Combating Unethical Practices in International Trade

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

Abstract

This article explores two key measures to combat unethical trade practices in international business - The Foreign Corrupt Practices Act (FCPA) and the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transaction. The FCPA signals efforts by the United States to prosecute bribery globally, while the OECD Convention represents the culmination of over three decades of US efforts to encourage other nations to adopt laws against bribery of foreign officials. In recent times, this two-pronged assault has been successful in that, it has brought about several prosecutions and, is serving somewhat as a deterrent to unethical trade practices. Despite the daunting challenge of competition often faced by compliant firms, they are still able to compete successfully because of the abhorrence towards corruption displayed by constituents within the international trade community. Accordingly, strict adherence to training, independent monitoring and Department of Justice Opinions and legal counsel will assist companies to avoid corrupt practices in international trade.

Keywords: OECD, bribery, FCPA, combating, unethical behavior, compliance, public officials, international trade, record keeping.

Introduction

Despite efforts to increase international trade through the removal of trade barriers, unethical trade practices threaten to derail such endeavors. In recent times, the easing of restrictions and other barriers to trade through globalization and other trade policies have resulted in increased trade amongst countries of diverse customs and cultures. Several factors such as technological changes, an emerging middle class in developing countries, improvements in the operations of international financial institutions and, the elimination of trade barriers all contribute to this emerging trend (Pacini, Swingen & Rogers, 2002). While this trend has many benefits, the reality is that removal of trade barriers and other restrictions make the task of engaging in global trade a formidable endeavor for many. The origin of this specific challenge partly has its genesis in the penchant of some companies towards bribing public officials and/or facilitating payments to varying entities in an effort to influence governmental decisions (Pacini, Swingen & Rogers, 2002; Witten & Koffer, 2008).

A critical challenge that global enterprises have had to address for a long time is that of "combating international corruption", (Apke. 2001, p. 58). Corruption in international trade is an illegal act, which manifests itself in extortions and bribery of public officials aimed at procuring

international business (George, Lacey & Birmele, 2000; Deming, 2006; Baker, Pacini, & Sinason, 2012; Pacini, 2012). Ironically, though companies complain, many are unwilling to do anything about it, because, either they are willing participants from the "supply" side or, they have come to regard it as an acceptable business practice. Indeed, Sanyal and Samanta (2004) observed that there is a strong correlation between countries given to accepting bribes and countries likely to offer bribes. This suggests that companies in corrupt countries, aside from considering bribery an accepted practice in business are more likely to engage in similar behaviors when conducting international business. A case in point was the system of illicit payments and kickbacks orchestrated by the Iraqi government under the Oil-for-Food Program (Gordon, 2006). As part of a UN trade sanction regime imposed on Iraq for their invasion of Kuwait, Iraqi oil sales and its proceeds were monitored strictly to ensure that proceeds from the sale of oil was used for humanitarian purposes only. However, despite the stringent oversight by the UN Committee, Iraqi government officials were able to inflate oil import contracts and, the vendors in turn secretly paid over the excess to the Iraqi government in cash. Although this corrupt practice happened over the duration of the program from 1996-2003, it seems very little has changed in Iraq since then. Transparency International in their Corrupt Perception Index Report 2012 identified Iraq as one of the most corrupt nations placing them near the bottom of the list with a ranking of 169 from 174 (Hardoon & Heinrich, 2011).

Regardless of the underlying reason however, companies engaged in unethical trade practices place severe pressure on international trade transactions. Consequently, in recent times, multinational agencies such as the International Monetary Fund (IMF) and the World Bank have vigorously sought to address corruption by adopting stricter controls over the projects they finance (Brademas & Heimann, 1998). Several writers (Pitman & Sanford 1994; Brandemas & Heimann, 1998; Pacini, Swingen & Rogers 2002; Boeckmann, 2004) are of the view that corruption at this level, were it to remain unchecked would not only undermine democracies, but would hinder the growth and development of market economies. Thus, the FCPA and the OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction are two of the measures used to combat unethical trade practices in international business. Both these measures will be the focus of this paper.

Foreign Corrupt Practices Act (FCPA)

The measures taken by international developmental agencies are timely and, follow closely the determined efforts and vigilance of countries like the United States to restrain their own companies from involvement in the bribery of public officials, as well as, to improve their image abroad (Kaikati, Sullivan, Virgo, Carr & Virgo, 2000). The efforts of American interests triggered by scandals, resulted in extensive investigations. The Securities Exchange Commission (SEC) spearheaded these investigations, which culminated in the passage of the FCPA in Congress in 1977. The main provisions of the Act addressed *bribery of public officials* and, *accounting and record keeping* with appropriate penalties for non-compliance (Yaffe & Ewald, 2009; Baker, Pacini & Sinason, 2012).

Bribery of Public Officials

The two features of the FCPA though separate provisions, complement each other as both provisions considered collectively serve to determine corrupt procurement practices during

deliberation of such matters (Deming, 2006). The first provision prohibits the bribery of foreign government officials by US personnel and prescribes accounting and record-keeping practices to deter misrepresentation of payments. Thus, it is illegal for US business interests to bribe a foreign official for the purpose of obtaining or retaining businesses.

Alongside these provisions is an exception that allows for "facilitation payments." Such payment made to foreign officials not only signals Congress' recognition of its prevalence in other countries, but it serves to expedite routine governmental services such as, obtaining licenses and/or permits (Barker, Pacini & Sinason, 2012; Jordon, 2012). Additionally, there are two affirmative defenses. The first, addresses payments considered lawful in the country of the foreign official and the second allows for "reasonable" payments (Barker, Pacini & Sinason, 2012). Barker, Pacini and Sinason (2012) highlight a concern expressed by Maris and Singer (2006) regarding the ambiguities that flowed from these exceptions. They noted the absence of a cap on amounts deemed facilitation payments, yet for amounts permitted, the sum was under US $1000. Given these affirmative defenses, it is not difficult to imagine that persons found in violation of the FCPA might present a defense that the stated payments in the recipient country are lawful or, that the payments were for promotional purposes in the recipient country. Either way such defense is hardly likely to succeed given the vigilance of enforcement agencies in investigating and prosecuting incidences of corruption in international trade transactions.

Accounting and Record-keeping

The second provision of the FCPA applicable to publicly traded companies in the US is the *accounting and record-keeping* provision. This provision outlines that such companies must maintain tight controls over their accounting systems, as well as ensure accurate record keeping. This feature is in place to deter illegal payments and misrepresentation of expenses. In fact, many companies have gone further by employing "due diligence" services to assist them in reducing their exposure to unethical trade practices. The SEC enforces the accounting and record-keeping provisions; however, it coordinates its role with the US Department of Justice, the chief enforcement agency. Together both agencies work to prevent improprieties in this area such as, failure to record illegal transactions, falsification of records and, creation of data that, though accurate from a quantitative standpoint, is less so qualitatively (Barker, Pacini & Sinason, 2012).

Organization for Economic Cooperation and Development (OECD)

Following the efforts by the United States to rid international trade of corruption, in 1997 the OECD, which comprises several nations, including European Union (EU) member countries, signed the OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction. The OECD Convention signed by member-countries represented a global response to corruption in international trade and was the member-countries' response to the pervasive force of bribery that threatened to disrupt trade, as well as, undermine economic development. Signatory nations adopted the view consistent with that expressed in the literature, that corruption in the form of bribery is a major obstacle to "democratic transitions, market economies and development" (Brademas & Heimann, 1998, p.18).

Article 1 of the Convention addresses the offense of bribery and requires signatory nations to make bribery of foreign officials a criminal offense (Pacini, Swingen & Rogers, 2002). Companies from signatory countries are often frustrated when conducting business with foreign companies that are not signatories to the Convention. In such situations, business interests from signatory countries, in collaborating with their counterparts from non-signatory countries for purposes of conducting international trade, often highlight the stark differences between them in ethical standards. This disparity between trading partners in international trade contexts, in the absence of anti-corruption laws, creates opportunities for offering bribes, primarily in an attempt to circumvent government bureaucracies. Ultimately, despite the acceptance of bribery as a normal business practice in some cultures, as a global phenomenon, it remains unethical, attracting severe sanctions against perpetrators.

In Article 8, the Convention imposes sanctions on companies for failing to adhere to proper accounting and auditing procedures. All payments must be disclosed and accounted for in the books of the company, failure to do so will result in liabilities not only under domestic laws, but also, under the laws of the Convention. Complete adherence to this section of the Article is a concern since according to Lin and Wu (2006) “internal control was not conceptually designed to be a panacea for corporate ills” (p. 48). The concern is that internal controls focus on accounting systems to support an accounting process and, auditors are inclined to follow set procedures in determining whether flaws are in an accounting system. Hence, the “cooking” of company books can go on for a protracted period before discovery of any irregularity, especially if the entries are accurate. The following two examples highlight the unethical behaviors of companies involved in international trade.

Statoil

Alice Fisher, the US Assistant Attorney General, in an address in October 2006 to the American Bar Association, outlined in her presentation the efforts made by the Department of Justice to combat corruption (Fisher, 2006). She cited then, the United States’ signing of the UN Convention Against Corruption and, the disposition of several cases of bribery.

One of the cases prosecuted involved Statoil, a Norwegian oil and gas company. Executives from Statoil had entered into an agreement with an Iranian official who persuaded them that he could influence the Iranian Oil Minister into awarding Statoil oil and gas contracts. The claim tested successfully when Statoil had the official send a message to the company through the Oil Minister (Fisher, 2006). Having satisfied themselves as to the power and influence of this official, they entered into a "consulting contract" whereby they agreed to pay a "success fee" and fund charities selected by the Iranian official. These payments were in exchange for being awarded the contract to develop the South Pars Field (an oil and gas field in Iran), as well as for future projects in the oil and gas industry (Prendergast, Fowler & Riddle, 2006). For his role as liaison, the official would receive a sum of $15.2 million over 11 years for "vaguely defined services" through a third-party, offshore company (Fisher, 2006).

Statoil paid over $200,000 to a third party company in June 2002 and, in October of the same year received the contract by the Iranian Oil Ministry to develop the South Pars Project (Cadwalader, Wickersham & Taft, LLP, 2006). Statoil had made the payments into a Swiss bank account via a bank in New York without properly accounting for it in its books (Prendergast, Fowler & Riddle, 2006). In addition, arising from this exchange the Iranian official used his influence to provide Statoil with "nonpublic information" regarding oil and gas projects in Iran,

as well as, gave Statoil copies of competitors bid documents (Prendergast, Fowler & Riddle, 2006).

For its part, Statoil recorded these suspicious payments on its books as "consulting fees for special consultants and analyses relating to technical, administrative, tax, and financial matters" (Cadwalader, Wickersham & Taft, LLP, 2006). Statoil's internal audit informed the Chief Financial Officer (CFO) of the irregular payments under the contract, whereupon the CFO gave directive for the creation of a security group to investigate the "consulting" contract. The security group in their report identified the "Iranian official" at the center of the contract irregularities and concluded that there might have been corrupt practices involved and ultimately violation of Norwegian and United States anti-bribery laws (Cadwalader, Wickersham & Taft, LLP, 2006).

Although further payments under the "consulting" contract were suspended, Statoil failed to address the recommendations of the security group, i.e. to probe further into the contract and, to disclose the findings to the authorities voluntarily (Cadwalader, Wickersham & Taft, LLP, 2006). The matter did not remain in-house for long as a whistleblower leaked the information pertaining to the consulting contract to the press. Upon disclosure in the Norwegian press of the corrupt deal, the contract was terminated, followed by the resignation of several key executives (including the CEO); by then, the Norwegian authorities had launched an investigation into the allegations.

When word got out about Statoil executives' corrupt practices the United States Justice Department got involved (Deming 2006; Fisher, 2006). The DOJ and SEC interests in the irregularities predicated that as an "issuer," under the FCPA Statoil securities are issued in accordance with the US Exchange Act, and as such, the company is not only required to file reports under the Exchange Act, but is open to scrutiny from US enforcement agencies for corrupt trade practices. Hence, the DOJ and SEC got involved when Statoil executives' illegal activities became public. It was at this point that Statoil agreed to carry out an independent investigation and to turn over the report to the DOJ and the SEC.

While the US investigations were underway, Norway (a signatory to the OECD Convention) had concluded its own investigation of Statoil's conduct and ruled that the company had violated the provision of the Norwegian law by making improper payments to an Iranian Official. Statoil had to pay approximately $3 million; however, they did not have to acknowledge they had committed a crime. On the contrary, US enforcement agencies felt that the punishment meted out to Statoil did not go far enough. They concluded that it failed to serve as a sufficient deterrent, since the sum imposed was tantamount to the cost incurred in doing business. Further, since under Norway's penalty phase Statoil failed to accept responsibility for their role in the transaction, the punishment meted out to them in the United States was much harsher, the specifics of which indicated it was to serve as a deterrent against future FCPA violations. Statoil had to pay an $18 million fine, admit to making illegal payments to the Iranian Official to obtain a lucrative business opportunity and, retain a US Independent Compliance Consultant for three years (Cadwalader, Wickersham & Taft, LLP, 2006).

Thus, the overriding message echoed in this case is that countries like the US that have adopted the FCPA can and will enforce the Act against violators, even if violators are foreign-owned companies (Fisher 2006). This is particularly the case for foreign companies traded on the US stock market as well as those that stand to benefit from activities on the US capital markets. Moreover, since countries are becoming increasingly intolerant of corruption in international

trade and are adopting and enforcing stringent anti-corruption laws, it is necessary for companies to provide employees and key stakeholders with clear definitions for "foreign officials" and the ramifications of offering bribe payments to such individuals when acting in the company's name.

Trafigura Beheer

Another case that caused much furor involved a controversial donation of about US$500,000 by Trafigura Beheer (a Dutch oil-trading company) to a political party in Jamaica (Wright 2006; Gayle 2011; Heimann, & Dell, 2012). In the late 1970s, the Jamaican government had contracted Trafigura to trade crude oil bought from Nigeria on the world market on its behalf. This transaction was the result of an oil agreement negotiated between the Jamaican government and its Nigerian counterpart with Jamaica standing to benefit from proceeds of the sale on the international market. The arrangement was for the Jamaican Government to pay the oil company a commission on each barrel of crude oil that Trafigura Beheer lifted from Nigeria. For this transaction, the Jamaican government does not finance the shipment upfront, the Dutch oil-trading company does and passes on to Jamaica its share of the earnings based on the number of barrels sold (Jamaica Gleaner, 2006).

In October 2006, the then Opposition party in Jamaica revealed that the ruling political party had received several million dollars in local currency from Trafigura Beheer to finance its annual party conference. The matter was further played out in the press at which point it was revealed that payments were made to CCOC Association with the then Minister of Information being one of the signatories on the account. SW Services received two check payments totaling J$30 million with both checks having the signature of the Minister of Information, as well as that of the Minister of Industry, Commerce, and Technology and two other private citizens. While Trafigura denied the allegation stating that the payment was the basis of a commercial agreement, the government official at the center of the scandal disclosed that the payment was an election campaign contribution; either way, the transaction seemed dubious and triggered an investigation. The purpose for carrying out the investigation in Jamaica according to the Office of the Contractor General (OCG) was to determine "the propriety of the procurement process" and, to establish a "link" (if any) between the payment made by Trafigura Beheer and, the awarding of a contract to them by the Government of Jamaica, now or, at any future time. The actions of both parties involved in the scandal besides being a violation of Jamaican law has implications for one of the key provisions of the OECD Convention i.e. bribing a public official (Office of the Contractor General, 2010). Moreover, the Netherlands being a signatory to the OECD Convention clarifies their interest in searching for evidence of corruption in the transaction.

Regulatory agencies from both countries launched intensive investigations into the allegation. The OCG found several irregularities that breached the Contractor General Act. Irregularities such as lifting oil "without a formal written contract in place," and, failure to have a Procurement Committee in place prior to 2006 highlight the fact that the proper procedures for awarding contracts were ignored. Additionally, deposits to accounts that had the named government officials as signatories provided evidence of the alleged payments (Office of the Contractor General, 2010). Whilst the findings reported by the compliance agency in Jamaica were inconclusive due largely to the failure of the main political player involved to cooperate (Office of the Contractor General, 2010), investigations conducted by authorities from the Netherlands where the oil-trading company originates, are ongoing.

The quest of the Dutch compliance agency to find evidence in Jamaica against Trafigura in support of the claim of bribery is fraught with many setbacks. The Dutch agency has not been able to get members of the political party involved in the scandal to answer any questions pertaining to the allegation. Until quite recently, members of the political party (bribe recipient) have challenged the intent of the opposition party leader, arguing breaches to their constitutional rights and requested private hearings from a judge in chambers. Twice they argued their points in the Courts. First, in the Court of Appeal (December 2011) and lastly, in the Constitutional Court (September 2013); they were unsuccessful in both Courts (Gayle, 2011; 2013). The Courts ruled that the stated members should testify in open courts and that there is no evidence that their constitutional rights were in breach. It appears that this matter will take some time before it is resolved.

Although the facts are inconclusive at this point regarding the Trafigura Beheer case, the bottom-line is that both cases highlight the vigilance of governments and regulatory agencies to identify corrupt trade practices and their commitment to punish perpetrators. In the meantime, despite the will to enforce the law, regulatory agencies in some countries, such as the OCG in Jamaica, lack the capacity to enforce compliance (Office of the Contractor General, 2010). These enforcement agencies need not only unfettered investigative and prosecutorial powers, but also support from all stakeholders (including the government).

Managerial and International Implications

In view of the passage of Anti-corruption Acts in several countries, a concern that stands out for companies compliant with these legislations is how to remain competitive amid other countries' use of corrupt practices. Companies in the United States at the inception of the FCPA complained that they are at a disadvantage when they do business with other non-signatory countries. The business community is rife with such complaints from corporate leaders who argued that they lose valuable contracts in other countries to companies that offered bribes. Whereas Boeckman (2004) finds that there is merit in this claim, Pitman and Sanford (1994) and, in recent times, Westbrook (2010) do not agree, as they report that any loss in business arising from compliance is negligible and overstated. Possible insights to the current onerous nature of international trade transactions seem rooted however, in increased due diligence and compliance efforts, and aggressive FCPA enforcement and fines (New York Bar City Association, 2011).

Further, not only do anti-bribery laws affect companies' abilities to be competitive, but they also influence investment in developing countries (Spalding 2011). With the threat of enforcement hanging over their heads, companies are less likely to invest in countries where bribery is an acceptable cultural phenomenon. Hence, developing countries that are not signatories to anti-corruption international conventions, and where bribery is an acceptable practice in international trade transactions, are less likely to attract investments. The New York Bar City Association (2011) proffers that the impact of FCPA is far-reaching, contending that enforcement served not only as a deterrent to investment overseas, but it contributed to the decision of several foreign companies to delist their securities from the US Stock Exchange between 2007 and 2011 (New York Bar City Association, 2011).

Nevertheless, for companies that are competitive, it appears that the growing intolerance to corruption shown by the international community has positively influenced their operations (Darrough, 2010). Such intolerance has resulted in the passage of laws such as, the Sarbanes-Oxley Act and the UN Convention Against Corruption, which serves to level the playing field. In

addition, in recent times companies doing business in foreign countries expend much effort conducting their own due diligence and investigations, as well as, implement internal controls to prevent and identify potential areas of misconduct (Darrough, 2010).

Recommendations

Training

When conducting international business, companies must be cognizant of the provisions outlined in not only the OECD Convention and the FCPA, but the provisions of anti-corruption laws in the jurisdictions that they do business, all of which exist to combat bribery of public officials (Jordon, 2012). The significance of these measures cannot be overstated since they form the basis for extensive litigation against companies found in breach of the provisions outlined in them. Companies, in ensuring such breaches do not occur, should conduct regular training sessions and workshops with company officers, directors, employees and agents to assist them in identifying and evaluating suspicious transactions such as, “shady” requests for payments. Unsubstantiated payments or gifts to an official in another country should signal a “red-flag” to employees that an illegal act has been committed.

Payments made to foreign individuals become important in the assessment, especially as it relates to their status, as well as their intent, both of which are important in determining the difference between gifts or “facilitating payments,” and a bribe (Pitman & Sanford, 1994; Apke, 2001, p. 59). Indeed, though payments that constitute gifts are permissible, it is to be discouraged, as there is a thin line between offering gifts and offering bribes. Assessing whether a bribe has taken place or not hinges on the intent of the parties and the amount involved. A well-structured compliance program that incorporates regular training sessions and workshops will enable a company and its stakeholders to know the difference (OECD, 2010).

The essence of compliance training should serve the dual purposes of a) teaching employees to avoid violation and b) auditing compliance in a company in relation to its FCPA policy (Huskins, 2008). To ensure buy-in and to make certain that adequate measures are in place for compliance purposes, senior company personnel such as members of the board and executive officers must spearhead the company's FCPA policy. Top management must set the tone by conducting FCPA compliance training on a regular basis and not leave it entirely to their employees to execute.

These training sessions should include training participants to determine whether a crime has been committed. To facilitate this, companies should publish a written FCPA policy manual that is "practical and specific" so that employees can reference specific examples and use them as guides when conducting business in non-OECD jurisdictions. In addition, companies should expend greater efforts in training those employees who conduct company business in countries with high scores on the Corruption Index (CI), in particular, employees who have the authority to commit company funds in the company's name. For this reason, FCPA compliance training should be mandatory for all employees to attend on a regular basis in order to reinforce the information. In addition, establishing "help lines" (in conjunction with the company's written policy document) and making them accessible to employees so they can have immediate and unencumbered access to information would provide employees with robust FCPA compliance guidance.

Internal Monitoring

In the event that a transaction is suspicious and triggers an investigation, it is critical for the company to show that it did not authorize or endorse such acts, and that it conducted proper due diligence, not only in the conduct of its business, but also in determining the reputation of its agents. In particular, companies must show that in the hiring and posting of personnel in positions, especially in locations with a high risk for bribery, proper due diligence was undertaken (Jordon, 2012). It is evident from the 2011 US Court of Appeals case of *United States v. Kozeny, et al*. that the court considers the reputation of third parties as well as a location's risk for bribery when making its ruling in determining a company's culpability under the FCPA (US Department of Justice & US Securities and Exchange Commission, 2012). Accordingly, enforcement agencies will consider the company's efforts to prevent the violation when deciding whom to go after and the magnitude of the penalty to impose (Huskins, 2008). Hence, companies should proactively monitor their operations (both inside and out) to ensure there are no FCPA compliance violations.

Vigorous monitoring of company operations to ensure there are no FCPA compliance violations means that senior company executives must be constantly examining the measures that are in place to achieve compliance, while the Board conducts inquiries to determine the efficacy of these measures. This then becomes the essence of an internal monitoring system whereby a company and its subsidiaries are part of a meticulously controlled environment that characterizes transparency and accountability in all FCPA and OECD-type transactions (Huskins, 2008). This rigor affects even third-party agents since they conduct business in the company's name and have the capacity to carry out acts that are in breach of anti-corruption laws. Thorough background checks and signed compliance contracts for all third-party agents are essentials in the internal monitoring process. In the event a company fails in its efforts to prove its innocence and breaches provisions of the FCPA, as part of the settlement agreement, regulators require the appointment of an independent compliance monitor to review the company's FCPA policies and procedures and, to make recommendations for bolstering its compliance program (Berger & Yannett, 2007).

The bottom-line is that companies should aim to adopt a holistic approach to combat corrupt practices in international trade. Moreover, the achievement of a holistic approach becomes possible when proper internal monitoring systems are in place in conjunction with viable risk management processes, regular scrutiny of internal controls, vetting agents, and creation of compliance and audit programs. The wisdom in adopting these measures becomes salient when a perceived breach occurs, which is usually followed by a comprehensive review of the action of the company(s) involved led by an independent compliance monitor. The sequence of events that occurred before the transaction, at the time of the event and after the event are important considerations taken into account by enforcement agencies when trying to determine whether to prosecute and, if found guilty, the magnitude of the penalty to apply.

Target Key Employees

Key employees such as marketers, sales agents and all those who represent companies in foreign markets must be knowledgeable about what constitutes a bribe. They should complete regular mandatory training that addresses anti-bribery issues, especially as it relates to proper conduct when dealing with public officials, and gift-giving. Adherence to strict anti-bribery policies and procedures is essential as under the FCPA, payments made through a third party will draw suspicion and become the trigger for intensive investigation by authorities. The truth is,

bribery risks in international markets and in particular those in emerging markets, increase proportionately with the hiring of local employees at all levels within the company (Eldridge, 2013). These companies must often rely on local employees and agents to carry out business transactions on their behalf, without knowing how amenable they are to a culture of bribery. Hence, it is important to target key employees within companies since under "*respondeat superior*," as it relates to FCPA, companies are liable for the acts of bribe-paying employees acting within the scope of their employment to benefit their employers, and it matters not that their actions contravened their company's compliance policies and programs (U.S. Department of Justice, & U.S. Securities and Exchange Commission, 2012; Eldridge, 2013). There is the presumption that employers control employees' behaviors and so must assume responsibility for their actions.

Consequently, it is very difficult for a company to plead ignorance of a transaction when done by a third party in the company's name. As was the case when the defendant in *United States v. Kozeny, et al*. used ignorance as a defense, the court rejected it, finding instead that there was evidence of "conscious avoidance" on the part of the defendant (US Department of Justice & US Securities and Exchange Commission, 2012). Indeed, since it appears that even with a comprehensive compliance program, companies are still at risk for violating FCPA rules, then, as Eldridge (2013) suggests, citing Professor Mike Koehler, focusing on key stakeholders' (including employees') "honesty, disclosure, and commitment to compliance" should help to make up the deficit in an otherwise carefully executed compliance program (Eldridge, 2013, p. 752).

Department of Justice Opinion Procedure

The Department of Justice (DOJ) Opinion Procedure was created as part of a Congressional amendment to FCPA in 1988 to enable companies to seek DOJ's opinion as to whether their "conduct conforms with the Department's present enforcement policy regarding the anti-bribery provisions of FCPA of 1977" (Department of Justice (n.d.); Smith, 2012). This means that companies can request an FCPA opinion on a proposed business transaction to avoid committing a violation. Upon granting an opinion, the presumption is that the particular matter has met the anti-corruption standards outlined in the FCPA (Fisher, 2006).

Although DOJ Opinion Procedure does assist companies in resolving FCPA concerns, the process is time consuming, as companies must wait up to thirty days for a response from the DOJ. In the current business environment where timing is important, a thirty-day response time could prove onerous to some companies wishing to capitalize on an overseas business opportunity. In the meantime, companies have been relying on the insights of compliance experts to interpret DOJ Procedure releases as they relate to case law and the company's specific circumstances (Smith, 2012). While seemingly this has had some measure of success, there is still much criticism because of the expansive interpretation of FCPA provisions that emerges from these releases to the point where it is felt that its meaning is based on what prosecutors want it to be (Sivachenko, 2013). Moreover, according to Losco (2014) these opinions are not binding, therefore, they will not create any precedence for companies to follow in future international trade transactions.

Ultimately, when approached, companies must handle bribe requests creatively. Executives must find novel ways to deal with such requests. For example, in the initial stages of contract negotiations, they can and should avail themselves of the "opinion procedure" under the FCPA, which allows companies to submit an *opinion request* to DOJ regarding a proposed

business conduct or transaction. In essence, companies are asking for advice before they carry out the transaction. Though the opinion obtained does not offer airtight protection, it will go a long way towards establishing compliance in an anti-corruption investigation under FCPA.

Conclusion

In response to the pervasiveness of corruption globally, the OECD Convention on Combating Bribery and, the passage of FCPA have gone a long way in curtailing bribery of public officials. As regulatory measures, the OECD Convention and the FCPA characterize the stance taken by the international community against corrupt practices in business that hitherto appeared to give some businesses an unfair advantage in international trade. Contrary to the commonly held view, that the passage of the FCPA would result in loss of business to companies, there is little evidence to support this position (Urofsky, Hee Won & Rimm 2012). In fact, the existence of the Act, and the vigilance of the international community, which have resulted in greater compliance, is more likely to promote business. Therefore, so as not to sabotage the opportunity to engage effectively in international trade, companies must ensure compliance with the provisions of the FCPA, and other similar anti-corruption legislations through the adoption of a compliance program and by maintaining vigilance in its execution.

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English Abstract

Combating Unethical Practices in International Trade

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

Abstract

This article explores two key measures to combat unethical trade practices in international business - The Foreign Corrupt Practices Act (FCPA) and the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Business Transaction. The FCPA signals efforts by the United States to prosecute bribery globally, while the OECD Convention represents the culmination of over three decades of US efforts to encourage other nations to adopt laws against bribery of foreign officials. In recent times, this two-pronged assault has been successful in that, it has brought about several prosecutions and, is serving somewhat as a deterrent to unethical trade practices. Despite the daunting challenge of competition often faced by compliant firms, they are still able to compete successfully because of the abhorrence towards corruption displayed by constituents within the international trade community. Accordingly, strict adherence to training, independent monitoring and Department of Justice Opinions and legal counsel will assist companies to avoid corrupt practices in international trade.

Keywords: OECD, bribery, FCPA, combating, unethical behavior, compliance, public officials, international trade, record keeping.

French Abstract*
Combating Unethical Practices in International Trade

La lutte contre les pratiques non-éthiques dans le commerce international

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

Résumé

Cet article explore les deux principales mesures de lutte contre les pratiques commerciales déloyales dans le commerce international, soit "Le Foreign Corrupt Practices Act" (FCPA) et la "Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales", de l'Organisation de Coopération et de Développement Économique (OCDE). La FCPA montre les efforts déployés par les Etats-Unis de poursuivre la lutte contre la corruption à l'échelle mondiale, alors que la Convention de l'OCDE est l'aboutissement de plus de trois décennies d'efforts des États-Unis pour encourager d'autres pays à adopter des lois contre la corruption d'agents publics étrangers. Ces derniers temps, cette attaque sur deux fronts montre des réussites, car il a entraîné plusieurs poursuites et sert d'effet dissuasif contre les pratiques commerciales non-éthiques. Malgré l'énorme défi de la concurrence qui pèse sur des entreprises éthiques et conformes, elles sont encore capables de concurrencer avec succès en raison de leur aversion envers la corruption. En recommandation, il faut adhérer à des formations alors que le suivi du Département de la Justice et des avocats aideront les entreprises à éviter les pratiques de corruption dans le commerce international.

Mots-clés: OCDE, Corruption, FCPA, Lutte contre les comportements non-éthiques, Conformité, Agents publics, Commerce international

* Translated by: Johannes Schaaper, Senior Professor in International Management, Kedge Business School, France

German Abstract*
Combating Unethical Practices in International Trade

Bekämpfung der unmoralischen Methoden im internationalen Handel

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

Zusammenfassung:

Dieser Artikel untersucht zwei Schlüsselmaßnahmen, um unmoralische Handelsmethoden im internationalen Geschäft zu bekämpfen – der Foreign Corrupt Practices Act (FCPA) und das Organization for Economic Cooperation und Development (OECD) Übereinkommen zur Bekämpfung der Bestechung von ausländischen Amtsträgern bei internationalen Geschäftstransaktionen. Das FCPA signalisiert die Bemühungen der Vereinigten Staaten, um Bestechungen global strafrechtlich zu verfolgen, während das OECD Übereinkommen den Höhepunkt von über drei Jahrzehnten der US-Bemühungen repräsentiert, um andere Nationen zu ermutigen, Gesetze gegen Bestechungen von ausländischen Amtsträgern zu verabschieden. In letzter Zeit ist dieser Doppelangriff darin erfolgreich gewesen, er hat mehrere Strafverfolgungen bewirkt und dient etwas als eine Abschreckung für unmoralische Handelsmethoden. Trotz der abschreckenden Herausforderung des Wettbewerbes, die häufig von konformen Unternehmen gesehen wird, sind sie immer noch in der Lage erfolgreich zu konkurrieren aufgrund der Abscheu gegenüber der Korruption, die von den Mitgliedern innerhalb der internationalen Handelsgemeinschaft gezeigt wird. Dementsprechend wird die strenge Einhaltung der Ausbildung, die unabhängige Überwachung und die Justizministeriumsmeinungen und der Rechtsbeistand den Unternehmen helfen, um korrupte Methoden im internationalen Handel zu vermeiden.

Schlüsselwörter: OECD; Bestechung; FCPA; Bekämpfung; unmoralisches Verhalten; Übereinstimmung; Amtsträger; internationaler Handel; Aufbewahrungsplicht.

*. Translated by: Prof. Dr. Marc Eulerich, University of Duisburg-Essen, marc.eulerich@uni-due.de

Spanish Abstract*
Combating Unethical Practices in International Trade

Lucha contra las Prácticas poco Éticas en el Comercio Internacional

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

Abstract

Este artículo explora dos medidas clave para combatir las prácticas comerciales contrarias a la ética en los negocios internacionales: La Ley de Prácticas Corruptas en el Extranjero (FCPA) y la Organización para la Cooperación Económica y el Convenio para el Desarrollo (OCDE) sobre la lucha contra el soborno de funcionarios extranjeros en las transacciones comerciales internacionales. La FCPA representa el esfuerzo de Estados Unidos para perseguir la corrupción a nivel mundial, mientras que la Convención de la OCDE supone la culminación de más de tres décadas de esfuerzos de Estados Unidos para alentar a otros países a adoptar leyes contra el soborno de funcionarios extranjeros. En los últimos tiempos, este asalto en dos frentes ha tenido éxito en varios sentidos, ha dado lugar a varios procesamientos y se presenta como un elemento de disuasión a las prácticas comerciales poco éticas. A pesar del enorme desafío frente a la competencia con el que a menudo se enfrentan las empresas que cumplen, todavía son capaces de competir con éxito debido a la aversión hacia la corrupción mostrada por los agentes que constituyen la comunidad comercial internacional. En consecuencia, el cumplimiento estricto de la formación, la supervisión independiente y las Opiniones del Departamento de Justicia y asesoría legal ayudará a las empresas a evitar las prácticas corruptas en el comercio internacional.

Keywords: OCDE, soborno, FCPA, lucha, comportamiento poco ético, cumplimiento de los funcionarios públicos, comercio internacional, mantenimiento de registros.

*. Translated by: Francis Blasco, Complutense University at Madrid, fblasco@ucm.es

Arabic Abstract*

Combating Unethical Practices in International Trade

مكافحة الممارسات الغير أخلاقية في التجارة الدولية

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

ملخص

بحث هذا المقال في اثنين من التدابير الرئيسية لمكافحة الممارسات الغير أخلاقية في الأعمال التجارية الدولية . فقد تم توقيع اتفاقية بين قانون الممارسات الأجنبية الفاسدة و منظمة التعاون الاقتصادي و التنمية , حيث نصت على مكافحة الرشوة من المسؤولون الأجانب في المعاملات التجارية الدولية. حيث قام المسؤولون عن قانون الممارسات الأجنبية الفاسدة من جانب الولايات المتحدة بجهود لملاحقة الرشوة على الصعيد العالمي , في حين , مثلت منظمة التعاون الاقتصادية و التنمية تتويجا لأكثر من ثلاثة عقود بسبب جهود الولايات المتحدة على تشجيع الدول الاخرى على تبني و ادراج قوانين لمكافحة رشوة المسؤولون الأجانب . و في الآونة الاخيرة , لاقى هذا الهجوم نجاحا واسعا من كلا الجهتين , حيث عمل على كسب عدة ملاحقات قضائية حتى تكون رادع و مانع للممارسات التجارية الغير أخلاقية . و بالرغم من التحديات الهائلة و الشاقة التي تواجه الشركات المتوافقة بسبب المنافسة , فهي لا تزال قادرة على المنافسة بنجاح بسبب الإشمئزاز من الفساد المنتشر داخل المجتمع التجاري الدولي و مكوناته. و وفقا لذلك , الالتزام في التدريب و المراقبة و آراء وزارة العدل و الاستشارات القانونية ستكون حلا لهذه الشركات لمساعدتهم في تجنب الممارسات الفاسدة في هيئة التجارة الدولية .

الكلمات الدالة: منظمة التعاون الاقتصادي و التنمية , الرشوة , قانون الممارسات الأجنبية الفاسدة , المكافحة , السلوك الغير أخلاقي , الامتثال , الموظفين , التجارة العالمية , حفظ السجلات .

*. Translated by: Zu'bi M. F. Al-Zu'bi, PhD, FHEA, School of Business, The University of Jordan, zoz55jo@yahoo.com

Italian Abstract*
Combating Unethical Practices in International Trade

Combattere le pratiche non etiche nel commercio internazionale

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

Abstarct

Questo studio esplora due misure per combattere pratiche non etiche di commercio nel commercio internazionale - la legge sulle pratiche di corruzione (FCPA) e la convenzione per combattere la corruzione su transazioni ufficiali internazionali. La FCPA evidenzia gli sforzi degli Stati Uniti per perseguire la corruzione a livello globale, mentre la convenzione dell'OECD rappresenta il culmine di più di trenta anni di sforzi da parte degli Stati Uniti per adottare leggi contro la corruzione di persone che lavorano in pubblici uffici. In tempi recenti, questa doppia applicazione è stata efficace nel determinare varie prosecuzioni legali ed è abbastanza utile come deterrente a pratiche di commercio non etiche. Nonostante la grande sfida a cui si trovano soggette aziende che rispettano queste leggi, queste aziende sono ancora capaci di competere con successo per il senso di repulsione presente verso la corruzione riguardante persone che fanno parte della comunità internazionale. In relazione a questo, strettamente razionato alla formazione, monitoring indipendente e consiglio legale da parte del Dipartimento di Giustizia che assisterà le aziende ad evitare pratiche di corruzione nel commercio internazionale.

Parole Chiave: OECD, corruzione, FCPA, combattere, comportamento non etico, impiegati pubblici, commercio internazionale, annotazioni

* Translated by: Riccardo Paterni, Synergy Pathways, riccardo@synergypathwyas.net

Chinese Abstract*

Combating Unethical Practices in International Trade

打击在国□□易中的不道德行□

Patricia Y. Taylor*

Argosy University, pt@isys-inc.com, (678) 849 2570

摘要

本文探讨了打击国际商业不道德的交易行为的两个关键措施，即反海外腐败法（FCPA）和经济合作与发展组织（OECD）为打击贿赂外国公职人员在国际商业交易制定的公约。反海外腐败法暗示了美国对全球范围内起诉行贿所付出的努力，而经合组织公约代表了三十年美国努力鼓励其他国家采取对外国官员的贿赂法律的最终成果。最近一个时期，这个双管齐下的攻击已经取得成功。例如，它带来了若干起诉，并在某种程度上对不道德贸易行为作为一种威慑。尽管合规企业经常面临竞争的严峻挑战，这些企业仍然能够取得成功。原因在于整个国际贸易社会中的选民对腐败深恶痛绝。因此，严格遵守培训，独立监察，司法意见和法律咨询，会帮助公司规避国际贸易中的腐败行为。

关键词： 合组织，贿赂，反海外腐败法，打击，不道德的行为，合规，政府官员，国际贸易，保存记录。

*. Translated by: Dr. Na Fu, Maynooth University School of Business, Maynooth University, Maynooth, Co. Kildare, Ireland.]