

Northwestern Journal of International Law & Business

Volume 1
Issue 2 *Fall*

Fall 1979

European Views of United States Anti-Bribery and Anti-Boycott Legislation

E. Ernest Goldstein

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

 Part of the [Antitrust and Trade Regulation Commons](#), [Comparative and Foreign Law Commons](#), and the [International Trade Commons](#)

Recommended Citation

E. Ernest Goldstein, European Views of United States Anti-Bribery and Anti-Boycott Legislation, 1 Nw. J. Int'l L. & Bus. 363 (1979)

This Perspective is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

European Views of United States Anti-Bribery and Anti-Boycott Legislation

*E. Ernest Goldstein**

It would be both an over-simplification and an over-statement to dismiss American anti-bribery and anti-boycott legislation as pious and ineffectual American attempts to legislate morality. It would be equally wrong to state that U.S. foreign trade is in the long term disadvantaged by this legislation.

In 1952, I came to Europe with a Marshall Plan budget of ten million dollars and the specific mission of encouraging the member countries of what was then the Organization for European Economic Cooperation, now the Organization for Economic Cooperation and Development, to enact legislation prohibiting restrictive trade practices. A quarter of a century ago, many considered that such legislation of morality in the marketplace was impractical in post-war Europe.¹ In recent years, however, the European Economic Community and every major industrialized country in Europe and Asia have enacted antitrust laws that are being vigorously enforced.²

Today, the United States Congress has made an attempt to legislate against corrupt practices and to encourage other countries to do the same. During the past year, I have had the opportunity to meet with numerous European groups in conferences, seminars, conventions, and one-day study sessions to discuss the most recent American legislation

* Partner, Coudert Freres, Paris, France; member, District of Columbia, Texas, and United States Supreme Court Bars; admitted as Conseil Juridique in France; J.D., 1943, University of Chicago; LL.B., 1947, Georgetown University; S.J.D., 1956, University of Wisconsin.

¹ See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE PRACTICES (4th ed. 1976).

² See, e.g., EUROPEAN COMMUNITIES COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES (1967); EUROPEAN COMMUNITIES COMMISSION, REPORT ON COMPETITION POLICY (1972) (annexed to the FIRST GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES); O.E.E.C., CONFERENCE ON ANTITRUST AND THE EUROPEAN COMMUNITIES (1963).

dealing with immoral business practices: the Foreign Corrupt Practices Act³ and the anti-boycott legislation within the Export Administration Amendments of 1977.⁴

This perspective is not intended to reproduce the remarks made on such occasions to European businessmen and lawyers, nor is it a scientific survey of European business or professional opinions concerning the two American legislative enactments. In this perspective, I would like to relay some of my impressions of the views and comments of the people with whom I have discussed the U.S. anti-bribery and anti-boycott legislation. This perspective also will reflect certain European governmental attitudes as disclosed by an absence of legislation.⁵

ANTI-BRIBERY LEGISLATION

Every major European country has legislation prohibiting the bribery or corruption of its public officials. Often such laws even prohibit the bribery of employees of private enterprises. Typical of this type of legislation are articles 177 to 183 of the French Penal Code.⁶ But nowhere in this legislation, nor indeed in the legislation of any other western European country, is it a crime to bribe or corrupt the public officials of another power.

Such corruption does exist, however, and is of a very large magnitude. The scope of bribery and corruption on the part of U.S. firms is now openly discussed. For example, in a recent article it is stated that: "More than 400 corporations, more than 117 of them in the Fortune 500, have admitted making questionable or illegal payments. In total, these corporate payments have exceeded three hundred million dollars."⁷ Indeed, such corruption is not only widely discussed, it also is widely accepted. Recent newspaper discussion in the United Kingdom, concerning allegations that officials of the British government had bribed Iranian officials, is bland and matter-of-fact.⁸

In France, the use of government monies for overseas payments, such as those which would be prohibited by the U.S. anti-bribery legislation, usually are expected to be covered by the French export insur-

³ Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. I 1977).

⁴ Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977).

⁵ See, e.g., Prevention of Corruption Act, 1916, 6 & 7 Geo., 5 c. 64; J. BAUMANN, ZUR PROBLEMATIK DER BESTECHUNGSTATBESTANDE 7 (1961).

⁶ C. PEN. art. 177-183 (France, 1945).

⁷ McCoy & Griffin, *Illegal Payments Abroad*, Legal Times of Wash., Oct. 30, 1978, at 8.

⁸ For example, note this report:

But, as last year's Racial case revealed, one of [the Shah's] close friends, Sir Shapoor Reporter,

ance scheme, COFACE.⁹ It generally is understood that commissions, including those given to persons who one might loosely categorize as agents, are among the economic risks expected in export trade.

The French overseas contractors, all of whom utilize COFACE insurance and with whom I discussed U.S. anti-corruption legislation, assured me that they considered the position of the United States to be naive. They, as well as most of the free world's exporters and overseas contractors, feel it necessary to make payments to government officials in developing countries. This is considered to be an ordinary cost of doing business in these countries.¹⁰ This view, which undoubtedly accurately reflects business reality in the third world, has been widely disseminated through the press.¹¹

The fact that such bribery and corruption does exist does not mean that a change is impossible or undesirable. Many thoughtful European businessmen have been impressed by legislation on commissions, such as that reputedly operative in Saudi Arabia and Iran.¹² By means of such laws, these third world governments have attempted to protect themselves from the fairly widespread practice of bribing their officials in connection with lucrative contracts.

On a much broader scale, the developing countries, through the Economic and Social Council of the United Nations, have attempted to repress corruption of public officials. These countries have proposed to accomplish this through an international treaty, which clearly parallels the United States anti-corruption legislation.¹³ The first article of the draft treaty defines the crime of bribery as the offering of a bribe to a public agent and, in the second paragraph, it further states that it is a

had received a secret one million pounds commission from the British Ministry of Defense for the sale of Chieftain tanks.

[The Shah stated:] "That's nothing. What's one million pounds? We bought close to twenty billion pounds of weapons."

"Some people might think it was a bribe."

"Well, the British Government paid the money. You did it."

The Observer (London), Jan. 7, 1979, at 9.

⁹ Compagnie Francaise d'Assurance pour le Commerce Extérieur.

¹⁰ For an example of a corporation that went bankrupt because of excessive bribery payments, see *Le Matin* (Paris), Aug. 6, 1979, at 1, 6, and 7, relating the history of Eurosysteme, a Belgian corporation which spent 275 million dollars for a one billion dollar contract. See also *Brussels Sprouts a Spicy Scandal*, NEWSWEEK, Aug. 20, 1979 (int'l ed.).

¹¹ Wall St. J., June 23, 1978, at 34, col. 2; Int'l Herald Tribune, June 27, 1978, at 7, col. 1.

¹² Ferrara & Goelzer, *Saints and Sinners Concluded—A Legislative Approach to Questionable and Illegal Corporate Payments*, in THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (N.Y.L.J. ed. 1978).

¹³ United Nations Economic and Social Council, *Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices*, U.N. Doc. E/1978/115 (July 7, 1978) (not published in the official record).

crime for an agent to solicit, demand, or accept such corrupt payments.¹⁴

In the French draft of the treaty, contained in Annex IV of the U.N. document,¹⁵ it is interesting to note that the first French definition of the crime is the solicitation of or acceptance by a public official of offers or promises of gifts, or otherwise being corrupted in the functions of office.¹⁶ It is only in the second paragraph of the French version that it is made a criminal offense for any person to give promises, offers, gifts, or presents in exchange for the commission of some act.¹⁷ Thus, the French place the burden of guilt, in the first instance, on the person receiving the bribe, before the person offering the bribe is considered guilty of a crime. This approach is totally consistent with the French attitude noted above and is reflected in the fact that COFACE export insurance covers bribes and commissions.

Despite the widespread existence of bribery and corruption, there is no European businessman whom I have encountered who does not state a preference for an end to such practices. As usual, someone has to be first, and there is no doubt that if any impact is possible, the U.S. leadership will have an impact on the world scene.

ANTI-BOYCOTT LEGISLATION

The 1977 anti-boycott legislation,¹⁸ and the subsequent Department of Commerce regulations,¹⁹ have also been the subject of dispute in Europe. Although the United States was the first to enact and implement anti-boycott legislation, it should be recognized that at least two other countries, the Netherlands²⁰ and the Federal Republic of Germany,²¹ have confronted the issue. A report published in London stated that:

The West Germans see no immediate need to pass a law, as the Federal Government has learned to act with courage whenever boycott pressures prove intolerable.

The classic example was provided after Volkswagen Werke AG came under threat of blacklisting. Firm action on behalf of VW, by the Federal Government, was revealed in the West German Parliament, the

¹⁴ *Id.* at 5.

¹⁵ *Id.* at Annex IV.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See note 5 *supra*.

¹⁹ 15 C.F.R. § 369 (1978).

²⁰ *Le Matin* (Paris), Aug. 5, 1977, at 14-15.

²¹ Britain and Israel (London), January 1978, at 4.

Bundestag, on September 4, 1975²²

Similarly, the government of the Netherlands has acted, in the past, in such a consistent way that there has been no need to consider such legislation. In addition, Dutch industry has been united in resisting the boycott.²³

In the United Kingdom, an attempt to enact anti-boycott legislation was rejected in July 1978.²⁴ In fact, the British Foreign Office has deliberately refused to discourage, in any way, the cooperation between British industry and Arab boycott activity. One commentator has noted that: "Unlike the U.S., which has anti-boycott legislation, and other countries which recommend firms to ignore the boycott, our traditionally Arabist Foreign Office merely declares that each firm must decide on the commercial value of its trade with Israel or the Arabs."²⁵

In France, the situation is highly complex. The first attempts to pass anti-boycott legislation took place in the 1976 debates of the National Assembly and in propositions of law submitted to the French Senate.²⁶ In 1977, the French added new articles to the French Penal Code, all of which constitute, when taken together, anti-boycott legislation.²⁷ The statutes adopted by the Parliament provide penal sanctions for those participating in economic boycotts. The new article 187-2 provides:

The penalties provided in Article 187-1 are also applicable to all holders of public office and all citizens charged by a ministry with a public function who, by their action or omission, shall have contributed to rendering more difficult the exercise, under normal conditions of any economic activity:

1. By any individuals by reason of their national origin, or their adherence or non-adherence, whether real or supposed, to a given ethnic group, race or religion;
2. By any corporate entities by reason of the national origin, or of the adherence or non-adherence, whether real or supposed, to a given ethnic group, race or religion of all or some of their members or all or some of their directors.²⁸

The new article 416-1 of the Penal Code provides:

The penalties provided in Article 416 are also applicable to any person who shall, by his action or omission, and without just cause, have

²² *Id.*

²³ *Le Matin* (Paris), Aug. 5, 1977, at 14-15.

²⁴ *Financial Times* (London), Aug. 1, 1978, at 6.

²⁵ *London Sunday Telegraph*, Dec. 3, 1978, at 21, col. 2.

²⁶ Senate Report 235 (France) 59-60 (1976); Senate Report 241 (France) (1976).

²⁷ Law No. 77-574 of June 7, 1977 *reprinted in* [1977] J.O. 3154.

²⁸ *Id.* at art. 187-2 (codified at C. PEN. art. 187-2 (France, 1977)) (translated by the author).

contributed to making more difficult the exercise, under normal conditions, of any economic activity:

1. By any individuals by reason of their national origin, or their adherence or non-adherence, whether real or supposed, to a given ethnic group, race or religion;
2. By any corporate entities by reason of the national origin, or of their adherence or non-adherence, whether real or supposed, to a given ethnic group, race or religion of all or some of their members or all or some of their directors.²⁹

The legislative history on the statutory additions clarified their application, stating that:

The provisions of articles 187-2 and 416-1 of the Penal Code, however, are not applicable when the acts covered by these articles are in conformity with government directives made in the context of its economic and commercial policies or in the performance of its international obligations.³⁰

The French government, however, soon debilitated this legislation. Within little more than a month of the effective date of the new French anti-boycott legislation, Prime Minister Raymond Barre gave his *avis*—which can be loosely translated as a decision—that had the effect of rendering the legislation totally ineffective.³¹ The Prime Minister exempted from the operation of the anti-boycott law all overseas activities by export or contract which come under the insurance granted by COFACE, the French export insurance scheme. The *avis* stated:

By reason of the need to re-establish a balance in foreign trade and to improve the employment situation in France through the pursuit of new avenues of trade, the development of French exports is more than ever an objective with priority.

This policy is consistent with the orientations of the Law of July 21, 1977, approving the VIIth Plan for economic and social development, which provides that it would be advisable to promote the entry of exporting firms in new markets, primarily in countries producers of oil and in the process of industrialization in the Middle East, Southeast Asia, Latin America, and certain countries of Africa.

The rapid development of exportations towards those markets is a fundamental objective of the economic and commercial policies of the government.

It is thus specified, in application of paragraph III of article 32 of Law No. 77-574 of June 7, 1977, that the commercial operations directed toward these markets enter within the framework of the economic and commercial policies of the government and thus are in conformity with the directives of the latter.

As one result in particular, paragraphs I and II of the above-men-

²⁹ *Id.* art. 416-1 (codified at C. PEN. art. 416-1 (1977)) (translated by the author).

³⁰ [1977] J.O. 3154 (translated by the author).

³¹ *Id.* at 4360.

tioned article 32 are not applicable to the decisions to grant the guarantee of the COFACE with respect to contracts relating to the said commercial operations.³²

Thus, the law is effectively without force.

Although the French anti-boycott law was unanimously adopted,³³ it is presently a dead letter. A court test, however, may be in the offing.³⁴ Moreover, there is a possibility that under article 85 of the Treaty of Rome,³⁵ which created the European Economic Community, action may be brought by the Commission of the Common Market against any such boycott as being in violation of the antitrust laws of the Community.³⁶

That the Arab boycott continues is not in doubt.³⁷ Nevertheless, it is equally clear that U.S. trade has not suffered by reason of American anti-boycott legislation. Indeed, reports in both the United States and European press have revealed the awareness of Europeans that trade with the Arab world does not, in fact, depend upon the absence of anti-boycott legislation.³⁸

CONCLUSION

Truly, there is some skepticism in Europe concerning the immediate efficacy of U.S. anti-corruption legislation. There is, however, less skepticism about the long-term effectiveness of the anti-boycott legislation, despite its apparent loopholes and the enforcement problems created by the Department of Commerce regulations.³⁹

In sum, the realities of trade and the needs of the marketplace are such that no European competitor of an American firm seriously believes that he has an advantage because the American firm has the "handicap" of the anti-boycott legislation. German and Dutch exporters have had the best of both worlds because their governments have taken strong positions from the very start. Indeed, there are many busi-

³² *Id.* (translated by the author).

³³ *Les Echos* (Paris), June 28, 1977, at 3.

³⁴ *See, e.g., Le Monde* (Paris), Aug. 10, 1977, at 8 (letter by J.L. Bismuth of the Law Faculty of Reims).

³⁵ 298 U.N.T.S. 47-48 (1958).

³⁶ *See, e.g., Le Monde* (Paris), Feb. 7, 1978, at 22.

³⁷ *See, e.g., NEWSWEEK*, December 11, 1978, at 59 (int'l ed.).

³⁸ *See, e.g., Int'l Herald Tribune*, Dec. 5, 1978, at 2, col. 1; *Le Matin* (Paris), Aug. 5, 1977, at 14-15; Petro-Economic File (Brussels), July 1978, at 8; *Washington Post*, Jan. 18, 1978, at C-7, col. 2.

³⁹ *See* Department of Commerce Export Administration Regulations, Restrictive Trade Practices, Boycotts, 15 C.F.R. § 369.6, ¶ a(2)(ii), a(5) (1978). *See also* 44 Fed. Reg. 16969 (1979).

nessmen who wish that a similar policy had been undertaken and implemented in both the United Kingdom and France.