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INTERNATIONAL ENERGY TRANSACTIONS: THE ROLE OF THE EXPORT ADMINISTRATION ACT AND THE FOREIGN CORRUPT PRACTICES ACT

*William A. Mogel**

I. INTRODUCTION

United States energy trade today, in both oil and natural gas, has a significant international component.¹ Many producers of oil are Arab countries which, historically, have adhered to a trade boycott of Israel. Libya, another major energy producer, has been identified with international terrorism.

A U.S. company or citizen engaging in an international energy transaction must not find itself in violation of U.S. law if trading with one of these countries. Similarly, a U.S. company or citizen anxious to do business (or to be competitive with a non-U.S. company) in a foreign country may not engage in a trade practice which may be commonplace in that country: bribery of government officials to obtain or retain business.

This paper briefly discusses two statutes: the Export Administration Act and the Foreign Corrupt Practices Act, and their role in international energy transactions.

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1. Natural gas imports during the first 9 months of 1992 were 23% higher than the comparable period in 1991. During the same period, natural gas exports to Canada and Mexico increased by 32%. *INSIDE F.E.R.C.* (Jan. 4, 1993); In addition, at the end of 1992, two California distribution companies entered into a new natural gas project called "Project Vecinos" to serve new electric generation in Baja, California (Mexico). *Id.*

With regard to oil, the ratio of domestic supply to consumption is about 45%.

Domestic Consumption	Domestic Production
1990: 17.0 mbd	1990: 9.0 mbd
1991: 16.7 mbd	1991: 9.2 mbd
1992: 17.0 mbd	1992: 9.0 mbd
1993: 17.2 mbd	1993: 8.8 mbd

II. EXPORT ADMINISTRATION ACT OF 1969

Since at least 1949, it has been the public policy and law of the United States to bar export trade with countries that boycott or "blacklist" other countries friendly to this Nation.² The Export Administration Act of 1969³ in section 2402(5) states that it is the law of the United States:

- (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States . . . ;
- (B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States.

The President delegated his responsibilities under the Act to the Secretary of Commerce⁴ who has promulgated implementing regulations.⁵

Section 2402(b)(1) of the Act provides that in "administering export controls" the following criteria "shall be taken into account":

- (A) the extent to which the country's policies are adverse to the national security interests of the United States;
- (B) the country's Communist or non-Communist status;
- (C) the present and potential relationship of the country with the United States;
- (D) The present and potential relationships of the country with countries friendly or hostile to the United States;
- (E) The country's nuclear weapons capability and the country's compliance record with respect to multilateral nuclear weapons agreements to which the United States is a party; and
- (F) such other factors as the President considers appropriate.

In addition, section 2405(j)(1) of the Act precludes the issuance of an export license if the government of such country has repeatedly provided support for acts of international terrorism.

Section 2407(a)(1) of the Act specifically deals with foreign boycotts:

[T]he President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

2. See The Export Control Act of 1949, 50 U.S.C. app. §§ 2021-2032 (1949). Pub. L. No. 91-105, § 1, 83 Stat. 169, provided for termination date of sections 2021-2032 of this appendix on Dec. 31, 1969.

3. 50 U.S.C. app. §§ 2401-2413 (Supp. 1991).

4. Exec. Order No. 11,533, 3 C.F.R. 533 (1971-1975), *reprinted in* 50 U.S.C. app. § 2401 (1988). An Export Administration Review Board also was established by the Act as the successor to the Export Control Review Board.

5. 18 C.F.R. § 369.1 (1993) reaffirms that the United States policy is to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States.

(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country . . .

(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship . . . with or in the boycotted country . . .

(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the boycotted country.

(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by regulations issued pursuant to this paragraph.

The following case law illustrates issues that have arisen under the anti-boycott provision of the Act. In *Briggs & Stratton Corp. v. Balridge*,⁶ the court of appeals rejected a contention that companies had been denied their First Amendment rights when, pursuant to the Export Administration Act, they were barred from answering a questionnaire prepared by Arab countries. The questionnaire sought information as to the companies' relationship with Israel, Israeli firms, and other entities that did business with Israel. In deciding, the court was aware that Arabs had "blacklisted" companies that failed to return completed questionnaires.

However, the New York District Court in *Antco Shipping Co. Ltd. v. Sidermar*, held that there was no violation of the Act in connection with a contract for the ocean carriage of crude oil between Libya and Freeport, Bahamas, even though the contract stated in part: "Loading one (1) or two (2) safe port(s) Mediterranean Sea, *excluding Israel*."⁷ Notwithstanding this explicit language, the court concluded "[t]his is a contract between an Italian shipowner and a Bahamian charterer for the ocean carriage of cargos from Mediterranean ports to Caribbean or . . . American ports, in which event the contract would give rise to imports, not exports, . . . [to] the United States."⁸ In sum, the Export Administration Act, is an unequivocal expression of national policy,⁹ which has been primarily applied in connection with the Arab boycott of Israel.

6. 728 F.2d 915 (7th Cir. 1984) *cert. denied* 469 U.S. 826 (1984).

7. 417 F. Supp. 207 (S.D.N.Y. 1976)(emphasis added).

8. *Id.* at 213. Compare *Abrams v. Baylor College of Medicine*, 581 F. Supp. 1570 (D. Tex. 1984) which held that a medical school that excluded Jewish physicians from participating in cardiovascular surgical teams sent to Saudi Arabia violated the Export Administration Act.

9. A criminal investigation by the Department of Justice and the Securities and Exchange Commission was initiated because of allegations that an international hospital supply company paid a \$2.2 million bribe to get off the Arab boycott list by: (1) waiving a debt of a Saudi company; (2) selling a plant in Israel and building a similar one in Syria; and (3) writing a letter to the Syrian Army official stating that it had "no present intention to make new investments in Israel or to sell new technology to Israeli companies." Thomas M. Burton, *Baxter Fails to Quell Questions on Its Role in the Israeli Boycott*, WALL ST. J., April 25, 1991, at A1.

III. FOREIGN CORRUPT PRACTICES ACT OF 1977

The Foreign Corrupt Practices Act of 1977 (FCPA) became law on December 20, 1977¹⁰ as an amendment to the Securities Exchange Act of 1934.¹¹ Stated simply, the FCPA makes it illegal for any "domestic concern"¹² to bribe a "foreign official"¹³ for the purpose of obtaining or retaining business.¹⁴

The legislative history of the FCPA was discussed in *Lamb v. Phillip Morris, Inc.*¹⁵

[T]he FCPA was designed with the assistance of the Securities and Exchange Commission (SEC) to aid federal law enforcement agencies in curbing bribes of foreign officials. According to the Senate report regarding the FCPA, the Senate Committee on Banking, Housing and Urban Affairs initially "ordered reported a bill, S. 3664, which incorporated the SEC's recommendations and a direct prohibition against the payment of overseas bribes by any U.S. business concern." . . . As the Senate report indicates, the resulting enactment of the FCPA represents a legislative endeavor to promote confidence in international trading relationships and domestic markets; . . . the authorization of stringent criminal penalties amplifies the foreign policy and law enforcement considerations underlying the FCPA. . . . The House Conference report refers to the "jurisdictional, enforcement, and diplomatic difficulties" of broadening the FCPA's reach, . . . thereby addressing concerns typically of special interest to law enforcement officials. In light of these comments and the general tenor of the FCPA itself, which requires the Attorney General to participate actively in encouraging and supervising compliance with the Act, *see, e.g.*, 15 U.S.C. §§ 78dd-1(e), 78dd-2(f), we find that the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets (footnotes omitted).

Implementing this congressional intent, section 77dd-1 of the FCPA makes it unlawful for an officer, director, employee, agent or stockholder of a company registered under the Securities Exchange Act of 1934¹⁶ to use the mail or other "instrumentality of interstate commerce corruptly in furtherance of an offer, payment, [or] promise to pay . . . of any money or

10. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (Supp. 1992).

11. In 1988, the FCPA was reenacted and amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5003(a), 5003(c), 102 Stat. 1107, 1415-24 (1988) (codified at 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. 1992)).

12. Section 78dd-2(h)(1) broadly defines a "domestic concern" to include, *inter alia*, a resident of the United States or any business entity which has its principal place of business in the United States.

13. "Foreign official" is defined as any officer or employee of a foreign government or any department, agency or instrumentality thereof; or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality. 15 U.S.C. § 78dd-1(f)(1). In determining whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official," one should utilize the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure.

14. *Cf.* Royal Decree No. 38, 22 Shaward 1377 (May 11, 1958) (Saudi Arabia has imposed strict bribery laws and regulations for combatting bribery).

15. 915 F.2d 1024, 1028-29 (6th Cir. 1990).

16. A company charged with violating the FCPA was alleged to have given a Syrian official an autographed picture of Joan Collins to add to his photo collection of American starlets and models. *Burton, supra* note 9.

anything of value"¹⁷ to any foreign official, any foreign political party, or official or candidate for foreign political office for the purpose of:

(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

The FCPA also makes it unlawful to make payments through an intermediary, knowing that all or some of the payment will go directly or indirectly to influence a foreign official¹⁸ in order to obtain or to retain business. The term "knowing includes a conscious disregard and deliberate ignorance."¹⁹

There is a major exception to the prohibitions of the FCPA as well as several affirmative defenses to a violation of one of its provisions. First, there is an exception for "grease payments" made to "expedite or to secure the performance of a routine governmental action."²⁰ A routine governmental action includes: obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery, scheduling inspections associated with contract performance or inspections relating to transit of goods across country; providing phone service, power and water supply, loading and unloading of cargo, or protecting perishable products or commodities from deterioration.²¹ However, the FCPA makes it clear that "routine government action" does not include:

any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a

17. Section 78dd-2(h)(1) makes clear that the FCPA applies to "any domestic concern" even if *not* subject to the registration requirements of the Securities Exchange Act of 1934 (emphasis added):

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

18. 15 U.S.C. § 78dd-1(a)(3) (Supp. 1992).

19. Arthur Aronoff, *Complying with the Foreign Corrupt Practices Act*, BUSINESS AMERICA, February 11, 1991, at 10, 11. "There are no cases explaining what 'knowing,' 'conscious disregard,' or 'deliberate ignorance' mean in the context of the FCPA. As such, it is unclear whether and to what extent there is a duty of diligent inquiry into any suspicious details concerning arrangements with an intermediary." *Id.*

20. 15 U.S.C. § 78dd-2(b) (Supp. 1992) states:

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

21. 15 U.S.C. § 78dd-1(f)(3)(A) (Supp. 1992).

decision to award new business to or continue business with a particular party.²²

The FCPA also provides for affirmative defenses to a charge of violating one of its provisions. These are set forth in section 78dd-2(c) as follows:

- (1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or
- (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to:
 - (A) the promotion, demonstration, or explanation of products or services; or
 - (B) the execution or performance of a contract with a foreign government or agency thereof.²³

The FCPA provides for both civil and criminal penalties.²⁴ A business entity may be fined up to two million dollars. Equally significant, an officer, director, employee, agent, or even a stockholder may be fined up to \$100,000 and/or receive a five-year prison sentence.²⁵

The record keeping provisions of the FCPA provide that affected companies keep books that, in reasonable detail, accurately and fairly reflect the issuer's transactions.²⁶ Companies that make "grease payments" are required to list the payments and the amounts. Those companies registered under the Securities Exchange Act of 1934 are also required to maintain a system of internal accounting controls sufficient to provide reasonable assurance that (1) transactions are executed according to the management's general or specific authorization; (2) transactions are recorded so that financial statements will be prepared according to generally accepted accounting principles; (3) access to assets is allowed only according to management's authorization; and (4) recorded accountability for assets is compared with existing assets at reasonable intervals.

In *United States v. Liebo*,²⁷ the court upheld a conviction under the FCPA. Liebo was vice-president of a company that sold military equipment and supplies throughout the world. In June 1983, the company became a prime contractor on a maintenance contract entered into by the Niger government and a German company. Liebo agreed to make "ges-

22. *Id.* § 78dd-2(h)(4)(B) (Supp. 1992).

23. It is often difficult to determine whether a payment was lawful under the written laws of the foreign country. Additionally, because it is an affirmative defense, the burden of proof is on the defendant to show that the payment met the statutory requirements. Thus, the prosecution bears no burden of demonstrating that such payments did not fall within the scope of the permissible provisions. Aronoff, *supra* note 19, at 10.

24. 15 U.S.C. § 78ff (Supp. 1992).

25. A person or firm found in violation of the FCPA may be barred from doing business with the federal government. Indictment alone can lead to suspension of the right to do business with the government. Furthermore, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses.

26. 15 U.S.C. § 78m(b)(2) (Supp. 1992).

27. 923 F.2d 1308 (8th Cir. 1991).

tures" to the chief of maintenance of the Niger Air Force (Tiemogo). The maintenance contract then was approved by Niger's President. Liebo made subsequent "gestures" to Tiemogo by establishing a U.S. bank account for Tiemogo and by having his company, NAPCO, deposit \$130,000 to that account. Thereafter, NAPCO was awarded two additional Niger contracts, valued in excess of \$2,500,000. Liebo then purchased airline tickets for Tiemogo's cousin, who was the first consular for the Niger Embassy in Washington, D.C. Inexplicably, the jury acquitted Liebo of all charges relating to the "gestures" made to Tiemogo.²⁸ However, he was convicted in connection with the airline tickets because they were found to have been made "to obtain or retain business."

In *United States v. McLean*,²⁹ the court of appeals held, under the earlier version of the FCPA,³⁰ that an employee could not be prosecuted for a substantive offense under the FCPA if his employer had not or could not be convicted of violating the FCPA. The defendant, a vice president of a supplier of compressor equipment to PEMEX, the national petroleum company of Mexico, was charged with bribing PEMEX officials. Although the defendant was conceded to have committed acts within the scope of his employment, his employer was not charged in the indictment. Relying on the Eckhart Amendment, which required as a condition precedent, a conviction of an employer, *McLean* concluded that an employee could not be convicted.³¹

Finally, in *Citicorp Int'l Trading Co., Inc. v. Western Oil & Ref. Co., Inc.*,³² the court addressed the issue of whether the FCPA provides for a private right of action. In *Citicorp*, private litigants, the Zanders, attempted to recover under the FCPA from Citicorp. Citicorp had entered into an agreement with Western Oil to act as the company's exclusive agent and to provide letters of credit in connection with a transaction that Western Oil was negotiating with the Nigerian National Petroleum Corporation (NNPC) for the export of oil from Nigeria.

The dispute arose when the deal between Western Oil and NNPC fell through, allegedly as a result of Citicorp's failure to provide acceptable letters of credit; Citicorp had attempted to bribe NNPC. The Zanders alleged that because they were parties to the agreement between Citicorp and Western Oil, they should be able to recover under the FCPA. The court disagreed, however, because it found that no private right of action existed under the FCPA's anti-bribery provisions. The four-part test established by

28. The payments made by NAPCO (and approved by its president) were to "commission agents" who were intermediaries of Tiemogo. In order to obtain financing, Liebo had certified that "no rebates, gifts or gratuities have been given contrary to United States law to officers, officials, or employees of the Niger government." *Id.* at 1310.

29. 738 F.2d 655 (5th Cir. 1984).

30. Under current law, there is no longer a condition precedent that a company have violated the FCPA in order to convict an employee or agent. 15 U.S.C. § 78ff (Supp. 1992).

31. 738 F.2d at 657. The Eckhart Amendment is no longer in effect.

32. 771 F. Supp. 600 (S.D.N.Y. 1991).

the Supreme Court that determines whether a statute implies a private right of action was not met.³³

IV. CONCLUSION

International energy transactions raise numerous business, financing,³⁴ legal and public policy issues. In contemplating such a transaction, a U.S. entity must consider whether it would be in violation of U.S. Laws, such as the Export Administration Act of 1969 or the Foreign Corrupt Practices Act.³⁵

The Export Administration Act has been most often applied in connection with Israel and has produced varied results in the courts. The Foreign Corrupt Practices Act, while allowing "grease payments" to expedite routine governmental action, prohibits bribery directly or through an intermediary.

For many U.S. businesses there remains pressure, particularly in this uncertain economic period, "to get the deal done." This pressure is often coupled with foreign customs which make bribery a way of life and foreign competitors who are not restricted by our laws. Consequently, the best advice is strict adherence to the rules of U.S. law.³⁶

33. *Id.* The relevant factors to be considered are whether: 1) The plaintiff is a member of the class for whose special benefit the statute was enacted; 2) The legislative history indicates an intent, either explicitly or implicitly, to create or deny such a private remedy; 3) The creation of a private right of action is consistent with the underlying purposes of the legislation; and 4) The cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law.

"The refusal of courts to imply a private right of action has been uniform." *Id.* at 606, (citing *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990); *McLean v. Int'l Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987); *Shields ex rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686 (N.D. Ill. 1989); *Lewis v. Sporck*, 612 F. Supp. 1316 (N.D. Cal. 1985)).

However, "conduct that violates the antibribery provisions of the FCPA may give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO) or to actions under other federal or state laws." FRAUD SECTION, U.S. DEPT. OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT, ANTIBRIBERY PROVISIONS (Feb. 1992). For example, "an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract." *Id.*

34. See *Mogel & Haslach, OPEC: A Success Story for Business and Government*, EXPORT TODAY 28 (Sept. 1991).

35. For governmental assistance in determining whether FCPA applies to a company, see FRAUD SECTION, U.S. DEPT. OF JUSTICE, *supra* note 33.

36. For further assistance, any party may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. See 28 C.F.R. § 80 (1992). The Attorney General is required to issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. *Id.*