN INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

It would be highly desirable from the point of view of the United States to have some kind of multinational commitment with respect to the outlawing of illicit payments, bribes, and corrupt practices. In fact, it would be extremely desirable in light of the existence of the Foreign Corrupt Practices Act. There are several agencies in the United States government that, with varying degrees of vigor, and depending on certain historical and political factors, will enforce the law. In any case, it is the law which hangs over the head of American business. One frequently raised question concerns the degree to which the law prejudices the ability of Americans to compete abroad. Certainly, there has been a great deal of feeling on the part of American businessmen, who are under the strictures of the Foreign Corrupt Practices Act, that the law adversely affects their business. There is a difference in approach which has a prejudicial affect on the ability of American corporations to conduct business abroad.[3] Consequently, it is highly desirable from the point of view of the U.S. government, representing the American business community, to obtain a multilateral commitment on the subject.

What, then, are the prospects for reaching such an accord? The prospects for achieving a multinational commitment in this area are dim. In the first place, there have been several attempts at reaching this sort of international consensus.[4] In 1976, the OECD, an organization of some twenty-four or twenty-five industrialized countries, issued a set of decisions and guidelines for multinational enterprise.[5] One of the OECD's guidelines included a

3. *See* Wall St. J., May 30, 1979, at 6, col. 2; Singer, *The Crackdown on Improper Corporate Payments Made Abroad*, NAT'L J., June 3, 1978, at 880; Butterfield, *U.S. Law Barring Bribes Blamed for Millions in Lost Sales in Asia*, N.Y. Times, June 26, 1978, at 1, col. 5.

4. *See generally* 61 U.N. ESCOR (Agenda Item 13, Addendum 1) at 5-6, U.N. Doc. E/5838 (1976).

5. OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES 7 (1976).

statement that corporations should neither offer nor expect to receive offers of bribes, illicit payments, or the like.[6] The governments of all countries in the OECD have signed that endorsement. In addition, the governments of some OECD member states, primarily the United States, have circulated the guidelines to their business communities and others, urging that corporations issue oaths of loyalty conforming to the OECD standards. Many American corporations have done so. The governments of other countries have not taken this step, largely on the grounds that they deem it to be unnecessary. The United States will follow the OECD guidelines in any case. These OECD guidelines represent what might be described as an international agreement on multinational enterprise.

In 1975, the International Chamber of Commerce (ICC), under the leadership of Lord Shawcross of Britain, began to develop a set of principles which would presumably lead to the establishment of a code of conduct for all businesses. The proposal included a procedure for hearing cases and the creation of a body acting partially as an information agency and partially as a semi-adjudicatory body. The ICC has a membership in the industrialized parts of the world, consisting largely of the chambers of commerce. It is a reasonably homogeneous group, much like the OECD. This effort by the ICC progressed to a certain extent until it reached the stage where people began taking a serious look at the standards which had been drafted and the procedures which were going to implement those standards. At that point the whole effort fell apart, and nothing really has been heard of it since.

There are, of course, a number of corporations which have announced codes of conduct, not merely in the field of illicit payments, but also in the area of appropriate corporate conduct in foreign nations. Caterpillar, Inc. was one of the first American corporations to actually implement this practice. The example has been followed by a number of others: the National Association of Manufacturers, the ICC, and the National Foreign Trade Council, all of which have issued standards of conduct. As a result, there exists a large body of guidelines for American corporations and, perhaps, for other corporations as well.

Insofar as the international community is concerned, the two things which seem to be in place at the present time are the rather

6. *Id.* at 13.

nonexistent ICC code and the existent OECD guidelines, both of which are voluntary. In both cases, it was made clear that no adjudicatory body should pass judgment on the conduct of a particular country or a particular transaction, and the OECD has repeatedly stated this. The OECD guidelines state explicitly that no decisions will be issued with respect to individual cases. Sometimes, it is a little difficult to understand how the OECD can do what it has done under its mandate to review the effectiveness of the guidelines, without thinking about the individual cases which embody the decisions as to whether the standards have had any impact. Likewise, it is difficult to understand how the OECD can review the question of effectiveness without considering the significance of the individual cases that provide the basis for review. There do exist, therefore, at least some standards on the international scene which may, to a certain extent, alleviate a troublesome situation for American corporations, which are held to a higher standard of conduct than are others.

There have been other efforts in the international area that deserve mention, one of which can be disposed of quickly. Senate Resolution 265, adopted in 1975 through the initiative of Senator Abraham Ribicoff,[7] suggested that the United States negotiate the proposal in Geneva at the General Agreement on Tariffs and Trade (GATT).[8] Senator Ribicoff suggested that the United States raise the question of the control of illicit payments with the other GATT countries. Although Senator Ribicoff's view resembled the views of others, such as Senator William Proxmire, it was more realistic than some of the other proposals. In particular, Senator Ribicoff argued that bribes, as well as similar practices, represent distortions of proper trade practices. Under this premise, the members of the General Agreement on Tariffs and Trade would be the appropriate group to consider the question of illicit payments and bribes that distort the fair competition desirable in the field of international trade. In other words, just as dumping and subsidization distort normal competition, so too does the practice of making illicit payments. This premise served as the basis

7. S. Res. 265, 94th Cong., 1st Sess. (1975).

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (effective Jan. 1, 1948). For a detailed discussion and analysis of GATT, *see* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 35-57 (1969).

upon which the issue was to be presented at the GATT conference. But when a special trade representative presented Senator Ribicoff's proposal before the GATT conference, he was greeted with polite silence.

The GATT, in 1979, concluded a multilateral trade negotiation. Among other things, this multilateral trade negotiation dealt with trade-distorting practices such as nontariff barriers, the question of government procurement, dumping codes, and the anti-subsidy or subsidies and countervailing duties. It would seem that the multilateral trade negotiation would have been a legitimate arena in which to discuss the subject, as being one more example of a trade distortion which ought to be regulated.

Another area of concern involves the efforts in the United Nations and the Special Committee on Illicit Payments, which was established some years ago by the Economic and Social Council of the United Nations. I have represented, for some years, and I continue to represent, the United States in the U.N. Commission on Transnational Corporations. In March of 1976, during the second meeting of that Commission in Lima, Peru, the State Department instructed me to bring before the conference the matter of an agreement on the subject of illicit payments. Instructions of this sort do not always conform to the realities of the situation at hand, and sometimes seem unlikely to be implemented. At Lima, for example, there was nothing on the Commission's agenda which indicated that the subject of illicit payments would be discussed. Instead, the Commission was focusing on other aspects of the regulation or conduct of transnational corporations. Nonetheless, I received instructions to present the subject at four o'clock on a Friday afternoon, with the understanding that Mr. Ingersoll, who was then Undersecretary of State, would make a presentation before Senator Proxmire's committee at the same time. Surprisingly, I succeeded in introducing the subject at that time.

The subject of illicit payments was brought up in that forum, at least partially, because there had been a great deal of noise made in the United Nations about the reprehensible conduct of certain corporations, which were known to be bribing governments of developed and developing countries alike. Iran was one of the chief proponents of this kind of activity. In Iran, under the Shah, there was considerable activity which fell into the category of reprehensible conduct. The Japanese cases were also receiving substantial publicity. I was, therefore, not entirely prepared for

the deafening silence which greeted my own suggestion that the Commission on Transnational Corporations take up this particular topic, especially since it was discussing a code of conduct to instruct transnational corporations on the proper mode of conduct in the international arena. Needless to say, I received support from only a few members of the Commission. Subsequently, the proposal went over to the Economic and Social Council, which established another committee, and the committee met over a number of years.[9]

The Americans were the chief proponents of a code which would outlaw illicit payments in the area of international trade. The Americans acted not only out of a sense of their firm moral position, but also because the appearance of the Foreign Corrupt Practices Act was imminent. In short, the United States was adopting a firm policy toward illicit payments at this time. In addition, it was abandoning a policy which had been a very firm and determined policy under the administration of President Ford. This policy did not favor criminalization on the grounds that it would violate various extraterritorial applications of American law,[10] and it would be almost impossible to enforce, both domestically and abroad.[11] As a result of these problems, the Ford adminstration had adopted a policy of requiring disclosure rather than criminalization. The Carter administration, however, introduced several changes, culminating in the adoption of the criminalization approach.[12] This change in policy met the predilections of Senator Proxmire and others, and the Foreign Corrupt Practices Act was passed without dissent—one cannot vote against virtue.

Having passed the Foreign Corrupt Practices Act, the United States began to exert pressure in the international arena for a mandatory code governing illicit payments. This was not a surprising development. Arguably, it is logical to require that if a code of conduct exists, it should be enforceable, and the only way

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9. See Note, *The Foreign Corrupt Practices Act of 1977: A Transactional Analysis*, 13 J. INT'L L. & ECON. 367, 382 (1979) for a more detailed description of this proposal.

10. *See* Ad Hoc Committee on Foreign Payments of the Association of the Bar of the City of New York, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION 1 (1979).

11. *See Hearings on Foreign Corrupt Practices Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess. 98-99 (1977).

12. *See generally, supra* note 10, at 377-78.

that one can enforce a code of conduct is by making it mandatory and having other governments agree that it will be put into effect. This is, however, difficult logic for the United States because in every other area pertaining to the conduct of transnational corporations, the United States has firmly insisted that the codes of conduct be voluntary. In the area where the issue has most been debated, namely the code of conduct being negotiated in the U.N. Commission on Transnational Corporations, the United States has always insisted that any agreements be non-mandatory. The United States has also insisted that the code on Restrictive Business Practices be voluntary. Thus, there exists a slight inconsistency in the American position.

The inconsistency of the American view is of little consequence because from the very beginning—when this idea was first put forward in March of 1976, until the last time the matter was discussed in 1979—it has been obvious that there was no chance of its gaining acceptance in the United Nations.

Much of the difficulty in the U.N. forum and elsewhere stems from the extensive split between the developed and the developing countries of the world. With regard to the code of conduct on transnationals, for example, there is a strong feeling on the part of developing countries that there must be some kind of massive transfer of resources from north to south, and that justice and equity form the basis for such a redistribution of resources. Many developing countries maintain that they have been exploited by the ex-colonial powers and that they are entitled to some kind of compensation as a result. This is not a basis upon which one easily arrives at the overall standards that will regulate a new international economic order. This problem is obvious to nations on both sides. But developing countries have felt that the U.S. desire for an illicit payment code—resulting partially from the existence of the FCPA—was a bargaining point in *their* aspiration for the more general transnational code. Interestingly, America's Western European allies have created the greatest difficulties. Although the Western European countries usually side with the United States in most matters, whether it be Restrictive Business Practices or the general conduct of transnational corporations, the United States has not been able to obtain their support for a code of conduct on illicit payments in the U.N. forum. Consequently, it is easy to understand why, in the area of illicit payments, there is great difficulty in arriving at any agreed-upon code.

The problem in the United Nations stems partially from the fact that there exists a difference in perception between what the conduct really is, or what the standards of conduct really are, and what they are said to be. Specifically, this situation occurs when a nation has a law opposed to bribery, as well as a law permitting a tax deduction for a payment that is stated to have been made for the purposes of a bribe and justified as being in the regular course of business. For this reason, the United States has not been able to achieve any degree of consensus with its moral allies in the United Nations.

There are several other reasons why the United States has not been able to achieve an agreement on a code of conduct in the U.N. forum. The way in which these clauses are phrased always raises doubt in the mind of anyone who reads them. Consider, for example, a clause in the proposed code by an ad hoc committee on illicit payments, which suggests that a corporation should not pay undue consideration to a government official for the performance or non-performance of his duties. What does it mean to say that a corporation should not give undue consideration to somebody for the performance or non-performance of his duties? Is it possible to give due compensation to an individual for not performing the duties that he should? This is characteristic of some of the difficulties which exist in respect to the situation confronting the United States. Partially as a result of this problem, and partially as a result of the wider differences which I have mentioned previously, the United States has not been able to get anywhere in the U.N. forum with this type of code.

III. CONCLUSION

I have reached the conclusion that America's hope for achieving an international code of conduct on illicit payments through negotiations in the United Nations is a forlorn one. The United Nations is characterized, to a certain extent, by the analogy to the cross-eyed javelin thrower: he is not likely to be very productive, but he bears a lot of watching. One can never quite tell where that javelin is going to go when it gets in the hands of the United Nations, though it is unlikely to be very productive from the point of view of American business in this particular regard.

Returning to a point mentioned previously, I think that if one were to reexamine the idea presented in Senate Resolution 265 and adopt this in the area of trade, one would be addressing the

problem of illicit payments in more meaningful and significant terms. When a large contract is lost by an American corporation because somebody else has paid a bribe, a trade distortion results. Clearly, if one were really serious about achieving a meaningful agreement in the area of international control of illicit payments, the peg on which to hang it would be trade policy and not morality.