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International Bribery: An Example of an Unfair Trade Practice?

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NOTES

INTERNATIONAL BRIBERY: AN EXAMPLE OF AN UNFAIR TRADE PRACTICE?

I. INTRODUCTION

Bribery,[1] corrupt practices,[2] and illicit payments[3] aimed at foreign officials with the power to award or renew lucrative contracts to corporations competing in the high stakes arena of international business continue to be common practices despite the presence of laws prohibiting such behavior.[4] The United

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1. The Ad Hoc Intergovernmental Working Group on Corrupt Practices established by the United Nations Economic and Social Council (Ad Hoc Group) has defined bribery as "the payment of anything of value to a decision maker (or his agent) in order to influence his official decision-making." *Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concepts and Issues Related to the Formulations of an International Agreement: Report of the Secretariat,* Ad Hoc Intergovernmental Working Group on Corrupt Practices, U.N. ESCOR, 2d Sess., ¶ 23, U.N. Doc. E/AC.64/3 (1977).

2. Corrupt practices were defined broadly by the Ad Hoc Group as "unfair competition and restrictive business practices such as market distortion, price fixing, price discrimination, allocation of markets, rigging of bids and so on. It is also possible to include taxes and royalties made to an illegal regime." *Id.* ¶ 18.

3. The term illicit payments refers to a broader definition of corrupt payments and was defined by the Ad Hoc Group as "the generic term for all payments that are made with the intention to improperly influence a decision. These payments may be directed to officials in public service as well as to officials of private institutions." *Id.* ¶ 21.

4. The reason national laws are not always effective was addressed by the Ad Hoc Group which concluded that:

> [a]lthough national laws exist in most countries with respect to corrupt practices, they are not always effective against illicit payments in international commercial transactions because of the transnational. . . element in the offence and its international implications.
>
> The impediments to effective national action are many and varied. Effective enforcement at the national level may be impeded by conflicts of jurisdiction, the inadequacy of information available in any one State and conflicting governmental policies towards enterprises and their activities.

States took a strong stand against these practices by enacting the Foreign Corrupt Practices Act of 1977 (FCPA)[5] which prohibits U.S. businesses from offering bribes to foreign officials in exchange for favorable treatment.[6] Despite Congress' hopes,[7] the FCPA did not lead to a multilateral agreement outlawing international bribery.[8]

Today, the FCPA remains the only piece of legislation in the world that criminalizes the bribery of foreign officials.[9] From its inception, the FCPA has received a great deal of criticism for isolating U.S. corporations from their competitors and placing them on an uneven playing field because they were forced to play by a different set of rules in competing for international business. The 1988 amendments to the FCPA[10] did little to win any additional international support for the U.S. anti-bribery position[11] and thus, the playing field remains slanted against U.S. businesses.[12]

Id. ¶¶ 47-48; *see also* Paul Klebnikov, *Joe Stalin's Heirs*, FORBES, Sept. 27, 1993, at 124 (discussing widespread corruption in Russia); Barbara Ettorre, *Why Overseas Bribery Won't Last*, MGMT. REV., June 1994, at 20, 21. ("There are signs that the tolerance of bribery by countries overseas is waning, even as experts caution that the practice is still widespread. 'There have been some reforms, but bribery is at a level that is still unacceptable,' says Michael Slattery Jr., an investigator at Kroll Associates, an international investigative firm.")

5. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m(b), 78dd-1, 78dd-2, 78ff (1988).

6. *Id.* § 78dd-1.

7. *See* S. Res. 265, 94th Cong., 1st Sess., 121 CONG. REC. 36, 107-08 (1975) (calling for the initiation of multilateral negotiations to establish an international system of antibribery rules and sanctions).

8. The international efforts (led for the most part by the United States) have yet to produce an international agreement concerning bribery and corrupt practices. *See* discussion *infra* p. 387.

9. *See generally* Christopher L. Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289 (1994).

10. The Foreign Corrupt Practices Act of 1977, *as amended by* Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 1901-2006 (1988).

11. As one commentator has correctly pointed out, the FCPA may have in fact created a disincentive for other countries to act. Professor Gevurtz explains "[i]f the United States is willing unilaterally to prohibit bribery by its nationals doing business abroad, there is a disincentive for other trading nations to agree to enforce similar prohibitions because this would take away a possible competitive edge for their firms." Franklin A. Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 216 (1987).

12. There is a split in opinion concerning how badly U.S. business has actually been hurt by this law. *See* Bill Mintz, *Ban on Bribery Hinders U.S. Companies*

The international response to bribery and the corruption of officials is best characterized as a bureaucratic tangle of good intentions rather than a blatant disregard for the underlying justifications for dealing with bribery. Although many in the international community recognize that there is a problem with bribery, they have never been able to mobilize enough support to deal with it effectively. One of the first failed attempts to deal with the problem occurred in 1975 when the United Nations General Assembly passed a resolution condemning all corrupt practices, including bribery.[13] Shortly thereafter, a working group of the Economic and Social Council drafted an agreement on illicit payments.[14] However, this agreement was never signed by any of the U.N. member countries, largely because of concessions that lesser developed countries (LDCs) demanded from developed countries.[15] Similarly, attempts by the Organization for Economic Cooperation and Development (OECD) yielded little in the way of combating bribery on an international scale.[16]

Past failures, however, should not thwart further attempts to achieve an international agreement concerning bribery, corruption and illicit payments through traditional channels.[17]

Abroad, HOUS. CHRON., Jan. 15, 1992, at 1 (After a two-week trip through the Middle East, then-Deputy Secretary of Energy Henson Moore observed that "American companies said they have a definite disadvantage in the Foreign Corrupt Practices Act. The companies from other countries do not have that."). *But see* Ettorre, *supra* note 4, at 22 (The remarks of Raymond V. Gilmartin, chairman, president and CEO of Becton Dickinson and Company and board chairman of the Ethics Resource Center, "I've never heard a manager say, 'We can't do business because we're limited by the Foreign Corrupt Practices Act.' We are not at a competitive disadvantage at all.") Although there is no consensus on the actual impact of the FCPA on American businesses, it is safe to say that it does not help promote American business overseas. Regardless of the fact that some business persons and scholars may argue that American business has not been hurt, the impact of the FCPA is really a question of degree.

13. *See* G.A. Res. 3514, U.N. GAOR, 13th Sess., Supp. No. 34, at 69, U.N. Doc. A/10034 (1976).

14. E.S.C. Res. 2041, U.N. ESCOR, 61st Sess., 2032d mtg., at 17, U.N. Doc. E/5883 (1976).

15. Bruce Seymour, *Illicit Payments in International Business: National Legislation, International Codes of Conduct, and the Proposed United Nations Convention, in* LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 219, 232 (Norbert Horn ed., 1980).

16. *See infra* pp. 394-95.

17. *See* Hall, *supra* note 9 (concluding that the international atmosphere is changing to become more receptive to an anti-bribery agreement and that the FCPA will set the example for this type of agreement).

Congress approved these efforts when it enacted the FCPA.[18] Therefore, the United States should continue to lead the effort to achieve an international agreement through conventional international channels.[19] However, considering the lack of any successful initiatives over the past twenty years, the United States must also pursue less traditional methods.

One reason that the United States should consider less traditional methods is that the globalization of trade as evidenced by the formation of the European Union, the signing of General Agreement on Trade and Tariffs (GATT), and, more recently, the ratification of North American Free Trade Agreement (NAFTA), makes the problem of bribery more urgent today than ever before. This urgency stems from the fact that unless countries come to a common understanding on a general set of rules concerning acceptable and unacceptable behavior among trading partners, the fear of instability and noncooperation expressed by the former U.S. Trade Representative (USTR) Carla Hills could just as easily apply to a failure in reaching an agreement on bribery. While discussing the possible collapse of the Uruguay Round of GATT, Hills stated, "[w]ithout internationally agreed rules trade disputes will grow into costly trade wars, increasing the odds that the world will splinter into giant exclusionary trading blocs."[20] Therefore, in

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18. Congress stated:

> It is the sense of the Congress that the President should pursue the negotiation of an international agreement among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section.

Omnibus Trade and Competitiveness Act of 1988 § 5003, 15 U.S.C. § 78dd-1 (1988).

19. It would appear that the Clinton Administration is receptive to the goal of eliminating international bribery. Secretary of State Warren Christopher made this clear when he addressed the OECD in June of 1994 to discuss a "vital objective" concerning the U.S. effort "to build an international consensus against the bribery of foreign officials in international business transactions." Secretary Christopher, Toward a More Integrated World, *in* DEP'T ST. DISPATCH, June 20, 1994, at 393, 395 (Statement at the Organization for Economic Cooperation and Development, Ministerial Meeting, Paris, France, June 8, 1994). Also, President Clinton announced, in September of 1993, a National Export Strategy, the goals of which are to: 1) remove obstacles to trade; 2) focus U.S. global trade initiatives on the fastest growing regions; and 3) create new international arrangements to benefit the United States and its partners. President William J. Clinton's Remarks Announcing a National Export Strategy and an Exchange with Reporters, 29 WEEKLY COMP. PRES. DOC. 1918 (Sept. 29, 1993).

20. Christina Morton, *Market Games or Market Rules?*, INT'L FIN. L. REV.,

the interim, the United States should examine the potential use of unilateral tools[21] that may prove much more effective than the multilateral tools on which it has previously relied.[22] As one commentator stated, "if the United States wants to even the odds in this one aspect of international trade, it must do so by applying its own law."[23]

Potentially, one of the most effective unilateral tools at the disposal of the United States is section 301 of the Trade Act of 1974.[24] Section 301 addresses unfair trade practices aimed at the United States by other nations and provides for sanctions in response to these practices.[25] However, the primary intention behind section 301 is not to encourage unilateral punishment of other nations but rather to provide the President with the "negotiating leverage" to "insure fair and equitable conditions for U.S. commerce" and "to eliminate [trade] barriers . . . and . . . distortions . . . on a reciprocal basis."[26]

The goal of section 301, as one authority explained it, is "to put a 'tool' in the hands of the USTR which can be used to eradicate unfair trade practices and establish free and fair trade."[27] Although the actual practice of bribery can certainly be seen as an unfair advantage, it is the action (or in most

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Special Supp. June 1991, at 3.

21. Although lobbying the OECD and announcing a National Export Strategy are certainly encouraging signs, they are not entirely novel approaches to a problem that the United States has been trying to solve for nearly two decades. Some commentators would point out that the economic world order has undergone a drastic change since the initial passage of the FCPA and that the old methods will yield different results in this new context. *See generally* Hall, *supra* note 9. However, if the United States truly wants to take advantage of the changed world order and the Clinton administration is serious about "removing obstacles to trade," now is the time to consider using existing U.S. law to address this problem instead of relying on recycled and repackaged approaches that have yielded little success.

22. Simply relying on the same methods of dealing with the problem of international bribery leaves the United States in a passive role. Continuing to use the multilateral tools, while also employing U.S. laws concerning unfair trade practices, makes the U.S. effort truly proactive and also shows the world that the United States is serious about the problem of international bribery.

23. *See* Gevurtz, *supra* note 11, at 216.

24. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1988).

25. *See id.*

26. S. REP. NO. 1298, 93d Cong., 2d Sess. 164 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7302.

27. Howard Russell, Note, *Overview of Amendments in the 1988 Omnibus Trade Bill: Sections 301, "Super 301" and 337*, 1989 B.Y.U. L. REV. 729, 737 (1989).

cases the inaction) that countries choose to take towards bribery that make it most suitable for section 301 measures.

This Note explores, in the wake of international reluctance to deal with the problem of bribery, how the United States can use its existing law in the area of unfair trade practices to level the playing field on which the FCPA has forced U.S. businesses to play. This Note treats bribery on two different levels. The initial focus is on bribery in general and how it negatively affects the international economic order. However, in order to use section 301 to deal with this problem, the ultimate focus of this Note is on a foreign country's response or lack thereof to the bribery in which its nationals are participating beyond its borders. This Note examines the potential for and practicality of classifying bribery, corruption, and illicit payments[28] as unfair trade practices as well as using section 301 to combat them. Part II of this Note examines the continued vitality of the bribery problem that warrants not only ongoing attention from the international community, but also justifies treating bribery as an unfair trade practice. Part III examines the history behind the use of section 301, the necessary elements required to take advantage of its protection, and how bribery meets these requirements. Finally, Part IV describes some of the problems that applying section 301 would inevitably create and proposes some possible solutions to these problems.

II. Is Bribery Wrong?

A. Economic and Political Consequences of Bribery

Bribery creates the potential for widespread economic damage because it misallocates money that could otherwise be spent on worthwhile national needs. Examples of the waste that bribery encourages can be seen throughout corruption-plagued Italy. A *Business Week* article describes, "highway overpasses . . . built on towering concrete pillars—even though the surrounding land is flat" and the existence of "superhigh-

28. The terms "bribery," "corruption" and "illicit payments" will be used interchangeably throughout this Note. Although there are differences in the definitions, the author seeks to address them as a class and will often refer in this Note to one and not the others. The reader should be aware that the arguments made by the author refer to all three terms.

ways to nowhere [that] begin and end abruptly."[29]

Bribery and corruption inflate the cost of goods. In Russia, where corruption runs rampant, an experiment was tried in one of the food markets in St. Petersburg in an attempt to measure the everyday costs of corruption.[30] Merchants were offered protection by police and former KGB officers from mob enforcers who would normally fix the price of the merchants' goods.[31] With the protection in place, the costs of the goods declined 15 to 20%.[32]

Finally, bribery reduces a country's income tax revenues while inflating its national debt. A study by the Luigi Einaudi Research Center estimated that the Italian government's debt was inflated by 15%, or about $200 million, because of corruption.[33] Although bribery may once have been seen as an inevitable cost of doing business, it is quickly turning into a cost that countries can no longer afford.

Bribery can also lead to political unrest. The 1975 disclosure that United Brands Corporation agreed to pay $2.5 million to high officials of Honduras in exchange for a tax break on bananas led not only to the suicide of United Brands' president, but also to a military coup that overthrew Honduran president, Oswaldo Lopez, when he refused to grant investigators access to his banking records.[34] More recent examples of the high political toll that bribery and corruption exact can be found in the scandals endured by the Brazilian and Italian governments.[35]

Moreover, direct action by government officials in accepting bribes is not the only way that a political crisis may materialize. For example, Malaysia, a former British colony, recently banned the award of any government contracts to British firms.[36] This ban resulted from an allegation that a $50,000 bribe was paid by the British corporation, George Wimpey

29. Karen Pennar et al., *The Destructive Costs of Greasing Palms*, BUS. WK., Dec. 6, 1993, at 133, 137.

30. *Id.* at 136.

31. *Id.*

32. *Id.*

33. *Id.* at 137.

34. JOHN T. NOONAN, JR., BRIBES 656 (1984).

35. *See* Ettorre, *supra* note 4, at 22-23.

36. *See* Michael Vatikiotis, *Trade Winds*, FAR E. ECON. REV., June 9, 1994, at 16.

International, in order to secure a contract in Malaysia.[37] Although the amount of money involved was small, it was important enough to lead to the potential breakdown of all diplomatic relationships between the two countries. Furthermore, the British government was not even directly connected to the bribe allegation since it was allegedly passed by a private corporation, yet the government suffered the consequences when the bribe was revealed to the public.

B. Bribery Is Socially Unacceptable

1. The United States Response

As the British/Malaysian situation demonstrates, bribery is generally not condoned—at least once it is publicly revealed. The FCPA was enacted in response to a similar type of bribery abroad, brought to light by the exposure of bribery schemes in the United States during the 1970's.[38] Corporate "slush funds," uncovered during the Watergate investigations, consisted of off-the-record corporate accounts that would be used to make questionable domestic and foreign payments in order to win influence or business.[39] Although the initial thrust of the investigation focused on illegal campaign contributions,[40] it soon became apparent that many corporations involved in questionable behavior domestically were also practicing similar acts overseas.[41] A subsequent initiative undertaken by the Securities and Exchange Commission (SEC) to encourage corporations to voluntarily disclose such payments resulted in nearly five hundred firms coming forward with confessions of having made questionable foreign payments totaling hundreds of millions of dollars.[42] The FCPA was Congress' attempt to clean the house of corporate America and polish the reputations of all U.S. businesses that had unfortunately been tarnished by these activities.[43]

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37. *Id.*

38. *See* Shelley O'Neill, *The Foreign Corrupt Practices Act: Problems of Extraterritorial Application*, 12 VAND. J. TRANSNAT'L L. 689, 689-90 (1979).

39. *Id.* at 690.

40. *Id.*

41. *Id.*

42. *Id.*

43. CONFERENCE REPORT FROM THE COMMITTEE OF CONFERENCE TO ACCOMPANY S. 305, FOREIGN CORRUPT PRACTICES ACT OF 1977, H.R. REP. NO. 831, 95th

Congress intended to eliminate a practice they found "apart from being morally repugnant and illegal in most countries, simply not necessary for the successful conduct of business [in the United States] or overseas."[44] Congress enacted the FCPA under the basic premise that bribery is not only inherently bad, but is also bad for business.[45] The FCPA unanimously passed into law due in large part to the feelings of Congress and the American people that bribery went against the basic tenet of the free market system, namely, that the sale of products should take place solely on the basis of price, quality, and service.[46] Given the strong moral rationale behind passage of the FCPA, as well as the belief that bribery is undemocratic and inconsistent with American ideals,[47] it is hard to imagine a politician who would want to propose a repeal of anti-bribery legislation and risk being labeled "pro-corruption" or, even worse, "soft on crime."

2. The International Response

While passage of the FCPA was vigorously supported in the United States, efforts on the international front to obtain an international agreement similar in effect to the FCPA have met with failure. One of the first attempts to deal with bribery began in 1975 when the U.N. General Assembly adopted Resolution 3514 by consensus,[48] which condemned all corrupt practices, including bribery, in violation of the laws and regulations of most countries. The resolution went on to affirm the right of any country to adopt legislation and to investigate and take appropriate legal action, in accordance with its national laws

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Cong., 1st Sess. 4 (1977), *reprinted in* 1977 U.S.C.C.A.N 4098, 4101.

44. *Id.*

45. *Id.*

46. *Id. See supra* notes 1-6 and accompanying text. However, this is not to discount the context in which the FCPA was passed. As an expert on bribery and its history throughout the world points out concerning the passage of the FCPA: "[l]ike a vote against obscenity in the nineteenth century, a vote against bribery in 1977 was certain of public approval in America. No member of Congress cared to stand as the champion of corruption at home or abroad." NOONAN, *supra* note 34, at 677.

47. As one commentator explained it, "[t]he FCPA serves pragmatic foreign policy interests of the United States by seeking to ensure that U.S. companies, like Caesar's wife, remain above suspicion." *See* Gevurtz, *supra* note 11, at 215.

48. G.A. Res. 3514, *supra* note 13.

and regulations, against enterprises and individuals involved in such corrupt practices.[49] Thereafter, an Ad Hoc Intergovernmental Working Group on Corrupt Practices was established by the Economic and Social Council.[50] This group completed a text draft agreement on illicit payments in 1979 and went no further. The failure to proceed any further was attributed mainly to the demand by Third World countries that the conclusion of an illicit payments agreement be linked with the Code of Conduct for Transnational Corporations[51] on which the United Nations was also working at the time.[52] The United States and other Western nations believed that the call for this linkage was inappropriate and the negotiations broke down.[53]

Attempts by the OECD[54] yielded similar disappointing results. Although OECD member states included a statement regarding their consensus view on the elimination of bribery in the 1976 non-binding OECD Guidelines on Multinational Enterprises,[55] the OECD has produced nothing more concrete in the ensuing years.[56] Although the international effort towards criminalizing bribery failed to achieve an agreement, the fact that members of the United Nations and the OECD deemed it worthy enough for the prolonged attention it received supports the proposition that it is a problem demanding international attention. Instead of considering the repeal of the FCPA due to

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49. *Id.*

50. E.S.C. Res. 2041, *supra* note 14.

51. U.N. CENTRE ON TRANSNAT'L CORPS., THE NEW CODE ENVIRONMENT, U.N. Doc. ST/CTC/SER.A/16, U.N. Sales No. E.90.II.A.7 (1990).

52. *See* Arthur I. Aronoff, *Antibribery Provisions of the Foreign Corrupt Practices Act, in* THE COMMERCE DEPARTMENT SPEAKS 1990 at app. C (PLI Corp. Law and Practice Course Handbook Series No. B4-6904, 1990) (reprinting the Report to Congress: Implementation of Section 5003(d) of the Trade Act of 1988, Aug. 25, 1989), *available in* WESTLAW, JLR Directory.

53. *Id.*

54. The OECD is made up of 26 member nations that comprise 16% of the world's population and two-thirds of its goods and services. Ettorre, *supra* note 4, at 21.

55. Declaration of June 21, 1976 on International Investment and Multinational Enterprises by Governments of OECD Member Countries, 75 DEP'T ST. BULL. 83, 84 (1976) (Annex).

56. The OECD has issued a press release reaffirming their stand against illicit payment. *OECD Governments Agree To Combat Bribery*, OECD PRESS RELEASE (Org. for Econ. Cooperation and Dev., Paris, Fr.), May 27, 1994. Although this can be seen as a positive sign, it certainly does not represent a great deal of progress over nearly two decades.

the failed international efforts, the U.S. position should be bolstered by the serious consideration these international forums have granted to the problem of bribery. Furthermore, encouraging signs do exist that the acceptance of bribery as a common international business practice is declining. An international group of government officials, development experts, and businessmen, have formed an organization named Transparency International (TI).[57] Its stated goal is "to monitor large-scale corruption which robs poor countries of badly-needed funds."[58] TI stated in its first meeting that "[c]orruption involving public officials in large-scale business transactions is devastating the lives of tens of millions of people and destabilizing dozens of countries."[59]

Positive signs also exist within the OECD that suggest an international agreement may still be possible. The OECD's recently issued press release, addressing the problem of bribery in international business transactions, demonstrates its desire to witness an international agreement on bribery.[60] The press release echoed the concerns of TI, stating:

> Bribery presents moral and political challenges and, in addition, exacts a heavy economic cost, hindering the development of international trade and investment by raising transaction costs and distorting the operation of free markets. It is especially damaging to developing countries since it diverts needed assistance and increases the cost of assistance.[61]

Some encouraging signs that make the OECD initiative more realizable are the fact that most of its members generally

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57. *See* Tom Heneghan, *New Worldwide Group Launches Anti-Corruption Drive*, Reuter Eur. Bus. Rep., May 6, 1993, *available in* LEXIS, News Library, REUEUB File. Transparency International (TI) has received funds from developmental agencies of Sweden, Germany, France, Switzerland and Holland, as well as two United Kingdom foundations and various corporations, including General Electric and Boeing. TI's advisory council and board of directors include highly placed international executives, ex-World Bank officials, as well as the former president of Costa Rica and Nobel Laureate Oscar Arias Sanchez. Ettorre, *supra* note 4, at 23.

58. Heneghan, *supra* note 57. TI also stated that it hoped to establish "'islands of integrity'" where government and business reject bribes. Ettorre, *supra* note 4, at 24.

59. Heneghan, *supra* note 57.

60. *See OECD Governments Agree to Combat Bribery*, *supra* note 56.

61. *Id.* at 1.

favor the elimination of bribery[62] and, since the developing nations are not members of the OECD, they cannot block the initiative as they did in the United Nations. However, simply because most member countries agree in principle that bribery should be prohibited does not lead to the conclusion that a meaningful agreement can be drafted.[63] Also, the fact that the LDCs are not present to block an agreement does not take into consideration that these are usually the countries with the worst bribery and corruption problems and, thus, the very countries that such an agreement needs to reach.

Finally, the overall attitude towards bribery does not make repeal of the FCPA a viable option. Although bribery is tolerated by many countries, even the most notoriously corrupt countries have laws that prohibit bribery. As one expert on bribery explains, there is

> [n]ot a country in the world which does not treat bribery as criminal on its lawbooks . . . . In no country do bribetakers speak publicly about their bribes, or bribegivers announce the bribes they pay. No newspaper lists them . . . . No one is honored precisely because he is a big briber or bribee.[64]

Therefore, the social stigma of bribery is simply too great for the United States to ignore.

The recent responses of both governmental and nongovernmental agencies lend support to the effort by the United States to eradicate bribery. After working so hard to encourage an international agreement, it would seem foolish for the United States to ignore these positive current developments and simply repeal the FCPA. On the contrary, these responses prove that bribery is an international problem that demands an international solution.[65] The recent international political

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62. *See* Aronoff, *supra* note 52.

63. In fact, Germany allows for corporate financing of political campaigns and also permits those payments to be tax deductible. Judson J. Wambold, Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 237 (1977).

64. NOONAN, *supra* note 34, at 702.

65. *See* NEIL H. JACOBY ET AL., BRIBERY AND EXTORTION IN WORLD BUSINESS: A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD 142 (1977) ("In contrast with open and aboveboard trading, free of corruption, they [bribes] involve unproductive uses of resources. They constitute wasteful barriers to international economic intercourse, which diminish the welfare of people in both the host country and the home country . . . .").

scandals involving bribery demonstrate its devastating effects on governments and the countries they represent.[66] The destabilizing effect of bribery and other corrupt practices is even more of a danger to developing countries attempting to build economic systems that would enable them to compete in the international community.[67] If the goals of free trade are equality and nondiscrimination,[68] then bribery clearly does not advance these objectives.

C. Domestic Bribery vs. International Bribery

Perhaps the biggest obstacle the United States must overcome to justify unilateral action against bribery is eliminating the double standard, which many countries embrace, of distinguishing domestic from international bribery.[69] If all countries recognize that bribery is wrong and enact laws against such conduct aimed at their officials, what makes it any different

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66. *See supra* pp. 390-92.

67. Ettorre, *supra* note 4, at 22 (Lynn Paine, an associate professor specializing in management ethics at the Harvard Business School explains, "[m]any countries are learning from their own experience. You can not build trust if you have corruption, and you can not build economic enterprise unless you have trust.").

68. *See* RICHARD POMFRET, UNEQUAL TRADE: THE ECONOMICS OF DISCRIMINATORY INTERNATIONAL TRADE POLICIES 1 (1988).

69. Domestic bribery will be defined, for the purposes of this Note, as the making of a secret payment to country X's official in order to influence that official's judgment. International bribery, in contrast, is the making of a secret payment to country Y's official by an individual or corporation of country X. Some confusion might arise concerning the distinction between international bribery and domestic bribery as being a false distinction. This confusion can be cleared up by simply recognizing that although bribery laws are on the books, selective enforcement or no enforcement leads to the creation of a climate that encourages bribery. This does not help U.S. corporations doing business in such nations since they are prohibited from bribing by the FCPA.

While domestic bribery is any bribery that would involve country X's official, whether he is bribed by a domestic corporation or a foreign corporation, international bribery is any bribery involving country X's corporation and a foreign official. A corporation, either domestic or foreign, may be able to get away with bribing country X's official because many countries do not enforce the domestic bribery laws that are on the books (a U.S. corporation would not be able to take advantage of this lax attitude because they are independently constrained by the FCPA). Country X's corporation could feel free to bribe a foreign official because it knows that its country has no law against this and any domestic law of the host country is probably equally lax (whereas the U.S. corporation would still be faced with complying with the FCPA). The problem that must be dealt with when addressing domestic bribery should focus on enforcement while the major problem in international bribery is actually enacting some form of law.

when their citizens conduct the very same act abroad, aimed at foreign rather than domestic officials? The false distinction between domestic and international bribery no longer has any value in an international community that is working towards common trade rules and regulations.[70] The double standard applied to bribery creates a barrier that inhibits free trade by granting certain states an advantage over others. In order to successfully remove this barrier, the disparate treatment of international and domestic bribery must stop.

No substantive differences exist between acts of domestic and international bribery. The only distinctions that can realistically be drawn between the two acts are: 1) the location of the action, 2) the actors involved, and 3) the benefit or harm that the country may receive. The first two distinctions offer no reason for countries to treat international bribery differently from domestic bribery. The location where the bribery takes place, whether within the country's borders or abroad, should not matter. Once a country recognizes certain activity by its nationals as wrong, it should punish those individuals that commit the act, regardless of the location of the actual crime. In fact, a strong argument can be made that committing a criminal act in a foreign country might actually be seen as worse. As one commentator points out, "one of the principal rationales given by those countries . . . which prosecute their nationals for crimes committed abroad is that the crime injures the country's reputation."[71] Therefore, the fact that one of the parties to the bribe is now a foreign entity also should make no difference.

The third distinction offers the best explanation why countries prohibit domestic bribery while simultaneously allowing, if not encouraging, international bribery. Domestic bribery harms a country while international bribery may actually offer benefits to a country that allows it. International bribery offers incentives to a country to look the other way. The same incentives are not present in the area of domestic bribery and, therefore, it is easier for the country to justify enacting laws against this practice.

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70. An example of a cooperative agreement is the *US/EC Agreement on Antitrust Cooperation and Coordination*, 61 Antitrust & Trade Reg. Rep. (BNA) 382 (Sept. 26, 1991).

71. *See* Gevurtz, *supra* note 11, at 215 n.17.

If corporations X and Z are competing for a contract domestically and X bribes an official of that country to get the contract, does the country benefit from this action? No, it does not benefit for several reasons. First, if the contract is for services, the bribe does not insure that the best company is doing the job and the final product might suffer. For example, a bridge may be built poorly and the country may need to invest more money to do the job right. Second, if the contract is for a product the same problem can occur. The product may be inferior, and the consumers of the product—presumably its citizens—may not be able to use it. Finally, tolerance of domestic bribery leads to distrust of the government by the citizens, which is certainly undesirable.

If corporation X travels overseas to compete for a contract, X's home country now may have an incentive to look the other way if X decides to bribe a foreign official to win the contract. The first two factors discussed above relating to domestic bribery—the double loss problem—do not apply here. If anything goes wrong with the contract it will be the foreign country, not the home country, that must deal with it.[72] The third factor, distrust of government, also probably would not apply. The home country could simply say that it cannot control what its corporations do overseas and that it had no active part in the bribery.[73] Thus, none of the disincentives present in domestic bribery are present in international bribery. If the acquisition of foreign business is not incentive enough to look the other way, then the profit that the ignorant country can make certainly is a strong inducement to take no action. If X secures overseas business, it will only serve to help its home country since the products produced by X and shipped to the overseas customer will factor into the home country's trade balance.

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72. Of course the opposing argument is that in the long run, if corporation X does not do a good job, then it will not get new business and this will indirectly hurt country A. Although this is true, if corporation X continues to pay bribes in its international dealings it probably will continue to win business and thus this is actually another reason for country A to keep its head in the sand. The fact that the host country must absorb the double loss is another strong practical reason why countries should not be so lax in enforcing the bribery laws that are already on their books and it also represents a practical reason why prohibiting international bribery would help all countries involved.

73. This argument will be harder to make for countries that actually allow for tax deduction of bribes paid to foreign officials.

Also, a successful corporation will be making more money and therefore paying more taxes. These are very large incentives for home countries to ignore how its domestic corporations obtain overseas business.

Two things must occur in order for the false distinction between international and domestic bribery to be successfully eliminated. First, the laws against domestic bribery must be more strictly enforced by all countries. Second, countries must recognize the harm that their corporations can create by participating in overseas bribery and must criminalize this activity as well. The achievement of these two requirements will lead to a greater willingness to discuss an international solution.

III. SECTION 301 AND BRIBERY

What makes the United States so sure that the prohibition of bribery is best for its economic and political interests as well as the interests of the international community? The United States has taken a leading role in attempting to negotiate an international agreement which would condemn bribery and illicit practices by corporations.[74] Is the United States motivated by a fear that it has placed its businesses out on a limb with the passage of the FCPA? Could the U.S. actions be in response to a realization that it might be easier to get countries to join it out on the limb, rather than to climb back and admit it was wrong? Perhaps. However, the real reason might be found in a growing awareness by the United States and the other countries making up the international business community that bribery no longer makes sense.[75]

If an international effort is to be successful, the United States must use its influence in the international economic community to identify bribery as a serious and urgent problem.[76] The distinction between domestic and international

74. *See supra* notes 4-8 and accompanying text.

75. *See generally* Ettorre, *supra* note 4.

76. Ecuador is a good example of one country that is beginning to see bribery as a serious enough problem to initiate their own unilateral action. It has recently declared that before any company, foreign or domestic, bids on any government contract, the senior representatives of the company must sign a statement that it will not offer or give a bribe to any government official for that contract. The company is also required to disclose all fees, commissions and payments given to hired agents and middlemen. Ettorre, *supra* note 4, at 24.

bribery must not be allowed to stand. The United States has been trying to lead the way through various multilateral initiatives. Another way to demonstrate to the international community that the United States is serious about eradicating bribery would be to use section 301 of the Trade Act of 1974.[77] Threatening to use section 301 would send a clear message to the rest of the world that the United States considers bribery a top priority. The threat may force other countries to re-evaluate the different standards they apply to domestic and international bribery. The possibility of section 301 sanctions may make the incentives of ignoring international bribery unattractive to these countries.

The goal of reaching an international agreement concerning bribery should not be abandoned. Section 301 should simply be seen as another avenue to explore in this ultimate pursuit. Keeping in mind the ultimate goal of an international agreement, two principles should be stated and strictly adhered to in the use of section 301. First, the goal must always focus on improving the overall international business community not simply the fortunes of U.S. businesses. Second, if an international agreement is eventually achieved through other more conventional means, section 301 would not be necessary and, therefore, should not be used. Faithfully adhering to these two principles may take some of the sting out of using section 301 unilaterally and place it in a more acceptable, multilateral context.

A. The History of Section 301

The idea that the United States should be able to take action against countries guilty of unfair trade practices is well established. The earliest examples of power granted to the President to respond to unfair trade practices date back to the presidency of George Washington,[78] when the U.S. Supreme Court decided to uphold the statutory power granted to the President to impose retaliatory tariffs.[79] This tradition contin-

77. Trade Act of 1974 § 301.

78. *See* K. Blake Thatcher, Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 NW. U. L. REV. 492, 495 (1987) (citing 1 Stat. 372 (1794)).

79. Field v. Clark, 143 U.S. 649 (1892) (upholding the Tariff Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567); *see also* Thatcher, *supra* note 78, at 495.

ued through the 1930 Tariff Act and its 1934 amendments which required, rather than allowed, the President to impose duties on articles in certain instances of discrimination against U.S. products.[80] The modern predecessor to section 301 was section 252(c) of the Trade Expansion Act of 1962.[81] Section 252(c) broadened the presidential power to take action in discriminatory trade relationships by giving the president the power to suspend trade agreements with nations whose import restrictions "'directly or *indirectly* substantially burden[ed] United States commerce.'"[82]

Section 301 of the Trade Act of 1974[83] further expanded the executive branch's discretionary power in the area of unfair trade practices. This expansion was accomplished by abandoning the direct/indirect description of trade restrictions. The President was allowed to take retaliatory action when he determined that a foreign nation maintained a trade restriction that was "unjustifiable, unreasonable or discriminatory and burden[ed] or restrict[ed] United States commerce."[84] Similar to section 252(c), section 301 allows the President to "suspend . . . or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions."[85] However, this power was also increased by allowing the President to impose import restrictions on goods.[86]

Amendments were made to section 301 through the Trade Agreements Act of 1979[87] and the Trade and Tariff Act of 1984.[88] The first set of amendments dealt with three issues. First, the President was given the express authority to pursue U.S. rights under any applicable trade agreement.[89] The sec-

80. Tariff Act of 1930, 19 U.S.C. §§ 1202-1677k (1988); *see* Thatcher, *supra* note 78, at 495.

81. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252(c), 76 Stat. 872, 879-80, *repealed by* Trade Act of 1974, 19 U.S.C. §§ 2101-2495 (1988); *see* Thatcher, *supra* note 78, at 495.

82. *See* Thatcher, *supra* note 78, at 495 (emphasis added) (citing the Trade Expansion Act of 1962 § 252(c)).

83. Trade Act of 1974 § 301.

84. 19 U.S.C. § 2411(a)(2)(B) (1982).

85. 19 U.S.C. § 2411(b)(1) (1982).

86. 19 U.S.C. § 2411(b)(2) (1982).

87. Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1988).

88. Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 301-307, 98 Stat. 2948, 3000-3013 (codified in scattered sections of 19 U.S.C. (Supp. IV 1986)).

89. 19 U.S.C. § 2411(a)(1) (1982).

ond and third issues addressed foreign relations concerns by setting time limits for the conclusion of section 301 investigations[90] and requiring simultaneous consultations with the foreign nation that was the subject of the investigation.[91] The second set of amendments established new negotiating objectives, provided specific examples of foreign practices that would warrant action,[92] and required the USTR to make an annual report to Congress concerning trade barriers to U.S. exports.[93]

The most recent amendments to section 301 were included in the 1988 Omnibus Trade Bill[94] (Trade Bill). The two most important changes that these amendments introduced were a distinction between mandatory and discretionary action[95] and the shifting of power from the President to the USTR in making the final determination on whether certain practices warrant section 301 action.[96] Both of these amendments were signs that Congress sanctioned more aggressive use of section 301.[97]

Although section 301 finds its roots in imperialism and protectionism, its viability as a tool to further the goals of free and fair trade should not be ignored. The elimination of international bribery certainly advances the goal of insuring "fair and equitable conditions for U.S. commerce,"[98] but it also has the effect of insuring those same conditions for international

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90. 19 U.S.C. § 2414(a)(1)(A) (1982).

91. 19 U.S.C. § 2413 (1982).

92. Trade and Tariff Act of 1984, 19 U.S.C. § 2411(d)(3)(B) (1988).

93. *Id.* § 2241(b).

94. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

95. 19 U.S.C. § 2411 (1982), *amended by* 19 U.S.C. § 2411 (1988).

96. *Id.*

97. Judith Hippler Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 49, 49 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990). As Hippler and Holmer explained:

> The message was loud and clear: Congress was dissatisfied with the direction and results of U.S. trade policy. Many congressmen complained that "trade is the handmaiden of all other considerations of the U.S. government," and that considerations of foreign relations, national security, foreign and domestic economics, and domestic politics "have crowded trade off the agenda."

Id. (footnotes omitted).

98. *See supra* note 26 and accompanying text.

commerce. The use of section 301 in the past may have signaled a focus on U.S. interests over and above the interests of other nations. However, with the emergence of a new world trade order, the best interests of the United States and those of the rest of the international economic community can no longer be seen as mutually exclusive. The use of section 301, at least in the context of combating bribery, is an instance where aggressive unilateralism[99] can actually advance the goal of establishing a multilateral world trading regime.[100]

B. Discretionary Action Authorized by Section 301

Section 301 both mandates that the USTR take action against a specific country[101] and authorizes the USTR to take

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99. This term has been used by authorities to describe section 301 action. Traditionally section 301 was seen as the most powerful tool in the United States' trade arsenal. This is still true today. However, the use of section 301 in the context of eliminating bribery is a slightly different application. Instead of using it to insure that U.S. interests are respected, the use of section 301 to combat bribery insures that international and universal interests are respected. *See, e.g.,* Jagdish Bhagwati, *Aggressive Unilateralism: An Overview, in* AGRESSIVE UNLATERALISM, *supra* note 97, at 1.

100. One authority noted that there are potentially different goals or purposes for using section 301. *See* Thatcher, *supra* note 78, at 514 n.181. The specific purpose may determine whether the use of section 301 in a particular instance conflicts with international law. *Id.* Among some of the purposes the use of section 301 could seek to achieve are: the unilateral establishment of guaranteed reciprocal market shares for U.S. exporters, the protection of United States industry from unfair trading practices by foreign nations, and export promotion to the extent the United States attempts unilaterally to force other nations to guarantee U.S. exporters a certain market share. *Id.* All of these would conflict with the principles of international trade law. *Id.* However, Thatcher goes on to state that if the purpose was simply "to publicize the trade barriers of other nations for the purpose of inducing reduction of these barriers-the potential for technical conflict with provisions of international law does not seem to exist." *Id.* at 514-15 n.181. Similarly, if the goal of using section 301 is to benefit the international trade community, with the United States just being one member that would share this benefit, then this would not seem to conflict with international trade law.

101. Section 301 requires the USTR to take specific action if any one of three situations is found to exist. The USTR shall take action against a country if: 1) "the rights of the United States under any trade agreement are being violated," 2) "an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under any trade agreement," or 3) if "an act, policy, or practice of a foreign country is unjustifiable and burdens or restricts United States commerce." 19 U.S.C. § 2411(a)(1)(A)-(B) (1988). The act defines "unjustifiable" as any act, policy or practice which is "in violation of, or inconsistent with, the international legal rights of the United States . . . [or] . . . which denies national or most-favored nation treatment or the right of establishment or protection of intellectual property rights." 19 U.S.C. §

action on a discretionary basis. The USTR is granted discretionary power to take actions against a country, under the direction of the President, if the USTR determines that acts, policies or practices are "unreasonable" or "discriminatory" and burden or restrict U.S. commerce.[102] Defined as unreasonable, is any "act, policy or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable."[103] An act, policy or practice meets the discriminatory standard if it "denies . . . most-favored nation treatment to United States goods, services or investment."[104]

Unlike the requirement imposed on mandatory action, discretionary action is much more flexible.[105] It allows for responses to actions that are neither violations of already existing trade agreements nor violations of international rights of the United States, but are nonetheless seen to be "unreasonable"[106] or "discriminatory."[107] As between the two qualifying terms, unreasonable is more flexible than discriminatory.[108] A section 301 claim addressing the toleration of bribery would fall within the definition of an unreasonable policy or practice.[109] Although it is possible to envision bringing a section 301 action against a state for an "unreasonable" act,[110] in

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2411(d)(4)(A)-(B) (1988).

The United States could not use this portion of section 301 to attack bribery. The mandatory action section is reserved for fairly limited situations. It is only triggered if there is a violation of an already existing trade agreement or if an established international right of the United States is broken. Since no trade agreement is currently in place that deals with the issue of bribery and the treatment of bribery is far from an international standard, the United States would have to look to addressing bribery through the discretionary acts allowed by section 301.

102. 19 U.S.C. § 2411(b)(1) (1988).

103. 19 U.S.C. § 2411(d)(3)(A) (1988).

104. 19 U.S.C. § 2411(d)(5) (1988).

105. *See* Thatcher, *supra* note 78, at 514 n.181.

106. 19 U.S.C. § 2411(b)(1) (1988).

107. *Id.*

108. Although "unreasonable" is defined by the statute, the words used to give it meaning, "unfair and equitable" are no less ambiguous and open for interpretation than "unreasonable."

109. *See* 19 U.S.C. 2411(b)(1) (1988).

110. *Id.* An unreasonable act would occur if a country actively encouraged bribery, for example, or if the country itself participated in a bribery scheme. It could be argued that a country actively encouraged bribery by allowing tax deductions for bribes paid, much like what is done in Germany. These cases would seem to

all likelihood, such an action would be brought against a nation only for its willful blindness to bribery by its nationals.

A section 301 action for tolerance of bribery is not simply created by a judicious reading of the already flexible "unreasonable" standard. There is support for this type of action found in the statute. Congress chose to not only define "unreasonable," but also to provide several examples of what would constitute "unreasonable" practices within the purview of the statute. An example of an "unreasonable" practice is:

> (B) . . . any act, policy or practice or any combination of acts, policies or practices, which (i) denies fair and equitable . . . (III) market opportunities, *including the toleration by a foreign government of systematic anticompetitive activities by private firms or among private firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms.*[111]

Applying this example to a country's tacit approval of "international" bribery would seem to yield a practice that falls squarely within "a toleration by a foreign government of systematic anticompetitive activities by private firms."[112]

The use of section 301 against the toleration of bribery would clearly liberalize international trade. Therefore, there should be little concern about its use in this context for purely political reasons. In fact, the application of the unreasonable standard to eliminate bribery promotes one of the stated goals of the statute which is "to authorize the negotiation of new agreements that establish new international legal norms in areas of emerging importance to the United States economy."[113] The primary goal of defining the toleration of bribery

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be fairly clear cut and would not raise many troubling issues as far as meeting the substantive requirements of a section 301 action.

111. 19 U.S.C. § 2411(d)(3)(B)(i)(III) (1988) (emphasis added).

112. *See id.*

113. Section 302 of the Trade and Tariff Act of 1984 states that the statute's purposes include encouraging "the expansion of . . . international trade in services through the negotiation of agreements . . . which reduce or eliminate barriers to international trade in services," and enhancing "the free flow of foreign direct investment through the negotiation of agreements . . . which reduce or eliminate the trade distortive effects of certain investment-related measures." *See* Trade and Tariff Act of 1984, 19 U.S.C. § 2102 note (1988); *see also* Patricia I. Hansen, *Defining Unreasonableness in International Trade: Section 301 of the Trade Act of*

as an unreasonable act, policy or practice and using section 301 to combat it is to achieve a new international agreement that will establish a universal norm prohibiting bribery. The emerging importance of this goal applies not only to the U.S. economy but also to the economy of the international community.[114]

C. *Substantive Requirements of Section 301 Applied to Bribery*

A private party may only petition for the use of section 301 powers if it meets four requirements.[115] The party must be able to prove: (1) proper subject matter jurisdiction exists for the USTR to take the case, (2) the private party has standing as an interested party, (3) injury resulting from the foreign trade practice, as defined by section 301, and (4) a substantive violation of section 301.[116] An American corporation could easily meet these four substantive requirements and thus petition the President and the USTR to use their powers under section 301 against bribery.

1. Jurisdiction

Section 301 has traditionally been used in a wide array of areas involving unfair trade practices by foreign governments. These areas range from silk and leather to aluminum baseball bats and tobacco products.[117] Although initially section 301 was aimed specifically at goods, subsequent amendments have established that its powers can also be enlisted to cover petitions involving services and foreign investment. The broad jurisdictional scope of section 301 makes it difficult to imagine a petitioner that would fail to fall within its range. A petitioner raising a claim of bribery as an unfair trade practice should be able to meet the subject matter jurisdiction requirement whether the claim is in a relatively new area like financial services offered in former Communist Eastern European coun-

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1974, 96 YALE L.J. 1122 (1987).

114. *See supra* part II.B.

115. A section 301 action can be initiated by the USTR without a petition from a private party as well. Additionally, even when a private party does make a petition that meets all the substantive requirements, the USTR still maintains discretion concerning whether or not to proceed. 19 U.S.C. § 2412(a)(1)-(4) (1988).

116. *See* Thatcher, *supra* note 78, at 500.

117. *Id.*

tries or in a more traditional area like military products offered to the Middle East.

2. Standing Under Section 301

A private party initiating a section 301 action must qualify as an "interested party."[118] However, like the jurisdictional requirement, the standing requirement is broad enough that it does not pose a serious problem to an otherwise legitimate claim. Congress defined interested party in section 301 as a party that "includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and industrial users of any goods or services . . . ."[119] Applying this broad definition of standing it would seem that everyone from General Electric to Ralph Nader would satisfy the standing requirement to bring a section 301 petition.

3. Injury Under Section 301

According to section 301, a practice by a foreign country only becomes actionable if it "burdens or restricts United States commerce."[120] Once again the actual requirement set forth in section 301 is not very hard to meet. The definition of "interested party" makes section 301 more lenient than other U.S. trade laws, as well as GATT customs. Whereas both GATT customs and other U.S. trade laws frown on complaints that allege de minimis effects, section 301 does not require that the petitioner suffer direct injury but rather that the petitioner have some interest in the foreign trade practice that caused the burden or restriction.[121]

Even with this lessened burden of proof, this requirement may still be the most difficult to prove. A firm that wins business by bribing a foreign official will probably not be quick to make this practice public knowledge. Nor will the foreign official who accepted the bribe be forthcoming with this information. Furthermore, complaining about losing a bid to a competitor because of bribery may be characterized by both the win-

118. 19 U.S.C. § 2412(a) (1988).
119. 19 U.S.C. § 2411(d)(9) (1988).
120. 19 U.S.C. § 2411(b)(1) (1988).
121. *See* Thatcher, *supra* note 78, at 502.

ning party and the government as simply a case of sour grapes. In this type of situation, the assistance of outside agencies such as TI may prove particularly helpful.[122] Independent verification that bribery occurred in a specific transaction or that it is known to be tolerated by a particular government may lend substantial reliability to an otherwise unsubstantiated claim made by the losing party of a bid.

4. Substantive Violations Under Section 301

The term "substantive violation," as applied to section 301, simply means that a party must allege that the conduct of a foreign government was: (1) violative of international agreements, (2) unjustifiable, (3) unreasonable, or (4) discriminatory.[123] As stated previously, the flexible definition given to the term "unreasonable" makes it the most likely category of violations within which bribery would fall. A government's toleration of bribery, while not necessarily in violation of, or inconsistent with, the "rights of the United States under any trade agreement,"[124] could be convincingly presented as "unreasonable or discriminatory."[125]

As one commentator correctly pointed out, the real question that must be addressed when a petitioner brings a claim alleging an "unreasonable" trade practice that is "unfair and inequitable" is what type of practice would be seen as "fair and equitable."[126] There are generally three understandings of what "fair and equitable market opportunities" should mean. The use of section 301 against bribery is consistent with the most reasonable and least controversial of these definitions.

The first definition of "fair and equitable" requires that the market share of an American exporter in a particular good or service to the country in question be roughly equivalent to the market share held by exporters of that country to the United States.[127] This approach has been criticized as being too "wooden" as well as being in contradiction with the theory of

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122. *See supra* notes 57-59 and accompanying text.

123. 19 U.S.C. § 2411 (1988). The failure of a country to take action against bribery comprises government action. *See infra* pp. 414-18.

124. 19 U.S.C. § 2411(a)(1)(A) (1988).

125. 19 U.S.C. § 2411(b)(1) (1988).

126. *See* Thatcher, *supra* note 78, at 504.

127. *Id.*

comparative advantage.[128] The second definition requires a market share for the firms of each nation in proportion with the market share of firms in the rest of the world market.[129] The obvious shortcoming of this approach rests on the fact that it tries to establish a market share based on what a firm does in the rest of the world without looking at the energy it exerted in the particular nation. The third approach, the "free trade" model, simply requires that each nation assure that trade barriers would be eliminated and that other nations would have a fair and equitable opportunity to obtain a market share.[130]

This "free trade" definition, with its focus on equal opportunity, is squarely in line with the U.S. attempt to simply "level the playing field" by eliminating bribery. Multilateral gain must remain the ultimate goal of using section 301 as a unilateral weapon. Using the free trade model to define a reasonable market opportunity ensures that the goal of the United States will remain a level playing field of international trade.

D. Using Section 301 To Get Countries To The Negotiating Table

Although the United States should be ready to back up its section 301 threat with appropriate sanctions, the best case scenario is for the threat of section 301 action to lead to meaningful negotiations rather than unilateral punishment. Initially, the threat of section 301 action could be used to achieve bilateral agreements between targeted countries.[131] The United States could then build on these bilateral successes by attempting to motivate countries to consider forming regimes or other regionalized responses to the problem of bribery.[132]

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128. *Id.* at 504, 518.

129. *Id.* at 504.

130. *Id.*

131. See *infra* Part III.E for a discussion of how the United States should choose the countries that should be the target of section 301 threats.

132. The United States has used section 301 threats in the past aimed not at a particular country but rather at a group of countries. The United States has brought section 301 action against European Community poultry export subsidies and European Community wheat and wheat flour export subsidies. *See* JAMES BOVARD, THE FAIR TRADE FRAUD 238 (1991). The United States could again use this approach to encourage the current members of the European Union to independently consider the problem of bribery and adopt standards for its own members.

These localized reactions could eventually lead to a universal agreement. However, even if they did not, they still could prove to be very helpful in the overall fight against bribery. Moreover, the fact that localized movements could be formed more easily than a worldwide coalition and offer potentially greater enforcement ability may actually make a regimented response to bribery a more attractive option. Although a universal agreement might still be the best long term goal, regional regimes may be the best short term, practical and temporary solution, while at the same time acting as an essential building block for a truly universal agreement.

The threat of section 301 action may also be successful in bringing countries to the negotiating table by playing the powers of the executive and legislative branches against each other. As one commentator has put it, "[a] thinly veiled message conveyed across the negotiating table would go something like this: 'Come to terms with the president, or face the prospect of drastic punishment from the United States Congress.'"[133] The separation of powers excuse might also provide a very practical response to other countries that claim the use of section 301 is really against fair trade. An administration forced to deal with this very real criticism "might welcome the chance to point a finger at the legislature, whose militancy presumably left the government no alternative."[134] This political version of the good cop/bad cop[135] scenario might lead other countries to decide it is not worth the gamble that the President may be able to reign in congressional protectionist fervor and avoid using section 301. Negotiation might be a more attractive alternative to being in the middle of a domestic political battle between Congress and the President.[136]

E. What The United States Should Do If Section 301 Does Not Bring Countries To The Negotiating Table—Possible Penalties

Although the United States might use section 301 as an effective scare tactic to convince countries to enter into negotia-

133. *See* PIETRO S. NIVOLA, REGULATING UNFAIR TRADE 122 (1993).
134. *Id.*
135. *Id.*
136. The use of the good cop/bad cop routine might be the most useful and practical, not to mention, the only real weapon available to President Clinton in light of the shift of power in Congress from Democratic to Republican control.

tions concerning international bribery, this practice will represent a transparent bluff if the United States is not prepared to take retaliatory action against those countries that fail to respond. Congress was aware of the practical use of section 301 as a tool to encourage negotiation.[137] However, Congress also meant to create a statute with real teeth, that would not be interpreted by foreign countries as simply a paper tiger.[138] The United States must formulate a realistic response to a country's decision not to address the problem of international bribery.

The issue essentially centers around the proper scope of retaliation. Should the United States focus its retaliation on a single industry, perhaps the one that was hurt by the toleration of bribery? Or should the retaliatory action be more widespread based upon the assumption that toleration of bribery is a government practice or policy that is not limited to one industry but is present in all of them? Based upon past section 301 actions, as well as the wording of the act itself, it appears that a narrow, focused and, most importantly, a proportionate response would be most appropriate to a country that refused to negotiate when threatened with possible section 301 action.

Another issue that arises concerning possible penalties is which countries should be targeted for section 301 action. There are at least two different ways to approach this problem. Either the United States could target those countries where bribery and corruption is found to be the most rampant or it could target countries where a changed policy towards bribery would yield the greatest benefits to U.S. trade. If the main goal of using section 301 to combat bribery is consistency, then the United States must target the most notorious countries for section 301 action rather than those countries that will possi-

137. Legislative history reveals that Congress felt that the power granted to the president "may also serve as negotiating leverage to reduce trade distortions on a reciprocal basis." S. REP. NO. 1298, 93rd Cong., 2d Sess. 164 (1974), *reprinted in* 1974 U.S.C.C.A.N. 1786, 7302.

138. The real bite intended by Congress is evident in the comments of the Senate Finance Committee in its report on the Trade Act of 1974. This report states that Congress intended section 301 powers to "be exercised vigorously to insure fair and equitable conditions for U.S. commerce." *Id.* It went on to explain that "'this retaliation authority" was not intended to "be a dead letter [for] [f]oreign trading partners should know that we are willing to do business with them on a fair and free basis, but if they insist on maintaining unfair advantages, swift and certain retaliation against their commerce will occur." *Id.*

bly lead to an increase in U.S. exports.

Improving the overall international business community should remain the goal of any section 301 action aimed at bribery. Thus, any positive effect on U.S. trade due to section 301 action or the threat of such action should amount to only collateral benefits. That is not to say that U.S. trade should not or will not benefit from eliminating bribery. However, in order to effectively deflect criticism that the United States is using section 301 only to advance its own international trade goals, the multilateral nature of using section 301 in this context should continue to be stressed.

IV. OBSTACLES TO USING SECTION 301 AGAINST INTERNATIONAL BRIBERY

There have been and always will be critics arguing against the use of section 301 action. However, applying section 301 to bribery places it in a unique context. Section 301, when used against bribery, is a unilateral tool being used to advance a multilateral goal. Detractors may simply state that framing the fight against bribery as a multilateral goal is actually a convenient pretext for gaining a greater advantage for U.S. businesses. It cannot be ignored that bribery creates real damage to countries and can be avoided by the use of section 301. Of course, there are some practical problems that the use of section 301 will inevitably create and that must be anticipated and addressed.

A. Foreign Policy Concerns

One of the most practical problems with using section 301 is the foreign policy complications it may create. Even though section 301 *can* be used to combat international bribery, the more important question is whether it *should* be used. Is it an "appropriate" tool? As one commentator explained it, politically "the United States must recognize that foreign practices and policies reflect delicate political balances that a foreign government may be unable or unwilling to disturb."[139] Section 301 has always been a target for supporters of GATT and the European Union who claim that such a unilateral tool has no

139. Hansen, *supra* note 113, at 1128.

place in an international community striving for free trade.[140]

However, the opposite side of this argument really carries much more weight when applying section 301 to the problem of bribery. First, the international trade agreements currently in place do not have effective enforcement mechanisms and the ones they do have in place are too slow and easily ignored.[141] Thus, section 301 is still necessary to protect American interests that otherwise would go unprotected. Also, the international community in general has not been willing or able to solve the problem of bribery, so it is not unreasonable for the United States to attempt to solve it through different means. Second, there is more than a little hypocrisy in arguing that the use of section 301 to combat international bribery hurts free trade, when it is these same countries' toleration of bribery that has created the unfair advantage and the need to use section 301 in the first place. It is also important to look at why section 301 is being used in this instance.[142] Section 301 is not being used to help create an added advantage for the United States but, rather, it is being used to level the playing field of international competition.

B. Using Section 301 Against Bribery Satisfies the Requirement of State Action

Opponents of section 301 in the bribery context may argue that its use would not satisfy the state action requirement. However, the toleration of bribery and, in some cases, its actual encouragement unquestionably satisfies the statutory requirement of state action.[143] Additionally, one does not need to rely solely on the language of the statute to see that the requirement of state action is satisfied. A favorable comparison can be made between a country's toleration of international bribery by its nationals and its refusal to protect the intellectual property of another nation. In the case of bribery, it is the private corporation that is making the bribe. Similarly, in the

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140. *See* Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil, in* AGGRESSIVE UNILATERALISM, *supra* note 97, at 113, 113-14.

141. *See generally* Marjorie Minkler, *The Omnibus Trade Act of 1988, Section 301: A Permissible Enforcement Mechanism or a Violation of the United States' Obligations Under International Law?*, 11 U. PITT. J.L. & COM. 283 (1992).

142. *See supra* p. 403.

143. 19 U.S.C. § 2411(b)(1) (1988).

case of intellectual property, it is the private corporation that is abusing the intellectual property of another. The United States has successfully used section 301 in situations involving disregard for intellectual property although the state was technically not committing the violations. The same logic can be applied to bribery.

1. The Thailand Example: No Action Can Constitute State Action

The situation concerning Thailand and intellectual property is illustrative of the U.S. position that a state's refusal to address an obvious unfair trade practice does constitute state action as required by section 301.[144] The successful threat of section 301 action against Thailand in order to motivate the Thai government to modify its very lax attitude towards the protection of intellectual property lends support to the theory that section 301 can be used just as effectively against bribery.[145] The fact that section 301 was successful despite serious problems in its implementation is of even greater importance since these same problems are, arguably, not present when dealing with bribery.

The action taken against the Thai government was actually initiated under what has come to be known as "Special 301." Therefore, a general overview of the particular provisions and powers that constitute Special 301 is appropriate before addressing its application in a specific situation.

a. Special 301 of the 1988 Trade Act

Multilateral efforts, discussed previously in this Note as applied to bribery, have also been initiated by LDCs as well as by developed countries in response to the growing problem of intellectual property protection.[146] However, the United

144. *See generally* Preeti Sinha, *Special 301: An Effective Tool Against Thailand's Intellectual Property Violations*, 1 PAC. RIM L. & POL'Y J. 281, 285 (1992).

145. *Id.*

146. *See, e.g.*, Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at* Stockholm, July, 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3; Berne Convention for the Protection of Literary and Artistic Works, Sept 9, 1886, *revised at* Paris, July 24, 1971, 828

States went a step further in its response by including special unilateral tools for the protection of intellectual property in the 1988 Omnibus Trade and Competitiveness Act.[147] In short, Special 301 provides for retaliatory trade measures instituted by the executive branch against any country that continually allows the production and sale of pirated goods.[148] The USTR tempered the effect of Special 301 by creating a "Watch List" and a "Priority Watch List."[149] By placing countries on either of these two lists, the USTR accomplished the goal of notifying the listed countries that they were in danger of suffering trade sanctions for their policies towards intellectual property, while also opening the possibility of bilateral negotiation and forestalling the institution of any actual sanctions.[150]

b. Thailand and Intellectual Property

Thailand did not have an official state policy that sanctioned the abuse of intellectual property. However, the government's lax attitude towards intellectual property protection resulted in estimated losses to the U.S. copyright industry of $70 to $100 million in 1990,[151] as well as annual losses of $25 to $100 million in the pharmaceutical industry due to patent piracy.[152] In both industries, these losses were brought to the attention of the USTR by U.S. copyright associations that filed section 301 petitions as "interested persons." These petitions led the USTR to place Thailand on the "Priority Watch List."

In response to the action taken by the USTR, the Thai government passed stricter copyright laws that became effective in January of 1992.[153] These new laws extended protection to service and collective marks and provided for heavy penalties against violators.[154] Efforts were also initiated by the Thai government to confiscate pirated goods and use them as evidence for prosecuting those responsible for the commer-

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U.N.T.S. 221.

147. *See supra* note 97.
148. Sinha, *supra* note 144.
149. *Id.* at 289 (footnote omitted).
150. *Id.* at 290.
151. *Id.*
152. *Id.* at 291.
153. *Id.*
154. *Id.*

cial piracy.[155] Similar legislation was also passed by Thailand granting greater protection to pharmaceutical patents.[156] However, since some major problems concerning infringement of pharmaceutical patents were not addressed, Thailand continued to be the target of a USTR investigation.[157] But the pressure of section 301 action seems to be working since the Thai government recently has indicated its willingness to continue to enact and enforce stiffer intellectual property legislation.[158]

The problems of intellectual property protection and bribery are really quite similar. In each case it is a state's inaction that leads to unfair trade practices. As the United States has proven through the use of Special 301 against Thailand, such apathy can and does constitute state action.

2. Business and Cultural Barriers Do Constitute State Action

The idea that business and cultural barriers amount to state action as defined under section 301 is really very closely related to, and perhaps is an extension of, the previous discussion concerning Thailand and a country's inactivity in the face of obvious unfair trade practices occurring within its borders. Business and cultural barriers are practices by private groups such as the establishment of distribution systems,[159] interdependent seller-buyer relationships[160] and buy-national attitudes.[161] Although several problems exist in proving that bribery as a business or cultural barrier amounts to state action, a petitioner should be able to successfully overcome these difficulties.

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155. *Id.*

156. *Id.* at 293.

157. *Id.*

158. *Id.* at 297.

159. U.S. businesses can find themselves at a disadvantage due to the complex, multilayered distribution systems of countries like Japan that can make "retail prices on imported consumer durables . . . two to three times greater than comparable Japanese products." *See* Thatcher, *supra* note 78, at 531 n.277 (citation omitted).

160. *Id.* at 531.

161. *Id.* There is an attitude among many government officials, importers, distributors, and end-users to "tend to prefer domestic products even where foreign goods are cheaper, incorporate novel design features, or are of higher quality." *Id.* at 531 n.279 (citation omitted).

The recent semiconductor case against Japan[162] would support a petitioner's claim that bribery is an industry-wide business practice, condoned by the host government which effectively sets up barriers to U.S. business. In the Japanese semiconductor case, the Semiconductor Industry Association condemned the whole Japanese market structure, rather than just targeting the practice of one company, as creating unreasonable trade barriers to semiconductor imports from the United States.[163]

Although the case was settled, leaving technical questions concerning the particular business and cultural barriers unaddressed, the settlement did produce a promise by Japan to "'encourage' its producers and users of chips to 'take advantage of the increased availability of foreign-made products in their market.'"[164] A similar nationwide appeal could be made against a country's tolerance of bribery by its industries. This appeal could motivate a country to take at least initial steps to prevent or discourage bribery.[165]

C. Section 301 is Consistent with its Own Legislative History and the Legislative History of the FCPA

The legislative history of both the FCPA and section 301 supports section 301's use against bribery in the international business community. While Congress has specifically mandated that the President make efforts to reach an international agreement on this issue, no such agreement has been forthcoming. Therefore, it is an appropriate time to begin examining other avenues that may lead to greater success in a shorter period of time.

Although Congress expressed its preference for traditional international channels to address bribery,[166] it did not foreclose the possibility of using unilateral methods to deal with the problem. Congress requested that the President submit,

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162. Semiconductor Indus. Ass'n, 50 Fed. Reg. 28,866 (1985) (initiation of investigation under section 301) (Office of the U.S. Trade Representative).

163. *See* Thatcher, *supra* note 78, at 532.

164. *Id.* (footnote omitted).

165. Of course the best first step towards this end would be to simply choose to strictly enforce the bribery laws that are on the books rather than look the other way.

166. Omnibus Trade and Competitiveness Act § 5003(d)(1), 15 U.S.C. § 78dd-1 note (1988).

within one year after the enactment of the FCPA, "a report on the progress of the negotiations"[167] towards an international agreement. Congress went on to state that if "these negotiations do not successfully eliminate any competitive disadvantage of United States businesses,"[168] then the President should also advise Congress on "those steps which the executive branch and Congress should consider taking"[169] in order to better address this problem. The report to Congress essentially skirted the issue by claiming that it was too early to advise that any different action be taken.[170] It has been five years since this presidential report was issued and no notable progress has been made towards an international agreement.[171] Congress' approval for considering other steps to eliminate bribery is explicitly stated in the FCPA. Therefore, the United States should now consider the use of unilateral means to address the problem of bribery.

D. The Use of Section 301 is Consistent with GATT

Many critics of section 301 claim that it is inconsistent with GATT and, therefore, the United States should not be allowed to employ it.[172] However, using section 301 to combat international bribery can be seen as not only consistent with GATT but also a major step towards one of GATT's primary goals which is achieving a necessary symmetry of rights and obligations.[173] Using section 301 in this particular context is trade augmenting rather than trade reducing. It insures that world trade is not only freer, but fairer as well. There are two major arguments to counteract the claim that using section 301 against bribery is inconsistent with GATT. First, using section 301 against bribery is justified disobedience. Second, the United States is simply holding the rest of the international economic community to a standard to which they have already agreed.

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167. *Id.* § 5003(d)(2)(i).
168. *Id.* § 5003(d)(2)(ii).
169. *Id.*
170. *See* Aronoff, *supra* note 52.
171. *See* notes 13-20 and accompanying text.
172. *See, e.g.,* Thatcher, *supra* note 78, at 514 n.181.
173. *See* Jagdish Bhagwati, *Aggressive Unilateralism: An Overview, in* AGGRESSIVE UNILATERALISM, *supra* note 97, at 2, 37.

The selective use of section 301 action or simply the threat of its use will make it more consistent with GATT's objectives. In addition, the requirement included in the latest amendments which mandate that the USTR begin negotiating with a country the day an investigation commences, shows that the initiation of bilateral negotiation is the primary goal of section 301. This goal is clearly sanctioned by the GATT.

1. Justified Disobedience

The altruistic argument that unilateralism has to be used in order to save multilateralism can certainly be applied to the use of section 301 to combat bribery.[174] Indeed, justified disobedience of GATT's provisions has a place in combating bribery.[175] GATT is acknowledged as a somewhat inefficient and ineffective agreement that often needs a jolt to achieve its purposes. Using section 301 against bribery is just the jolt the GATT needs. As one authority explained, "GATT law needs additional pressures to function effectively, and . . . Section 301 is an appropriate form of pressure to meet this need."[176]

The inherent shortcomings of GATT, namely its ineffective enforcement mechanisms and its painfully slow process of law reform, make justified disobedience all the more relevant when dealing with bribery. In certain prescribed instances, a country should be allowed to step outside the GATT framework if it follows certain prearranged guidelines. Professor Hudec has proposed five substantive guidelines that could be applied to activity outside the sphere of GATT. They are:

> i) The objective of the disobedient act must be to secure recognition of a legal change that is consistent with the general objectives of the Agreement [GATT]. . . . ii) Disobedience undertaken in support of a claim must be preceded by a good faith effort to achieve the desired legal change by negotia-

174. *Id.* at 30-31. These arguments are defined as altruistic because they appeal to the reasoning that the United States is not acting in a self-serving manner, but rather is acting in the spirit if not the letter of GATT and the international economic community. The argument that unilateralism had to be used in order to save multilateralism was succinctly summed up by Professor Bhagwati when he stated that "to save multilateralism, one had to depart from it through the use of unilateral threat and even actions that would violate the multilateral obligations defined by GATT." *Id.*

175. *See* HUDEC, *supra* note 140, at 131.

176. *Id.* at 126.

> tion. . . . iii) Disobedience must be accompanied by an offer to continue to negotiate in good faith, with a pledge to terminate the disobedient action upon satisfactory completion of such negotiations. . . . iv) The extent of the disobedience must be limited to that which is necessary to achieve a negotiated legal reform of the kind needed to solve the problem. . . . v) [G]overnments acting out of a concern to improve GATT law must necessarily respect that law as fully as possible, even when disobeying it.[177]

The use of section 301 against bribery meets each of these criteria and, therefore, unilateral action should be allowed. The across-the-board prohibition of bribery certainly meets the GATT goal of achieving an equality of rights and responsibilities. The United States has met the "good faith" requirement by continuing to strive for an international agreement through the more traditional channels. Moreover, if an international agreement was achieved, the United States would surely abandon any thought of using section 301, since its use would no longer be necessary. The extent of the disobedience would be addressed by the limited nature of any potential retaliation. Finally, an effort to achieve an international agreement concerning bribery by using section 301 is not a condemnation of GATT, but rather a realistic acknowledgment of its limitations. The fact that bribery meets each of these proposed criteria makes it a particularly appropriate situation for justified disobedience.

2. Benign Dictator

The argument forwarded by Professor Bhagwati[178] that the United States should not act as a benign dictator, "laying down its own definition of a desirable trading regime instead of making (admittedly slower) progress by persuasion and mutual concessions,"[179] is not persuasive when dealing with the issue of bribery for two reasons. First, the efforts at achieving a multilateral agreement on international bribery have not been moving "admittedly slower" but, as it has been shown, this effort has ground to a virtual dead stop. Second, in the area of

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177. *Id.* at 137.
178. Bhagwati, *supra* note 173, at 36.
179. *Id.*

bribery, the United States is not imposing its own definition on the rest of the international trading community. Most of the world condemns bribery as wrong.[180] All the United States would be attempting to do by using section 301, in the context of bribery, is to break down the artificial distinction between domestic and international bribery which can not be allowed to exist in the new world trading system.

E. The Use of Section 301 and the World Trade Organization

Another problem the United States must deal with if it wants to assure continued use of section 301 as a viable threat to nations conducting unfair trade practices is the World Trade Organization (WTO), formed at the end of the Uruguay Round to replace GATT.[181] Although section 301's use can be consistent with the goals of the GATT,[182] the obvious issue that arises is whether section 301 use is consistent with the WTO. The WTO's more effective enforcement mechanisms, in contrast with the enforcement methods of GATT,[183] could lead to a renewed attack against any consideration by the United States of resorting to section 301 action. However, the WTO should not be viewed as an obstacle to avoid in the ultimate use of section 301. Rather, the WTO should be viewed as an opportunity to achieve through international channels the same goal the United States hopes to accomplish through the use of section 301.[184]

The WTO essentially gives the enforcement mechanisms

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180. *See supra* notes 48-68 and accompanying text.

181. General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], GATT Doc. MTN/FA (Dec. 15, 1993), *reprinted in* 33 I.L.M. 13 (1994).

182. *See supra* notes 173-77 and accompanying text.

183. *See* Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 481 (1994) (the dispute settlement mechanism seems to establish within the GATT for the first time a genuine system of enforceable rules and remedies).

184. In other words, the United States attitude towards the post-WTO GATT should be the same as it is towards the pre-WTO GATT. If bribery can be stopped through the use of traditional international channels, then it should be done this way. The goal of the United States is not the use of section 301, but rather the elimination of bribery in international business. In this respect, the ends justify the means. However, if the means can be an effective multilateral tool rather than a controversial unilateral tool, then the United States should not oppose such a remedy.

greater teeth than under the GATT. It is not possible within the scope of this Note to examine all the revised provisions of the WTO. However, the essential function of the WTO as it applies to the use of section 301 is simply to require the United States to comply with one more procedural layer before resorting to the unilateral application of section 301.[185] The biggest difference between the WTO and GATT enforcement mechanisms appears to be the possibility that this procedural layer may actually yield substantive results. In other words, if the enforcement mechanisms of the WTO work as envisioned, resort to section 301 may be unnecessary. Although it is much too early to tell how effective the WTO will eventually be, any success that it achieves will only help to further the United States' ultimate goal of eliminating bribery as an unfair trade practice.

V. CONCLUSION

This article has attempted to provide a rationale for using the U.S. law on unfair trade practices to combat bribery in the international economic order. The consideration of using unfair trade law was precipitated by the lack of any notable success in achieving an international agreement through the traditional multilateral channels. Bribery represents a serious problem to all those nations participating in the international economic community. Section 301 of the Trade Act of 1974 provides just as strong a remedy and it should be implemented if necessary.

However, achieving an international agreement through the traditional multilateral means should not be abandoned. Although this route remains the most desirable, it is time that the United States and the rest of the world realize that it is no longer the most plausible means of achieving their goal. Use of section 301 may force the United States to deal with certain problems and criticisms not associated with traditional multilateral efforts, but it also may provide a solution that until now has not been possible.

The biggest obstacle the United States may face in using

185. For a complete treatment of this complex issue, see for example, Lowenfeld *supra* note 186; Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L L. 1095 (1994).

section 301 to combat bribery may be the response that resorting to this particular solution may elicit from the rest of the world. There are many in the international business community that will argue that section 301 can only advance unilateral interests. The argument of those who dislike section 301 is essentially that you cannot teach a unilateral dog multilateral tricks. However, if the United States moves cautiously and deliberately in its use of section 301 against bribery, there is no reason why the end result cannot be a winning situation for all those involved. Countries will have a uniform set of rules to apply to the practice of bribery, the international business community will have an atmosphere that will encourage free and fair trade, and U.S. businesses will be placed on a level playing field for the first time since the passage of the FCPA.

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