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Lee C. Buchheit

Ralph Reisner

INTRODUCTION

Why Has the FCPA Prospered?

*Lee C. Buchheit**
*Ralph Reisner***

U.S. courts have long struggled with legislation that purports to regulate the conduct of persons outside the United States. In 1909, when the world seemed a simpler place, Justice Holmes articulated a strictly territorial approach to the issue:

> But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.[1]

As the century moved on, however, American jurisprudence on this issue became more subtle and expansive. The authority to regulate conduct occurring within one's territory was never in doubt. What changed over the years was a growing concept of so-called "effects" jurisdiction; that is, the authority to regulate conduct occurring outside of one's own territory if that conduct had a substantial effect within the country.[2] Effects jurisdiction was the philosophic basis for important U.S. legislation in areas such as antitrust and the sale of securities that purported to regulate conduct taking place outside the United States having a direct effect in this country.

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* Partner, Cleary, Gottlieb, Steen & Hamilton, New York.

** Director, Office of Advanced International Legal Studies, and Acting Professor of Law, Northwestern University School of Law.

[1] American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (citations omitted).

[2] *See* Restatement (Third) of Foreign Relations Law of the United States § 402(1)(c) (1987).

But as Justice Holmes predicted in 1909, every attempt to extend the reach of U.S. law outside the territory of the United States risks friction with other countries. The most recent example of such friction was triggered by the passage of a law popularly known as the Helms-Burton Act.[3] Among other things, the Helms-Burton Act creates a federal cause of action in the United States on behalf of any U.S. national who has a claim for property confiscated by Cuban authorities since January 1, 1959.[4] Such a claim can be brought by the prior owner against any person who "traffics" in property previously belonging to the claimant. "Trafficking," in turn, is defined to include both the purchase and sale of such property as well as "engaging in a commercial activity" which has the consequence "of using or otherwise benefiting from the confiscated property."[5] Thus, for instance, a Mexican or Canadian company that purchases a commodity grown on confiscated property and that, coincidentally, does business in the United States may be sued in the United States by the prior owner of the confiscated property. Additional sanctions against those trafficking in confiscated property include being barred from entry into the United States. These sanctions apply to persons who are affiliated by ownership, employment or family relationship with the persons deemed to have trafficked in confiscated property. One of the purposes of Helms-Burton was to discourage persons and companies from doing business in Cuba[6] and thereby to increase pressure on the Castro regime to liberalize the political system in that country.

The international reaction to the Helms-Burton Act has been fierce.[7] But even while the Helms-Burton debate has been raging, an earlier piece of U.S. legislation, the Foreign Corrupt Practices Act (FCPA or Act),[8] has garnered unexpected flattery from some of the same countries that have been so vigorous in denouncing the Helms-Burton Act. There are two possible explanations for these different reactions. One explanation is that other countries view more leniently extraterritorial legislation which ad-

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[3] The Cuban Liberty and Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified as 22 U.S.C. § 6021-91 (1996)) [hereinafter Helms-Burton Act].

[4] *Id.* § 301(5) & (6).

[5] *Id.* § 4(13)(A).

[6] *See* Andreas F. Lowenfeld, *Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act: Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L LAW 419, 427 (1996) (citing House Comm. on International Relations, Cuban Liberty and Solidarity (LIBERTAD) Act of 1995, H.R. Rep. No. 104-202, pt. 1 at 39, 104th Cong., 1st Sess. (1995)).

[7] *How to Lose Friends and Annoy People*, ECONOMIST, July 20, 1996, at 16 ("[T]he law's bite was delayed for six months to appease the Europeans, Canadians, and Mexicans. Predictably, nobody is pleased.").

[8] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, *as amended by* Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15. U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)).

vances a policy that is widely accepted by the international community (in the case of the FCPA, this policy was the suppression of bribery and corruption). Under this explanation, at least part of the problem with the Helms-Burton Act is that it seeks to further a political objective of the United States (liberalizing the regime in Cuba) under the guise of vindicating principles of international law relating to the confiscation of property.

An alternative explanation is that other countries object more to the means by which the extraterritorial legislation seeks to attain its objectives than they do to the nature of those objectives as such. The FCPA is, after all, far more restrained in imposing itself on foreigners than is the Helms-Burton Act. The FCPA is *not* a law that attempts to punish foreigners for bribery committed abroad, nor is it a law that subjects the U.S.-based property of a foreigner to seizure or private litigation risk as a result of a bribe paid outside the United States.

The anti-bribery provisions of the FCPA apply only to U.S. citizens and corporations (referred to in the Act as "domestic concerns"[9]), and to foreign companies whose securities are listed on a U.S. exchange if those companies use any means of "interstate commerce" in carrying out the bribery of a foreign official.[10] Even foreign subsidiaries of U.S. corporations were deliberately excluded from the coverage of the anti-bribery provisions of the Act.[11] Foreign individuals are at risk for their conduct outside the United States only in limited circumstances where they are acting as agents for a domestic concern.[12]

Thus, in passing the FCPA, the U.S. Congress sought primarily to discipline the behavior of U.S. companies in bribing foreign officials. Congress knew that this would in many cases place U.S. companies at a competitive disadvantage with their foreign counterparts, but Congress did it anyway in pursuit of the higher goal of promoting transparent international business practices. It was, of course, something of a gamble. Unless international norms eventually conformed to the U.S. lead on this issue, U.S. companies would have been permanently hamstrung by their own Congress.

The charm of the FCPA in the eyes of foreigners may therefore lie both in the fact that its policy objective (suppression of bribery) was widely accepted by the international community, and in the perception that the means by which the Act sought to achieve that end were moderate and reasonable.

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[9] 15 U.S.C. § 78dd-2(h)(10)(B) (1994).

[10] 15 U.S.C. § 78dd-l(a) (1994).

[11] *See* David E. Brodsky, *More than an Artifact of the '70s? Foreign Subsidiaries and the Foreign Corrupt Practices Act*, Business Crimes Bulletin: Compliance & Litigation, Mar. 1995, at 5 ("Congress deliberately excluded [foreign subsidiaries of U.S. companies] from coverage under the FCPA because of the jurisdictional, enforcement, and diplomatic difficulties inherent in prosecuting foreign entities.").

[12] *See* Dooley v. United Technologies Corp., 803 F. Supp. 428, 440 (D.D.C. 1992).

Whatever the reason, the FCPA has been instrumental in bringing the issue of corruption to the forefront of many international agendas.[13]

On December 17, 1997, for example, the Organization for Economic Cooperation and Development (OECD) signed a convention to combat the bribery of "foreign public agents" in the pursuit of business.[14] International financial institutions such as the World Bank, the IMF and regional development banks have also over the past year moved vigorously to implement policies designed to curb corruption in the programs, and in the countries, funded by these institutions.[15]

These international initiatives against corruption were largely inspired by the policies embedded in the Foreign Corrupt Practices Act. The articles in this symposium trace this evolution from the domestic origins of the FCPA to the very recent multilateral efforts to suppress corruption in international business.

The opening article, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its 20th Birthday*, by Judge Stanley Sporkin provides an illuminating perspective on the origins of the FCPA and the role of the SEC staff in assisting at its birth.[16] Judge Sporkin's article also shows how a deceptively simple regulatory device — the requirement that corporations keep accurate books and records — has had a dramatic effect on curbing questionable business practices by U.S. companies.[17]

The FCPA has been remarkably effective in altering corporate behavior. Many large multinational corporations have instituted "compliance programs" designed to deter and uncover activities that could, at the least, embarrass the company and, and at the worst, subject it to civil or criminal penalties. The elements of an effective compliance program are the subject of Daniel Goelzer's article, *Designing an FCPA Compliance Program: Minimizing the Risks of Improper Foreign Payments*.[18]

If a violation of the FCPA does occur, the corporate defendant will need to make a number of crucial tactical decisions, some of which are unique to the defense of an action under the FCPA. For instance, strategies

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[13] Martin Wolf, *Corruption in the Spotlight*, FIN. TIMES, Sept. 16, 1997, at 23.

[14] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, Organization for Economic Cooperation and Development, 37 I.L.M. 1 (1998); *see also* Robert Graham, *Anti-bribes convention signed*, FIN. TIMES, Dec. 18, 1997, at 6.

[15] Stephanie. Flanders, *Clear thinking on corruption*, FIN. TIMES (London), June 23, 1997, at 10; Guy de Jonquieres & John Mason, *Goodbye to Mr. 10%*, FIN. TIMES (London), July 22, 1997.

[16] *See* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 Nw. J. Int'l L. & Bus. 269 (1998).

[17] *See Id.*

[18] *See* Daniel Goelzer, *Designing an FCPA Compliance Program: Minimizing the Risks of Improper Foreign Payments*, 18 Nw. J. Int'l L. & Bus. 282 (1998).

that may be appropriate in defending against civil charges brought by the Securities and Exchange Commission may be quite different from, and sometimes in conflict with, those required to respond to criminal changes brought by the Department of Justice. The need to reconcile conflicting strategies may also arise where management is confronted with having to balance the tactical advantages of conducting an internal investigation (followed by self-reporting) against the criminal liabilities that may flow from any disclosures. A comprehensive analysis of these and other key issues related to the defense of actions brought against corporate defendants under the FCPA is the subject of Arthur Mathews' seminal article, *Defending SEC and DOJ FPCA Investigations and Conducting Related Corporate Internal Investigations: The* Triton Energy/Indonesia *SEC Consent Decree Settlements.*[19]

The FCPA has not only changed the way U.S. corporations do business overseas, it has also established a model that is being emulated by the international community. This evolution from a domestic U.S. law, enacted unilaterally, to multinational initiatives such as those recently adopted by the OECD, the European Union and the Organization of American States is the subject of David Gantz's article, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus.*[20]

This symposium also includes a "Perspectives" section consisting of three commentaries that deal with selected issues concerning national and international efforts to stem corruption in emerging market economies. The first of these, *International Financial Institutions Face the Corruption Eruption: If the IFIs Put Their Money Where Their Mouth Is, the Corruption Eruption May Be Capped*, by James Wesberry, Jr., provides a candid and revealing account of the internal processes within the World Bank and the International Monetary Fund that have, after many years, led those institutions to adopt policies designed to stem corruption in recipient countries.[21]

The second commentary, *The Problem of Corruption: A Tale of Two Countries*, by Kimberly Ann Elliott, focuses primarily on the policies that can be undertaken by local authorities in emerging market economies to curb corruption.[22]

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[19] *See* Arthur Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The* Triton Energy/Indonesia *SEC Consent Decree Settlements*, 18 Nw. J. Int'l L. & Bus. 303 (1998).

[20] *See* David Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 Nw. J. Int'l L. & Bus. 457 (1998).

[21] *See* James Wesberry, Jr., *International Financial Institutions Face the Corruption Eruption: If IFIs Put Their Money Where Their Mouth Is, the Corruption Eruption May Be Capped*, 18 Nw. J. Int'l L. & Bus. 498 (1998).

[22] *See* Kimberly Ann Elliott, *The Problem of Corruption: A Tale of Two Countries*, 18 Nw. J. Int'l L. & Bus. 524 (1998).

The efforts by one major U.S. multinational company to fashion an effective FCPA compliance program is the subject of the concluding commentary, *The Development of Compliance Programs: One Company's Experience*, by Patrick Head, former General Counsel of the FMC Corporation.[23]

In closing, it is with regret and great sorrow that we must inform the readers of the untimely passing of Arthur Mathews, who authored the article around which this symposium was organized. Mr. Mathews, who passed away on May 24, 1998 at the age of 60, was a senior partner at Wilmer, Cutler & Pickering and in that capacity earned a reputation as one of the leading white collar criminal defense lawyers in the country. He also made his mark as a teacher and scholar having taught on various occasions at the law schools of Georgetown, George Washington and American University. His scholarly interests also led him to be a frequent contributor to professional journals. Mr. Mathew's major published work is the three-volume treatise entitled *Civil RICO Litigation*. As his contribution to this symposium makes clear, Mr. Matthews had the capacity to take extraordinarily complex subjects and make them comprehensible to the non-expert. It is unlikely that this symposium would have come to pass without his advice, counsel and outstanding contribution.

[23] *See* Patrick Head, *The Development of Compliance Programs: One Company's Experience*, 18 Nw. J. Int'l L. & Bus. 535 (1998).