ILLICIT PAYMENTS IN INTERNATIONAL TRADE
Selected Legal Aspects of Multinational Corporate Operations

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> Corruption, the most infallible symptom of constitutional liberty.
> — GIBBON'S *Decline and Fall of the Roman Empire.*

PART I

POLITICAL, ECONOMIC AND SOCIO-CULTURAL CONSIDERATIONS

All societies have their own norms of behaviour based on attitudes considered traditional, normal — and therefore remotely, if at all related, to modern concepts of legality and illegality. The exchange of gifts is treated as a form of income augmenting one's wages, thus enabling him to extend financial assistance to his extended family, clan, village or other similar object of personal loyalty. This practice is especially characteristic of societies in developing countries.

Political payments, from contributions to political parties to facilitation payments to outright bribes, are generally regarded by tradition-bound populations as extensions of the age-old practice of paying tribute to those in power. The "grease", bakshish, mordida, suckling pig or chicken delivered by the peasant farmer-share cropper to the home of his absentee landlord, local councilman or resident congressman pass as twentieth century equivalents of ancient tokens of obeisance to the powers that be. Significantly, highly industrialized nations show that the ostensibly primitive practice of gift-giving has not lost either its appeal or utility. The Persian rugs presented by the former Shah of Iran to occupants of Capitol Hill are now history; a jade Buddha is an appropriate gift to the head of a government agency in Peking after completion of negotiations with Jardine-Mathesons; a Silver Shadow will certainly please the Minister of Public Works in one of the Gulf States a week after signing a construction contract. These are not aberrant activities of an insignificant few as many a politician is wont to explain.

Traditional kinship ties help create relationships that may appear corrupt to many observers. Thus, in many Latin American and Asian societies where loyalty to the state plays a poor secondary role to that of loyalty to the family, clan or village, public office is exploited for the

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benefit of the immediate or — more often, an over-extended family. The relatively modern and esoteric concepts of the state and loyalty to it have been superimposed on these tradition-bound societies as soon as they obtained independence. Essentially the product of western political philosophy, the concepts have already been described as elements of "ideological imperialism".

Corruption is exacerbated by the dominant role of governments as dispensers of privilege and as sources of employment. A position in the civil service is, in most of the world, a source of high status and power. Thus, a government job is sought, often literally paid for, and jealously guarded once obtained. Public office is viewed not just as a passport to the exclusive clubs of the elite; opportunities for unearned wealth attract even those who nurse no aspirations to join "high society".

Being responsible for economic planning, public services and even the production of goods, governments represent the single largest employer in society. Their role as dispensers of privilege (e.g., licenses, import and export permits, franchises, foreign exchange remittance authorization) has gone a long way toward increasing opportunities and incentives to corruption in their vast work forces. And government bureaucracies in third world countries are only seldom exposed to effective counter-measures in the formal political structure such as political parties, effective legislatures, labour unions and industrial lobbies. All too often, the civil service serve as feudal baronies of the few that hold real power. Developed economies generally have civil servants with status and education similar to the majority of the population. In pre-industrialized societies, in contrast, the civil servant has had more and better education — perhaps with a college degree or technical training — while the vast majority of the population are semi-literate or barely so. In such societies the farmer or city dweller (who is likely to be an immigrant from the countryside) approach the government employee not as a citizen seeking services to which he is entitled as of right but as a total stranger pleading a personal favour from another. Hence, the wide social and educational gap that separates the two engenders graft and corruption. Accustomed to this humble approach, the civil servant sees contact with multinational corporate personnel as an inconvenient but necessary part of his job. The educated, clean-cut, glibtongued company man in his western suit and Cartier watch knows what he is entitled to, complains when he does not get it forthwith and — most important, has access to "grease money". And so the bribe or money extorted from him becomes just an extension of traditional gift giving.

Characteristics of corruption

Gifts in the traditional, institutionalized sense and illicit payments in the form of bribery or extortion have much in common. Their similarity lies principally in that they are intended by the giver to court and maintain

favour with the recipient. Such gifts or payments, when repeated over time and between the same parties, easily fall into that grey area of distinction between corruption in the modern, legal sense and "a social convention". Oftentimes a gift can be classified as both. The following have been suggested as characteristics of corrupt transactions.

A principal trait of corrupt acts is the reciprocity of interests.[1] The corruptor enters into an illicit transaction always with a specific purpose. In cases of bribery he seeks to influence the power holder towards a favourable or sympathetic exercise of his influence or office. In extortion, the object is acquisition of some benefit for the power holder. But, whatever the nature of the transaction, the relationship of the parties to it is always based on *quid pro quo:* there are mutual obligations and benefits. Second is the element of deception. The corrupt transaction must, of necesity, be kept secret. Even when a particular transaction is completely legal for one party (as in the case of political contributions by U.S. firms to parties or candidates in Italy or Canada, the payments are allowed there but U.S. law prohibits them), the other may be liable under his own national law. What is consistently manifest is the existence of some factor which will make publicity of the payment prejudicial to either or both parties. And so, they undertake, with varying degrees of sophistication, to keep the affair from the public eye. And the matter is always kept secret from the recipient's principal. In cases where some form of recording of the transaction is made with the attendant increase in the risk of detection, some form of disguise is employed to clothe the deal with a semblance of regularity and legality. Moreover, the parties in each case consciously and meticulously avoid any open conflict with the law.

A third essential characteristic of corrupt transactions is the multiplicity of the parties. Corruption in multinational corporate operations always involves three and, more often than not, over three parties. The company man (whether or not a corporate employee), the agent (almost always a government officer or employee) and the host government are typical three parties. The home country of the corporation is a frequent fourth party especially when it gets involved in taxation, anti-trust regulation and other aspects of international trade. Fourthly, illicit payments always denote a breach of trust. All corrupt acts involve the subordination of the principal's interest in favour of the agent's and therefore import dual, often contradictory functions for the parties. The civil servant betrays the public trust in his office while the multinational enterprise contravenes its duty to abide by the laws of the host country, its home country, or both.

Drawn up through enumerative induction, this list is not exclusive but serves as a guide in the discussion of extortion and bribery. It is generally admitted that corruption is an age-old problem and that all societies, except perhaps the most primitive, have been visited by this affliction. Depending

[1] *See* ALATAS, SYED HUSSEIN, THE SOCIOLOGY OF CORRUPTION (1968).

on the degree of corruption and several other factors, it has been pointed out that the viability and development of an effective deterrent to corruption in international trade need not be stultified or thwarted by the complexity of the issues involved.[2]

Negative functions and causality of corruption

The high incidence of corrupt transactions and the large amounts of money involved in the countless decisions tainted with it becomes a burden to the public as the cost of corruption is eventually passed on to the consumer. Where there is an ineffective price control, business will inevitably attempt to transfer the burden of taxation to the consumer. For the same reasons and often with the same methods, this also applies to extortion and bribery. And, although corruption occasionally helps to promote efficiency in a generally disordered economy, it tends to lower the efficiency of the civil service as a whole. It erodes public regard for government and hinders the prosecution of state programs for the general welfare.

Extortive corruption is a pathological activity which tends to spread rapidly, breeds negligence and encourages indifference. Never restricted in form, the habit of doing something which is illegal but financially rewarding spreads quickly and to ever widening circles, unless curtailed early and effectively. Corruption undermines respect for the duly constituted authorities, robs the government of mass support, and alienates society from its leaders.

The type of corruption alleged to promote efficiency, i.e., facilitation payments, has a tendency to thrive in areas where it is difficult to achieve efficiency. The fact that this type of corruption is more widespread and deeply ingrained in those branches of government where transactions are most numerous (e.g., customs, licensing, immigration, tax assessment, etc.) and the civil servants likely to be less educated and paid, speaks for itself. Within the contextual framework of corrupt relationships exists competition based on corrupt criteria. Those who pay the most are not always the successful bidders for a segment of political authority in the black market of corruption. The reliability of the buyer (the briber or victim of extortion), the ancillary benefits he can offer to the corrupt agent and other less obvious factors are all elements that affect the receptiveness of the government officer or employee involved.

The case for positive functions of corruption has been argued eloquently and convincingly. Yet when its effects are viewed from an interdisciplinary approach, it is difficult to sustain a conclusion other than that it fosters exploitation, inefficiency, and a decline of the legal and moral order.

[2] *Ibid.*

Still using enumerative induction, we now focus on some of the causes of corruption. Among the causes to which the incidence of corruption has been attributed are:[3]

— the absence or weakness of leadership in key government positions;
— lack of education;
— weakness of religious training;
— colonialism;
— poverty;
— inadequacy of punitive measures;
— irregularity in the structure of government; and
— greed.

These constituent elements of corruption are, by themselves, insufficient to explain its existence. Their significance lies in that they are but elements in a complicated matrix of causes — each of which are of varying importance depending on spatial, temporal and circumstantial details.

Colonialism may be said to induce corruption in that the imposition of an alien culture, with its own value system, results in but a fragile superimposition of ideas on the native population. Although members of society, in living with the colonizers, attempt to reconcile the new value system with their own for the sake of convenience (among other things), traditional values remain which, in case of conflict, dominate the new. Thus, in the circumvention of the unacceptable or irreconcilable standards of the aliens, corruption is inevitable. In much the same fashion, proponents of other factors as primary causes of corruption tend toward a simplistic theory of causality. On the whole, however, a significant trait of politico-sociological inquiries into corruption is the consistency with which the traditional institution of the gift arises. A reexamination of that institution is, it appears, in order.

The proposition that in traditional (i.e., developing) societies the institution of the gift lends itself readily as a vehicle for corruption is not contestible. What is dubious is the assertion that the institution is the most important determinant of the incidence of corruption within the context of traditional societies. The error, it would seem, can be found in the argument's implied assumption that in gift giving the transfer of traditional norms into a modern bureaucratic setting is a natural, automatic extension of traditional behaviour. The assumption becomes manifest in that corrupt behaviour is not considered as an abuse but rather a traditionally/institutionally supportable fact in a new arena.

[3] *Ibid.*

When dealing with gifts given in return for bureaucratic service it is obvious that corruption takes an infinite number of forms. But this fact alone does not justify the conclusion that the institution of the gift is *the* causal agent in traditional societies. As noted above, the gift is a universal institution, prevailing as much in modern western societies as elsewhere in the world. That the case for a causal correlation between it and corruption is over-rated is shown by the fact that the prevalence or decline of corruption is not attributable to fluctuations in gift-giving behaviour. The gift is distinguishable from a corrupt transaction thus:

— a gift is not given/intended to be a secret;
— it does not violate any duty of loyalty;
— it is not a misappropriation of unowned property.

Following these considerations, it is evident that it is not so much traditional values that create inducements to corruption, whether gifts, family ties, or others. Rather, it is the unique political and economic circumstances that characterize society at any one given time. It is significant that when traditional societies of Asia and Africa came into contact with western culture, many of the societies were already afflicted with corruption. In many cases the situation was aggravated by colonization; still, the corruption that followed was only a continuation of the past. Modernization and the rapid social changes that followed induced more corruption where it already existed.

Economic factors.

In discussing economic factors of corruption, the influence which is sought to be affected through an illicit payment may be treated as "merchandise". In this case influence denotes the ability to affect the actions of agents or power-wielders. Payments by multinational enterprises are intended to influence authority — mostly political in nature, to act favourably *vis-a-vis* their corporate operations or to avoid the exercise of authority in a manner prejudicial to their business interests. This general proposition applies irrespective of the size or frequency of the illicit payment or the nature of the action sought to be affected. Where multinational corporations are involved the wielders of power are inevitably political/government officials or employees. However, exceptions do occur from time to time. No document is drafted to reflect the illicit transaction; there are no guarantees of performance nor warranties for the "quality of the merchandise". The basic underlying reason for the corrupt deal is the expectation that the "seller" will act in a manner that will bring about, or permit the accrual of benefits worth more to the "buyer" (i.e., the firm) than the cost to it in terms of

the illicit payment. And the "merchandise", whether bought through a bribe or "forced sale" (extorted) remains the same: political influence.

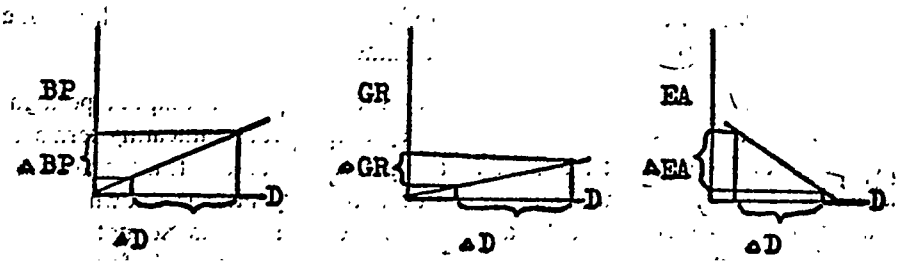
Like more mundane commodities as furniture and shampoo, political influence is traded in a "market" — that system of communicating terms of purchases and sales by traders (and the places where the transactions are actually, physically consummated). To be sure, very little is known of this market as it is essentially a "black market". Civil servants do not declare their corruption openly and corporations do not advertise bids for corrupt public servants to consider. And, although such a market is crude and inefficient — what is significant is that it exists.

The demand function.

An examination of the trade in political influence points to three distinct factors[4] that give rise to the need — and therefore, demand for the improper use of political authority. The proposition in this analysis is that multinational corporations will require the exercise of political power to their advantage in direct proportion to the potential business perceived in any host country. Likewise, the proposition applies with an increase in government interference over the public sector of the economy; too, it applies in relation to the inefficiency of the government's regulation/administration of foreign investment. Hence, business potential and government regulation bear *direct* relations to the demand for illicit payments while government administrative/regulatory efficiency bears an *inversely* proportional relation to the demand function. An increase in perceived business potential, or government regulation, or both, will create pressures to increase corruption: Possibilities for corporate expansion and diversification, greater profits, and similar factors that help create an atmosphere hospitable to foreign investment invites intensification of multinational corporate activity. This, when considered alongside growth in complexity and sophistication of government regulation create inducements to corrupt transactions. On the other hand, when government regulation is clear and administration efficient, compliance becomes workable and procedures definite. This leaves less room for discretion on the part of civil servants and therefore, less opportunity for bribery or extortion. A graph of the demand function with the three variables mentioned above reveals a positive slope for business potential and government regulation and a negative slope for efficiency of regulation and administration.

D = Demand	EA = efficiency of administration
f = function	GR = government regulation
BP = business potential	D = f (BP, GR, EA)

[4] *See* JACOBY, NEHEMKIS, AND EELLS, BRIBERY AND EXTORTION IN WORLD BUSINESS. A STUDY OF CORPORATE POLITICAL PAYMENTS ABROAD (1977).



If: $\Delta BP, \Delta GR, > 0 \Rightarrow D > 0$

$\Delta BP, \Delta GR < 0 \Rightarrow D < 0$

$\Delta EA > 0 \Rightarrow D < 0$

$\Delta EA < 0 \Rightarrow D > 0$

A small country with meager natural resources and low per capita income offers multinational companies relatively limited business opportunities. The natural resource base of such a country will not absorb much investment in the export markets and the small, relatively poor population will necessarily limit the size of the domestic markets. Therefore, *ceteris paribus* there will be less need/demand for illicit payments. In contrast, a country with rich natural and human resources presents greater investment opportunities. Both export and import markets will be larger; business will tend to be more profuse and varied. Moving up the scale, business opportunities increase proportionately; the same is true for the need/demand for the sympathetic exercise of political power.

Corollary to the increase in business opportunity and foreign investment is the development of government regulation. Growth of business activity and sophistication of management techniques usher in the intensification of government regulation. It thus becomes increasingly important to develop business-government interaction. As that interaction becomes more frequent and the rules that govern the relationship increase in volume and complexity, opportunities and inducements to corruption multiply. However, an increase in the clarity and efficiency in enforcement of government administration provide disincentives to corruption. When the implementation of foreign investment regulations is certain and when the rules themselves are precise and easily understandable, the investor will know what to do, when to do it, where, how and through whom it is to be done. And, although delegation of authority (to civil servants) may not have been lessened, there is less room for discretion. There results a corresponding decrease in the need for courting the personal sympathy of government officials. Perhaps most important, since payments in the form of bribes or as responses to extortionate demands represent additional costs

to the firms, corruption will be avoided for being contrary to the twin maxims of profit maximization and cost minimization.

The supply function.

The sister function of demand is supply and here, again, three factors stand out as most determinative of the availability of political influence as a commodity obtainable from the black market of corruption:[5]

— stability of government;
— competence and remuneration of government employees; and
— the amount of discretionary authority delegated to the civil servants.

Relative political instability creates a climate hospitable to corruption. Frequent changes in government, violence in politics, recurrent changes in political leadership and government policy all contribute towards a feeling of uncertainty in tenure for government personnel. There will, as a result, be more incentive to get the most of what one can while in office. Less time to capitalize on official positions and ensure the financial posture of their families induces the generally poorly paid civil servant to put the authority in his hands for sale. Conversely, a politically stable environment offers assurance of tenure and predictability of financial position. Hence, political stability serves as a disincentive to corruption.

The competence and remuneration of civil servants likewise serve as determinant variables in the supply function of corrupt political influence. Where government personnel are adequately paid and well trained there is less need to augment their incomes through illicit means; a greater sense of pride and dignity attaches to their positions. This is not the case, unfortunately, in many of the host countries where multinational corporations operate. Much of the natural resources sought to be tapped by corporate giants are in third world counrties; this is also true of cheap labor. Again, it is in those countries where government bureaucracy is often grossly underpaid and shamefully incompetent. Political power in the hands of such an unfortunate lot opens innumerable opportunities to augment their income via bribe or extortion.

Like the first two variables noted, the degree to which authority is delegated and discretion vested in government personnel affects the supply of political influence for sale. As much as political power is delegated and as wide as official discretion allowed in the exercise of that power, so too will the opportunities for corruption be. It is an open secret that bribery and extortion are largely attributable to the exercise of bureaucratic fiat. Governments often use procurement and concession policies that leave decisions in the hands of a single or handful of individuals rather than competitive processes such as submission of bids to procurement boards

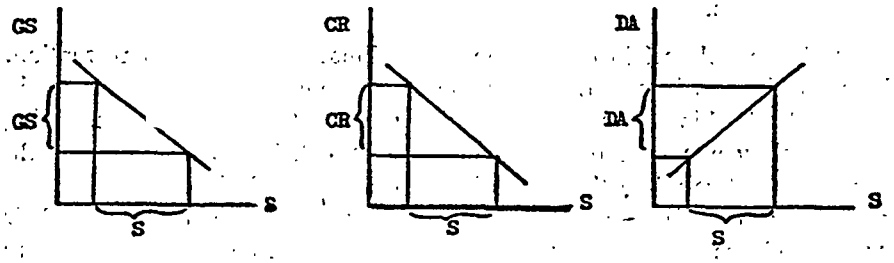
[5] *Ibid.*

that announce the bids publicly. When a single officer holds plenary power to admit or deny entry of goods into the country, to approve or disallow a construction project worth millions or to adjust tax assessments, the possibilities for corruption are almost limitless.

Diagram of supply function

S = supply
f = function
GS = government stability
S = f (GS, CR, DA)

CR = competence & remuneration of civil servants
DA = discretion & authority delegated to government personnel



If: $\Delta GS, \Delta CR > 0 \Rightarrow \Delta S < 0$
$\Delta GS, \Delta CR < 0 \Rightarrow \Delta S > 0$
$\Delta DA > 0 \Rightarrow \Delta S > 0$
$\Delta DA < 0 \Rightarrow \Delta S < 0$

GS and CR have inveresely proportional relations to S while DA bears a directly proportional relation with S. Thus, graphs for GS and CR have a negative slope while that for DA has a positive slope.

The cost of influence

A well known axiom in economics states that strength and inelasticity of demand coupled with scarce and inelastic supply leads to high prices. In the varied environments of multinational corporate operations the factors of supply and demand can combine in any number of ways to characterize the black market for political influence. The nature and relative intensity of these factors in any one host country ultimately determines the amounts of illicit payments to be made in corrupt transactions. No fixed rule can be formulated with reliability; however, practical generalizations are helpful to the student of influence peddling. For example, given a situation characterized by meager business opportunities and a *laissez faire* economy combined with an unstable political situation and an underpaid civil service — in the jargon of economists "weak and elastic demand with cheap and elastic supply", we can predict widespread corruption but in relatively small payments. Consider the reverse: in a country with wide possibilities for foreign investment and vague government regulations (i.e., strong inelastic demand) where the government is stable with a competent civil service (weak but elastic supply), we might predict a low incidence of corruption but where payments are made in large amounts. Thus, the elements in the matrices of the supply and demand functions form permutations which,

following the logic of the axiom, provide valuable clues in studying the incidence and magnitude (i.e., size of payments) of bribery and extortion.

A discussion of corruption from the viewpoint of economics attains greater relevance when translated into practical terms, especially in relation to its effect on international trade. As earlier noted, illicit payments represent additional costs. If we are to accept that efficiency leads to profits and that minimization of costs leads to profits, the conclusion must be that corruption leads to inefficiency and is, therefore, uneconomical. For economic reasons, if not for any other, it is in everyone's best interest — including multinational firms, to do away with corrupt transactions. By benefiting individuals rather than the general public, illicit payments are unnecessary burdens imposed on international trade. In addition, the uncertainty of the amounts paid illicitly compounded by the time and expenses involved in negotiating corrupt transactions are all extra costs to doing business abroad that do *not* produce proportionate benefits. Bribery and extortion constitute wasteful barriers to international economic intercourse which diminish the welfare of peoples in both host and home countries of multinational enterprises.

When seen as an integral part of a more general investigation of corruption in multinational corporate operations, the economics argument lends itself to still another practical observation. In addition to the insight into causes and effects, it helps in the evaluation of the reform proposals that have been and will be made to combat this phenomenon. More important, economics reveals that only those proposals that reduce the supply and demand for the improper exercise of political influence will have substantial effects.

Ethical considerations

The purpose of business ethics is to help us determine what business practices are right and what are wrong. In this section the primary consideration is whether multinational firms actually do wrong in paying bribes.

It is sometimes said that businessmen care nothing about right and wrong; that all they are interested in is making profits. And, after all, were it not for the profit to be had, hardly anyone would be in business. The characterization is misleading. There are, to be sure, those who have not the slightest regard for right and wrong in the race for profits. But such individuals are probably a minority. In business — as in all other human activity, everyone "draws the line" somewhere. It may not be altogether reckless to suggest that businessmen often display two sets of moral standards. Few will dispute that the 1970 attempt by ITT to induce the American CIA to help prevent Salvador Allende's rise to the presidency in Chile was, at least, morally questionable; more are likely to declare that any attempt to interfere with another country's politics is wrong. And the

same individuals would hardly question the "facilitation payment" made to a customs inspector in Caracas airport by the local manager of a firm meeting the Executive Vice-President from their world headquarters. We cannot fail to recognize the double standard of morality.

It appears that most of the wrong-doing in business activities is not because the individual intends to do wrong; rather, he believes it is "right for him under the circumstances". It is one of the aims of business ethics to help men free themselves from this self-serving bias and measure actions objectively with consistent standards.

The questions at this point are two: what is unethical/wrong about an illicit payment by a multinational corporation? What is wrong about a government official's receipt of a bribe? Firstly, such practice are wrong because they are illegal — they violate the law. They violate laws which had been enacted because corrupt payments are seen by society as wrong and because the need to proscribe them by statute had been felt. Ultimately, the question is asked: why are such practices seen as wrong in the first place? Primarily, the answer lies in the breach of trust corruption involves. The government officer or employee holds, in his office, the public trust. By virtue of his position the public expect him to discharge his duties faithfully in the sense of public interest — as opposed to his private, self-interest. More specifically, corruption is wrong because it violates the principles about the nature, function and purpose of government which is in fact established to achieve justice and promote the public weal. Stated differently, the principle involved is that the government — through the officers that guide and employees that operate them, should distribute the benefits at its disposal strictly on the basis of merit. And, in our discussion of multinational corporate activities merit is determined by foreign investment regulation — not in accordance with favour obtained through the secret diversion of corporate funds.

In reviewing the general proposition that those who rule a country should act fairly in doing so we find that the more socially and politically developed societies are those that emphasize ethics. This is perhaps because experience has shown that government needs to be impersonal in moderating and adjudicating the differences between the various competing groups in society; to attain higher efficiency and greater range of goods that people need, possible conflicts must be avoided where possible. It is precisely to avoid or control strife between segments of society that public trust in government functionaries is necessary. And it is because of these assumptions that society finds it wrong for politicians or civil servants to allow personal interests to dominate their "official duty". No matter what justification is offered for the making of illicit payments, it is contrary to the principles of good government.

The precarious position of management

The past two decades have seen the proliferation of writings on multinational corporations. Examining the nature, scope, power, effects and potential of the business giants, authors have studied such companies from almost every conceivable angle. The composite picture drawn from the existing literature is generally unattractive. In going about their business multinational enterprises deal with numerous entities: individuals, groups of individuals, companies, associations, unions, industries, whole populations and, most important, states. Yet, the unpleasant truth is that more than any of the others, states have come to regard multinational corporations as predators. Given this setting, it is understandable — indeed, predictable, that host governments have reacted with floods of foreign investment regulations specially designed to control corporate activities. Government intervention has, in turn, given rise to a complex web of pressures on international trade. Political, economic and social factors exist that create inducements to corrupt activity; foreign investment regulations, too, create environments hospitable to corruption when these are imprecise and inefficiently administered.

The efforts of host governments to maintain control of their national economies have increasingly restricted the freedom of management to employ the resources at their disposal (e.g., the strict control of movement of foreign currency). At the same time they have managed to penetrate the erstwhile autonomous process of formulating multinational corporate strategy. As international trade and investment have made national economies less responsive to traditional economic formulae, governments have reacted with increased control of entire industries. For example, the Philippines allows only four cylinder engines for motorcars manufactured locally by Toyota and set export volume quotas for the local assembly of vehicles by Ford.

In addition to the restrictions on corporate strategy, host governments have sought to exert direct influence on the processes by which multinational corporations formulate their strategies. To achieve this, governments in South America and South Asia have encouraged joint venture schemes between multinationals and domestic firms, provided these with government-backed financial packages, tax holidays and a score of other incentives. Spain imposes strict limitations on foreign equity participation and closely regulates the use of foreign capital equipment. The workers' co-determination schemes now gaining momentum in Europe may ultimately have the same effect by forcing subsidiaries to allow representatives of their local constituencies active participation in corporate planning. This type of intervention is usual in areas considered by the host country to be critical to national political, social or economic interest. In such cases the

usual demand is for the multinational corporation to decentralize decision making and for subsidiaries to share the process with local constituents.

The obvious point is that the formal structures within which multinational companies must operate are already bogged down by regulations. The pressures militating against the traditional modes of conducting business are enormous. And beyond the parameters of strictly business-government relations lie corrupt elements. The question facing a manager is likely to be: what compromises are necessary to go on doing business competitively and profitably? An obvious item in his list of options is: pay bribes.

PART II

The Proscription of Foreign Bribes in the United States

Corrupt payments

A bribe is any gift, payment or conferment of benefit upon the agent of a person with whom the briber is dealing. The briber knows that the recipient of the bribe is acting on behalf of another (i.e., the principal) and pays the bribe intending to motivate its recipient (agent) to act favorably towards the briber in a transaction with the principal. The fact of the gift being given, payment made, or benefit conferred upon the agent is generally not disclosed to the principal; its disclosure does not alter the corrupt nature of the transaction. In multinational corporate operations, the briber is commonly a corporate employee or commission agent; the principal is the multinational firm; and the recipient of the illicit payment is usually a government officer or employee. When the bribe is offered the technical term used is "bribery"; when initiative is taken by the recipient in asking/demanding payment, it is called "extortion". In both bribery and extortion a corrupt intention *(scienter)* is present in that the payor seeks to influence the recipient of the gift, payment or benefit to act in a manner favorable to him. In international trade the motive for an illicit payment may be to obtain or maintain business, to "induce" the recipient to perform his duty which he would refrain from doing without the bribe; the expedition of the performance of such duty (thus, "facilitation payment"); it may be to induce the recipient *not* to perform his duty; or it may be to create a "reservoir of goodwill" upon which the payor may want to draw later.

The essential elements of bribery as a criminal offense in American statute books are, (a) the receiver must be in some governmental position, and (b) a thing of value must be offered to influence official action.[7] Thus, the U.S. Code declares unlawful

> The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly.... (1) to any officer, partner, employee or agent of a prime contractor

[7] Kugel & Gruenberg, International Payoffs 14 (1977).

> holding a negotiated contract entered into by any department, agency or establishment of the United States.[8]

In corrupt transactions, a corrupt intent *(scienter)* need not be shown as to both parties, only that of the defendant is required.[9] The U.S. Canon of judicial ethics mandates that a member of the bench not to

> accept any present or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment.[10]

The various Departments of the U.S. Government have their own regulations prohibiting illicit payments. One department has promulgated the following:

> ... an employee shall not solicit or accept, for himself or another person, directly or indirectly, any gift, gratuity, favor, entertainment, loan or any other thing of monetary value from a person who:
> (1) Has, or is seeking to obtain contractual or other business or financial relations with the Department;
> (2) Conducts operations or activities that are regulated by the Department;
> (3) Is engaged, either as principal or attorney, in proceedings in which the United States is an adverse party; or
> (4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duty.[11]

Corrupt payments made by multinational corporations, specifically when made outside the territorial jurisdiction of the country, frequently involve a government employee or officer — therefore falling within the requirement stated by the U.S. Code. This is not to say that commercial corruption does not occur (i.e., those not involving government personnel). Commercial corruption does occur, and it too is proscribed by law. Of the fifty states in the Union, twenty-eight have enacted statutes specifically dealing with commercial corruption. Typical of such statutes is that of New York where

> A person is guilty of commercial bribing when he confers, or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.[12]

Federal legislation proscribing corrupt payments

Until December 1977 bribery by American nationals (natural or juridical persons) committed abroad was not a criminal offense. It was the Federal Corrupt Practices Act of 1977 which effectively criminalized cor-

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8 4 U.S.C. ss. 51
9 WHARTON'S CRIMINAL LAW PROCEDURE. 773 (1975).
10 BLACKS LAW DICTIONARY. (1971).
11 Department of Justice, 28 C.F.R. 45.735 *et seq.*
12 New York State Code, Article 1800 at 76.

rupt acts done outside United States territory. However, the *effects* of corrupt transactions were covered by U.S. laws, principally in the field of antitrust.

1. *Antitrust laws.* The fundamental antitrust law in the U.S. is the Sherman Act which prohibits contracts, combinations in the form of trust or otherwise, and conspiracies in restraint of trade or commerce among states in the Union or with foreign countries.[13] The *ratio legis* of the Act is the promotion of competition based on efficiency[14] and violations thereof necessarily entail the existence of contracts or conspiracies that result in restraining trade. Pursuant to the intra-enterprise conspiracy rule enunciated by the Supreme Court in *Perma-Life Mufflers v. International Parts,*[15] even where a (multinational) firm and its foreign subsidiaries are the only ones involved in the bribery of a foreign official, this can be considered as a conspiracy in restraint of trade. When the import and export trade of American firms are unreasonably restrained or monopolized the Sherman Act may be applied even to acts committed outside U.S. territory.[16]

Under the aegis of the Federal Trade Act the U.S. Federal Trade Commission is charged with preventing persons, partnerships or corporations from using unfair methods of competition in commerce or deceptive acts or practices in trade. The acts proscribed extend further than the Sherman Act in that, beyond the element of conspiracy essential in the latter, "other acts or practices" — including bribery — which are unfair or deceptive, fall clearly within the prohibitions embodied in the law. In addition to the Sherman and Federal Trade Acts, the Robinson Patman Act relates to bribery in business transactions when it declares in Section 2(c) that it shall be unlawful for any person engaged in commerce

> ... in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof ... either to the other party to (the) transaction or to an agent, representative or other intermediary therein where such intermediary is acting in fact for ... any party to such transaction other than the person by whom such compensation is so granted or paid.

Commercial bribery falls within the prohibitions of the Robinson Patman Act since it tends to lessen competition and works to create a monopoly.[17] And Section 2(c) applies to a payment *abroad* by a U.S. firm if it is at the expense of sales or profits of a U.S. competitor.[18]

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[13] 15 U.S.C. ss. 2, 2.2.

[14] Cornell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

[15] 392 U.S. 134 (1968).

[16] Hearings before the Subcommittee on International Economic Policy of the Committee on International Relations, House of Representatives, 94th Congress, 1st Session, June-Sept. 1975.

[17] Fitch v. Kentucky-Tennessee Light and Power Co., 136 F. 2d. 12 (1943).

[18] Commerce Secretary F. Richardson. *Letter* to Sen. W. Proxmire, 11 June 1976.

2. *The Internal Revenue Code.* Although the Internal Revenue Code does not criminalize bribery, it disallows such payments as deductions from gross income in the computation of the income tax base. Note Section 162(c) of the IRS Code:

> (c) illegal bribes, kickbacks and other payments. —
>
> (1) illegal payments to government officials or employees. — No deduction shall be allowed under subsection (a) for any payment made directly or indirectly . . . if the payment constitutes an illegal bribe or kickback, or if . . . the payment would be unlawful under the laws of the United States if such laws were applicable . . .[19]

Where this subparagraph of the Section deals with payments to public officials, the next subparagraph disallows deductions of payments made to "*any* person" if the bribe is an illegal payment under "*any* law of the United States, *or under any law of a State*".[20] Thus, where the payment is illegal under any state or federal law, and whether the recipient happens to be a government official or not; further, even when the proscription of the payment is by the law of a foreign country, the disallowance from deductions in computing the income tax base remains.

The parent company of an American multinational corporation may not deduct from gross income the illicit payments made abroad by its foreign subsidiaries. This prohibition falls squarely under Section 952 of the Internal Revenue Code which defines "Subparagraph F income" as 'in the case of any controlled foreign corporation,' the sum of . . . and

> (4) the sum of the amounts of any illegal bribes, kickbacks or other payments (within the meaning of section 162(c)) paid by or on behalf of the corporation directly or indirectly to an *official, employee, or agent in fact of a government.*[21]

Purely domestic U.S. firms (i.e., those with no foreign subsidiaries) but with marketing and sales operations abroad are treated as a different class but, nevertheless, subjected to the same restrictions as multinationals and firms with exclusively domestic operations. Referred to as "DISCs" (Domestic International Sales Corporations), Section 995 of the Code states

> (a) general rule. — a shareholder of a DISC or former DISC shall be subject to taxation on the earnings and profits of a DISC as provided in this chapter, but subject to the modifications of this subpart.
>
> (b) . . . . .
>
> (F) (iii) any illegal bribe, kickback or other payment (within the meaning of section 162 (c)) paid by or on behalf of the DISC directly or indirectly to an official, employee or agent in fact of a government . . .

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[19] (US) Internal Revenue Code 1977, Section 162 (c).
[20] *Ibid.*, Section 162 (c) (2); emphasis supplied.
[21] *Ibid.*, Section 952 (a), (a) (4); emphasis supplied.

Again, illicit payments are disallowed as deductions in the computation of the net taxable income of a "Domestic International Sales Corporation".

The income of multinational corporations is reported on Form 3646 which includes bribes and other illegal payments *made abroad*. The items in this form are added to the corporation's gross income to arrive at the tax base. Similarly, Schedule M-1 of Form 1120 (covering domestic firms and DISCs) effectively compels a company to reconcile its net income as reflected in its books with that reported for taxation purposes. The overall effect of the Code's treatment of illicit payments is to make them "deemed contributions" and to make the income reported to the tax authorities higher than that shown in the firm's books. Upon investigation, discovery of "irreconcileable discrepancies" between these two figures may subject the firm to prosecution under state and federal law.

3. *The Federal Corrupt Practices Act (FCPA)*. As a result of the work of the Office of the Watergate Special Prosecutor in 1973, the United States Securities and Exchange Commission became aware of a pattern of conduct involving the use of corporate funds for illegal domestic political contributions. Because these activities often involved matters of significance to public investors the nondisclosure of which entailed violations of federal securities law, the Commission published a statement on 8 March 1974 expressing the views of its Division of Corporate Finance concerning disclosure of these matters in documents filed with the Commission.[22] Subsequent Commission investigations and enforcement actions revealed that instances of undisclosed questionable or illegal payments — domestic *and* foreign, were widespread. These represented serious breaches in the system of corporate disclosure administered by the Commission and the payments threatened public confidence in the integrity of the system of capital formulation that rests on the premise of full and fair disclosure of corporate business and financial transactions. On 12 May 1976 the Commission submitted a detailed Report on Questionable and Illegal Payments and Practices, *"THE MAY 12 REPORT"*, to the Senate Committee on Banking, Housing and Urban Affairs. That Report describes and analyzes the Commission's activities concerning such practices and payments and proposed legislative remedies to these problems. On the basis of the May 12 Report, the following recommendations were made:

> ... the enactment of legislation addressed specifically to enhance the accuracy of corporate reports and reliability of auditing processes... by
> — requiring issuers (corporations listed in the Exchange) subject to the periodic reporting requirements of the Securities Exchange Act to make and keep accurate books and records;
> — requiring the issuers to devise and maintain a system of internal accounting controls meeting the requirements of the American Institute of Certified Public Accountants;

[22] Securities Act Release No. 5466, 8 March 1974.

— prohibiting the making of false, misleading or incomplete statements to an accountant in connection with any examination or audit; and
— prohibiting the falsification of accounting records.

In the same Report, the Commission proposed the expansion of its own enforcement capabilities, the development of a voluntary disclosure program and the vitalization of the role of boards of directors by suggesting that reporting companies create audit committees composed of non-management directors and the separation of the functions of independent corporate counsel and director. The SEC's legislative proposals were considered by the 94th Congress. When Congress adjourned before taking final action on the proposals, the Commission published proposed rules for public comment identical to the proposals submitted earlier to the legislature. The main items of the proposal (Rule 13b-1 and 13b-2) were eventually incorporated into the Federal Corrupt Practices Act (FCPA). The FCPA was signed by the President on December 19, 1977 and became effective immediately. That law declares that it shall be unlawful:

> ...to offer, pay or promise to pay, or authorize the payment of, any money, or to offer, give or promise to give, or authorize the giving of, anything of value to—.
>
> (1) any person who is an official of a foreign government or instrumentality thereof, for the purpose of inducing that individual—
>
> (A) to use his influence with a foreign government or instrumentality, or
>
> (B) to fail to perform his official functions, to assist issuer in obtaining or retaining business for or with, or directing business to, any person or influencing legislation or regulations of that government or instrumentality;
>
> (2) any foreign political party or official thereof or any candidate for foreign political office for the purpose of inducing that party, official or candidate—
>
> (A) to use its or his influence with a foreign government or instrumentality thereof, or
>
> (B) to fail to perform its or his official functions...
>
> (3) any person while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given or promised directly or indirectly to any individual who is an official of a foreign government or instrumentality thereof, or to any foreign political party or official thereof or candidate for foreign political office.[23]

Thus, the FCPA prohibits bribing foreign government officials or political parties, officers or candidates for the purpose of obtaining or retaining business. Other possible motivations for the illicit payments by American firms operating abroad are also covered by the statute. Severe

[23] Section 103, Federal Corrupt Practices Act (FCPA).

penalties can be imposed on American companies, their officers and directors, and others who violate the prohibitions. All publicly owned corporations must meet the statute's internal control and record-keeping requirements. The provisions of the FCPA apply to all U.S. corporations and their officers, directors, employees, agents and stockholders acting on behalf of the company. The law is divided into two principal sections: one covers publicly held corporations and the other is addressed to all other domestic concerns. A domestic concern is defined as:

> (1) a business entity which either has its principal place of business in the United States or which is organized under the laws of any State in the Union or other American territory or possession, or
> (2) an individual who is a U.S. citizen, national or resident.

Although the law does not specifically mention foreign subsidiaries of U.S. firms, these are included in the prohibition against indirectly paying or offering bribes abroad.

Acts prohibited by the FCPA are those involving "corrupt" use of interstate commerce to offer, pay, or promise to pay, or authorize giving anything of value to:

> a. a foreign official, including any person acting in an official capacity for a foreign government, department, agency or instrumentality;
> b. a foreign political party, official or candidate for foreign political office; or
> c. another person, while knowing or having reason to know that the offer or payment will ultimately go to either of the two categories above.

The offer or payment must be to influence an act or decision by a foreign government, politician, or political party, to assist in obtaining or retaining business — or its direction to any person. The Senate Committee report on the law stated that the use of the word "corrupt" is designed to make clear that the offer, payment, promise or gift must be intended to induce the recipient to misuse an official position in order to (wrongfully) direct business.[24] However, it is not necessary that the act be consummated or that it succeed in producing the desired result; it is sufficient that an attempt to corrupt was made. The issue of who initiated the corrupt transaction (i.e., whether it was extortion or bribery) is immaterial.

Political contributions in foreign countries are not necessarily proscribed. Whether or not these are legal in the country where made, what brings the FCPA into operation is that the motive was to obtain or retain business. On the other hand, the contribution's legality will be rendered suspect if it is closely connected with *specific* business activities in the host country; the same happens to payments the sheer amount of which is to imply that reciprocal arrangements with the recipient exist.

[24] The May 12 Report; see p. 456 *supra*, for discussion.

Up to $1 million in fines may be imposed on companies convicted of bribery; violations by an officer, director or stockholder acting on behalf of the firm can result in a fine of up to $10,000 or imprisonment for up to 5 years — or both. An employee or agent subject to U.S. jurisdiction is subject to these same penalties. The liability of a director, officer or stockholder is predicated on a *wilful* act while that of an employee or agent may be based on *either* a wilful act or a finding that the company has in fact violated the anti-bribery provisions in the law. This is intended to prevent a low-level employee or agent from becoming a "scapegoat" for the corporations or its executives. Further, the law prohibits the corporation from directly or indirectly paying the fine imposed on the individual.

One thing is immediately clear from a reading of the FCPA: "facilitation" or "grease" payments are *not* outlawed. These terms are generally used to refer to payments to low-level government personnel; their purpose is different from that of payments contemplated by the FCPA. These payments merely "move" a matter to an eventual act or decision that does *not* involve influencing *discretion* one way or the other. Hence, the law does not apply to payments to government personnel whose duties are *"essentially ministerial or clerical"*. Since facilitation payments are made to secure prompt and *proper* performance of duties, these are not within the prohibitions of the FCPA.

The U.S. Securities and Exchange Commission

1. *Regulatory function.* As the guardian of public confidence in the capital formation system and financial transactions in the U.S., the SEC seeks to provide investors with adequate and accurate information on the activities of corporations. The Securities Exchange Act of 1933 was designed to prevent further exploitation of the public by the sale of unsound and worthless securities through misrepresentation and to place accurate information on corporate operations within their reach.[25] Thus, the SEC is designed to control the excessive use of credit for speculation and the secrecy surrounding financial conditions of firms that invite the public to invest in their securities.[26]

Consonant with its *raison d'être* the SEC has adopted a voluntary disclosure program whereby reporting companies make known to shareholders and the investing public all information material to their interests. And, materiality, when used as a standard for requiring disclosure of information, denotes that which an average prudent investor should reasonably be informed about before buying or selling securities listed by the Exchange. In a series of pronouncements American courts have dealt with the import of materiality as such a standard; however, the essence of materiality remains unchanged: companies should reveal information which is

[25] Senate Report 47, 73rd Congress, 1st Session, p. 1.
[26] Senate Report 792, 73rd Congress, 1st Session, p. 1.

likely to influence — one way or the other — the decision of an investor in its securities.[27]

When the SEC discovered a pattern of illicit or questionable payments by companies during investigations in 1973 it set out to uncover the clearly widespread practice of corporate corruption. The prevalence of the practice meant that the existing staff of the Commission would be overwhelmed by an unmanageable volume of paperwork so that a *voluntary* disclosure system was adopted (to complement the mandatory disclosure system). As a consequence, hundreds of companies submitted admissions of corrupt payments of incredible frequency and amount. (See Annex A.) Without the cooperation of the corporations it is doubtful whether the SEC would have unveiled the bribes so revealed, let alone obtain documentary evidence sufficient to sustain convictions. In exchange for the voluntary disclosures the SEC settled for the less severe "consent decrees" whereby firms undertook to desist from making further such payments, issue "in-house rules" prohibiting them, and the creation and development of accounting/audit procedures to prevent recurrence of illicit payments.

2. *Audit and accounting control functions.* On February 15, 1979 the SEC announced the adoption of two rules "for the promotion of the reliability of financial information and prevention of the concealment of questionable or illegal corporate payments and practices".[28] These rules were codified in Rule 13b-2 of the Securities and Exchange Commission.

> *Rule 13b 2-1.* No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act.

This rule re-states the traditional prohibition against falsification of corporate books but adds several new features. The most significant of the features is that it does not limit the application of the rule under standards of materiality (discussed above). Comments by members of the Commission on the rule indicated concern that false entries of insignificant or nominal amounts would constitute violations and that the large firms with volumes of books, records and accounts would find compliance impossible. In the announcement made that day, these concerns were dealt with as follows. It noted that Section 13(b)(2)(A) of the Exchange Act requires issuing companies (i.e., publicly held firms) to make and keep books which,

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[27] In Kohler v. Kohler Co. (319 F. 2d. 634) the ruling was that what is material is that which *might* have been considered important by a reasonable shareholder who was in the process of deciding how to vote. Two years later, the same court said that "... to the requirement that the individual plaintiff must have acted upon the fact misrepresented, is added the parallel requirement that a reasonable man would have also acted upon the fact misrepresented." (List v. Fashion Park, 340 F. 2d. 457). Finally, the US Supreme Court held in TSC Industries Inc. v. Northway, Inc. (96 S. Ct. 2126 [1976]) that "the general standard of materiality... is a *substantial likelihood* that a reasonable shareholder would consider it important in deciding how to vote." (Emphasis on all citations supplied.)

[28] Securities Act Release No. 5466, 8 March 1974.

"in *reasonable detail*", accurately and fairly reflect the transactions and dispositions of the assets of the issuer. The phrase 'in reasonable detail' was added to 'accurate and fair' because the latter requirement, if unqualified, might connote a degree of exactitude and precision which is unrealistic.[29] The amendment makes it clear that the company's records should reflect transactions in conformity with accepted methods of recording events and effectively prevent off-the-books "slush funds" and payment of bribes. The Commission emphasized that compliance would be facilitated by increased use of independent audit committees and, finally, that continued strict application of the materiality standard would unduly narrow its scope — resulting in unwarranted diminution of investor protection.

The second feature of Rule 13(b) 2-1 is that no showing of *scienter* is required to prove violation of the rule. Comments on the rule when it was proposed were to the effect that some false entries resulting from inadvertent errors or oversights are inevitable in view of the large number of transactions that large corporations record daily. They also underscored the unfairness of penalizing persons who have acted in good faith and made honest mistakes. In its announcement the Commission stated that inclusion of a *scienter* requirement in the rule would be inconsistent with the language of the law which does not indicate legislative intent to impose such a requirement. The Commission went on to explain that imposing liabilities for inadvertent or inconsequential errors was unwarranted because the statute does not require perfection but reasonableness.

Finally, a singularly significant feature of the rule is the extension of its applicability to *any person*. Responding to suggestions that the application of the rule as proposed be extended only to persons affiliated with the issuing corporation, the Commission noted that the effect of falsification of books, records or accounts is "not necessarily contingent" on the identity of the falsifier or whether or not he acts with knowledge or acquiesence of management. It would be impractical to identify all categories of persons who are in a position to falsify corporate records.[30]

> *Rule 13b 2-2.* No director or officer of an issuer shall, directly or indirectly:
>
> (a) make or cause to be made a materially false or misleading statement, or
>
> (b) omit or omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in the light of the circumstances under which such statements were made, not misleading...
>
> to an accountant in connection with (1) any audit or examination of the financial statements of the issuer required to be made pursuant to this subpart or (2) the preparation or filing of any document or report required to be filed with the Commission pursuant to this subpart of otherwise.

[29] House of Representatives Report (H. R. Rep.) No. 95-831; 1st Session, 1977.
[30] *See* note 24 *supra.*

This rule is plainly meant to be of very broad application, including as it does the audit of financial statements by independent accountants, the preparation of any required reports by independent or internal auditors, special reports to be filed with the SEC, and any other work performed by an accountant that culminates in the filing of a report with the Commission. Moreover, it applies to both oral and written reports. In limiting its scope the traditional requirement that prohibited statements be "materially false" and misleading — or that omissions be of "material facts", remains. Like the first subpart (i.e., 2-1) of the rule, there is no *scienter* requirement here. The Commission asserted that the advantages of the rule as a deterrent against questionable or illegal payments outweigh potential disadvantages of impeding communications between auditors and those from whom they seek information. On the other hand, unlike the first subpart, the prohibitions here extend only to directors and officers of the corporations. However, controlling persons of the issuing firm *may* be held liable for conduct violative of this subpart under Section 20(a) of the Exchange Act.[31] Existing anti-fraud provisions and the concepts of aiding and abetting may be invoked against other persons.

3. *Internal control.* Publicly held companies are required to devise and maintain internal control systems sufficient to provide reasonable assurance of meeting certain objectives.[32] These objectives require that, *inter alia,* transactions be properly authorized and recorded and that assets be safeguarded. That management has a responsibility to maintain internal control of the company they run is a well-established principle. But subjecting corporations, their officers and employees to possible liability in either civil or criminal actions for not having a system *as adequate* as is contemplated by law is new. Significantly, there are no clear guidelines by which to grade the accounting standards of companies — at least, not in the statute books. Further, evaluating an internal control system is a subjective process and even the most knowledgeable individuals can arrive at different conclusions. In establishing and maintaining control systems, particularly with the object of preventing illicit payments, management must consider such diverse factors as: the size of the business, diversity of operations, degree of management centralization, executive management's exposure to daily details of operations, and many others. Such considerations are not included in the law.

While the internal control objectives of the FCPA are taken directly from professional accounting/auditing literature, it is important to recognize that the traditional definitions of such control systems are addressed to informing the auditor of management objectives. The auditors' purposes in reviewing internal control is to help determine the extent to which

31 *Ibid.*

32 These objectives are outlined in the Statement on Auditing Standards No. 1, section 320.28 and included in Section 13 (b) of the Exchange Act.

other auditing procedures need be performed. Thus, an auditor determines whether certain internal control procedures are satisfactory for this purpose. Whereas the law here is intended to prevent defiance or circumvention of the system of corporate accountability, it is nevertheless true that most published reports of questionable or illegal payments indicate not that internal control mechanisms are *inadequate* but that they were circumvented. It is not possible for the FCPA to prevent or detect all illegal or questionable foreign payments.

Aside from exhortations to comply with the law addressed to company personnel, there remains not much more that management can do other than review its accounting procedures to ensure corporate accountability. The question may be asked: how does a firm's internal control system provide *reasonable assurance* that illegal foreign payments do not occur? Broadly speaking, a first step would be to consider possible ways in which such payments may be made. For instance, a part of the commission payments or discounts to foreign agents, consultants or distributors may be passed on to foreign government personnel. Indicative of such arrangements that call for inquiry are: a commission or discount disproportionate to the services performed or rates prevailing at the time such services were rendered; requests for false certifications to government agencies in relation to the amount of payment; overbilling coupled with disbursements to a third party. In general, unusual requests related to payments — no matter how innocuous, should be checked thoroughly unless supported by satisfactory explanations.

Another factor to consider is the possibility that foreign payments are being made from corporate funds not reflected in the accounting records. This should immediately lead to an investigation of ways in which such funds could be established and maintained. The very existence of "slush funds" is totally incompatible with corporate accountability. Finally, management should determine what changes in the internal control system of the firm are desirable to prevent and detect illicit payments. Should an illicit payment be detected, proof that management had devised and maintained an adequate control system is one way for directors and officers to show that there was no wilful violation of the anti-bribery law by those not directly involved in the questioned transaction. Also, a formal code of conduct that is appropriately communicated and monitored is an important step in exercising the proper care contemplated by law. Such "in-house rules" should outline in unequivocal terms the firm's policies on, *inter alia:*

a) political contributions — payments made to political parties, their officers and individual candidates for political/governmental positions;
b) compliance with rules and regulations in host countries;
c) commissions, fees, discounts, retainers and similar arrangements; these should include statements of kickbacks and "facilitation payments"; and

d) accounting — the standard of accuracy in reporting, describing and otherwise documenting financial transactions of the firm.

Treatment of violations of the FCPA

When a violation of the FCPA is suspected or discovered, house counsel and the firm's audit committee should be informed forthwith. If counsel finds that the violation is actionable, a second opinion from outside (not in-house) counsel may be required; notice to the SEC's Division of Corporate Finance should be sent stating that an internal inquiry has been authorized by management to be undertaken by independent auditors and outside counsel. The firm will thus be in a position to decide how to approach the SEC to negotiate a resolution of the problem with the least onerous consequences. The possible ways of solving the problem, in their order of severity, are:

(a) disclosure of the violation on an informal basis and co-ordinate with the SEC's Div. of Corp. Fin. on what steps would be taken thereafter;
(b) Filing SEC Form 8-K with a report of the firm's audit committee attached;
(c) the issuance by the SEC of a report pursuant to Section 21(a) of the Exchange Act; and
(d) a "consent injunction", either with or without ancillary relief.

SEC Form 8-K. A disclosure of FCPA violations to the SEC on an informal basis and the filing of Form 8-K are the least onerous alternatives in dealing with illicit payments. These result in the following consequences. Facing a case of corrupt payments, even when kept strictly an internal company affair, adversely affects morale and prestige. Admission of the offense to outsiders (i.e., the SEC) makes this effect more distinct. The disclosure amounts to a confession of guilt and Form 8-K makes it a matter of public record. Thus, there arises the possibility of a share-holder derivative suit based on the facts disclosed. A disenchanted stockholder may decide to ask that the company be reimbursed the amount of the illicit payment; allege mismanagement in that the payment was not prevented or that adequate internal control systems were not maintained; etc.

Section 21(a). SEC Release No. 34-156664 (21 March 1979) outlines the procedure by which reports of investigations and statements submitted pursuant to Section 21(a) of the Exchange Act are dealt with. As part of the process of resolving their involvement, persons under investigation submit a statement to the Commission setting forth certain factual admissions and, in some cases, specific undertakings. A statement will typically contain the principal aspects of the matter being investigated, the role in these matters of the person(s) making the statement, and "any other representatoins the person(s) may wish to make". If accepted, the Commission will publish the statement. Acceptance and publication of the statement will *not* preclude other proceedings by federal and state agencies

such as the Department of Justice — or even the SEC itself. However, the determination to accept and publish the statement would probably not have been made by the Commission had it not already decided *not* to institute proceedings based on the contents of the statement or other information revealed in the course of the investigation. On the other hand, there is no assurance that the published admissions will not be utilized in private suits or criminal prosecutions.

Administrative proceedings under Section 15 (c) (4).

> If the Commission finds, after notice and opportunity for hearing, that any person subject to the provisions of Section 15 of this title or any rule or regulation thereunder has failed to comply with any such provision, rule or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person to comply with such provision, rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order. (Section 15(c)(4) of the Exchange Act.)

The provisions of the FCPA addressed to accounting standards were codified into the Exchange Act as Section 13(b)(2). This part of the law has been used to require correction of previously filed reports and to mandate the future compliance with Exchange Act reporting requirements. In contrast with an injunctive settlement (discussed below), a benefit that comes with settlement under Section 15(c)(4) is that there are no collateral consequences to the defendant such as criminal contempt for violation of the various disqualifications under securities laws. A settlement under this section is more practical from the standpoint of enforcement since the prosecution might obtain relief similar to a permanent injunction *without* showing that a recurrence of the violation is likely.[33] However, this section may be utilized more vigorously in the payments and perquisites area by ordering a more encompassing ancillary remedy.[34]

Injunctive relief. Compared with the resolutions to violations of the FCPA outlined above, injunctions are decidedly more severe and effective. Future violations are liable to prosecution as criminal contempt resulting in various disqualifications under federal securities laws. The injunction would, for example, provide the basis for disciplinary proceedings against a broker or dealer in securities; prevent services in various capacities by an investment company and provide disqualification of certain professionals from practice before the SEC under Rule 2(e) of its Rules of Practice. In addition to the adverse effect on the issuing company's reputation in the business community, collateral estoppel consequences may result.

Among the ancillary reliefs pursuable by the SEC are: the appointment of a temporary receiver; establishment of a trust over the firm's assets;

[33] This comes in the form of an undertaking, entered into unilaterally by the person revealing the violation, that the violation will not be repeated and that measures will be taken to prevent recurrence thereof.

[34] Note that the section states that the SEC may "compel compliance upon such terms and conditions ... as the Commission may specify."

the nomination by the SEC of a director(s) to sit with the firm's Board — the nominee(s) not having been previously connected with the company.

U.S. Agencies in international trade

The Overseas Private Investment Corporation (OPIC) was created "to mobilize and facilitate the participation of U.S. private capital and skills in the economic and social progress of less developed countries".[35] In furtherance of this aim, it grants loans to American investors overseas for projects which will be conducted in accordance with local laws. Thus, Section 2.02 of the Foreign Assistance Act (1969) requires the investor to state that all the information submitted in support of a loan is "true, correct and complete in all respects". Further, the Act's Section 2.04 aims to assure compliance with OPIC requirements on the legality of projects by mandating that proposed investments conform with all the laws of the host country which would have been ascertained had a reasonable inquiry been made.

What is curious, however, is that the law does not provide a standard for ascertaining the "reasonability" of an investigation/inquiry on the laws of the host country. It does not indicate who is to conduct the inquiry nor provide for monitoring continued compliance with the laws applying to the investment project; and it does not contain a "conflict clause" addressed to possible inconsistencies between laws of the home and host countries. Thus, in countries where political contributions are legal, an investor may be *within* the bounds of acceptable conduct *vis-a-vis* Section 2.04 in contributing funds to a political party and — at the same time, be in *violation* of the FCPA. Similarly, a U.S. company that uses loans from the Export-Import Bank is obliged to desist from conduct illegal in the host country. To discourage illicit payments, commissions and fees in excess of the actual value of the goods or services involved in the investment project must be declared by the investing company. Failure to disclose "relevant material" or making misleading or fraudulent statements renders the firm liable to a revocation of its loan and referral to the Criminal Division of the Justice Department. Again, there are no guidelines on what constitute "relevant material" nor on the valuation of the services rendered in connection with the investment project.

The Agency for International Development (AID) is yet another U.S. agency providing funds for overseas investment by American corporations. In obtaining a loan the firm must certify that no bribes, kickbacks or illegal payments are made.

Without specifying bribes, kickbacks or other illicit payments, both the Civil Aeronautics Board (CAB) and the Federal Maritime Commission

[35] Butler, 1975 House Hearings; Foreign Assistance Act, 1969.

(FMC) invoke particular statutes that proscribes corrupt payments. Section 1302 of Public Law 85-726 states:

> (c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or restrictive competitive practices.

In this description of the nature of civil air transport the CAB is charged with promoting, the law clearly provides a basis for the disallowance of corrupt practices meant to obtain unjust preferences. Hence, if the CAB finds that an air carrier engages in such prohibited practices or unfair methods of competition, it may order such carrier to desist from such acts and refer the matter to the Justice Department for disposition. And, like the CAB, the FMC has authority to deal with illicit payments in the shipping industry. Falling under the category of unjust and unfair trade practices, bribes are proscribed by implication of law in 36 USC ss. 815, thus:

> ... It shall be unlawful for any skipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent or employee, knowingly and wilfully, directly or indirectly, by ... any ... unjust or unfair devise or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Purchase and sales of military equipment

The procurement of military equipment is within the province of the U.S. Defense Department which prohibits the use of improper influence "which induces or tends to induce consideration or action by any employee or officer of the United States with respect to any government contract on any basis other than the merits of the matter".[36] Inequitable and exorbitant fees charged in relation to goods bought or services rendered are prohibited and contingent fees for information which leads to a contract are disallowed unless the agent involved is a *bona fide* employee or is maintained by the contractor for the purpose of securing business.[37] The misrepresentation of fees and discovery of other improper payments are grounds for the rejection of the bid or offer, the annulment of a contract, and recovery of the fee involved. The Defense Department may also declare persons involved in corrupt or questionable transactions as inelligible for future contracts and refer the matter to the Justice Department for disposition.

Foreign military sales are regulated by the International Security Assistance and Arms Export Control Act of 1976. In addition to the requirements of the Foreign Military Sales Act, it requires full disclosure of payments, contributions, and gifts; disclosure of the following is also necessary:

> (a) the name of the person who made the payment, contribution, gift, commission or fee;

[36] Defense Department Regulations on procurement of material.
[37] Armed Services Procurement Regulations.

(b) the name of any sales agent or other person to whom such payment, contribution, gift, commission or fee was paid;
(c) the date and amount of the payment;
(d) a description of the sale in connection with which such payment was made; and
(e) the identification of any business information considered confidential by the person submitting the report.[38]

Significantly, firms participating in foreign military sales programs are not eligible for reimbursement by the U.S. government for any unreasonable payments that were made or for expenses incurred in transactions where the use of "improper influence" is discovered.[39] And, if extortion is attempted by any foreign official with reference to any transaction involving U.S. military equipment, the President of the United States may recommend the termination of the military assistance program in the country involved.[40]

The criminalization of illicit payments made abroad

It is unusual; indeed the United States is the only country where one can find statutes making it a criminal offense for persons within its jurisdiction to pay bribes abroad. The reluctance of states to legislate against corrupt payments abroad is due at least to four factors: (1) the well-established principle of the territoriality of criminal law; (2) the difficulties inherent in prosecution based on acts done abroad; (3) burdens on a defendant created by the imposition of criminal penalties done abroad and which raise important questions of fairness and due process; and (4) the principle of comity among nations.

1. *The extra-territorial application of criminal law.* In general, states have been reluctant to extend the application of their criminal law beyond their territorial jurisdictions in consideration of the twin principles of sovereignty and territorial supremacy of nations. Criminalizing the act of paying a bribe necessarily involves the characterization of the act of *receiving* the payment as criminal as well. Therefore, if an employee of a multinational firm would be liable to criminal prosecution in his home country for bribing a customs official in a host country, the necessary implication is that the customs official would likewise be liable to criminal prosecution in the firm's home country. And, a conviction of the company man automatically stigmatizes the recipient of the bribe as guilty, too. These implications would arise irrespective of the action taken by the host country's government. A further conclusion would be that the host country would be effectively deprived of its prerogative of deciding whether or not, in the light of the circumstances, it wishes to take any action at all.

[38] Section 604 (a), International Security Assistance and Arms Export Act. 1976.
[39] *Ibid.*, Section 604 (c).
[40] *Ibid.*, Section 607.

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs beyond its territory and causes an effect within its territory in the following instances: (a) when the conduct and its effect are generally recognized as constituent elements of a crime or tort under its laws or (2) if the conduct and its effect are constituent elements of activity to which the rule applies; or the effect within the territory is substantial (as in forgery of bank notes and coins); or it occurs as a direct and foreseeable result of the conduct outside the country; or the rule is not consistent with the principles of justice generally recognized by states (as in the case of air piracy).[41] It can be convincingly argued that the effects of corrupt payments, particularly of the frequency and magnitude attributed to multinational corporations, provides states with justification in criminalizing bribes abroad.

2. *Difficulties of enforcement.* Whatever the scope of a country's legislative jurisdiction, a formidable obstacle exists in that its writs do not extend to non-citizens beyond its territorial boundaries. Thus, both investigation and prosecution of foreign corrupt payments depend to a very large degree upon the voluntary co-operation of foreign individuals and governments. Whether such co-operation is forthcoming is certainly problematic. The availability of witnesses and evidence in a case where the essential elements take place abroad will probably be so limited as to preclude proof beyond reasonable doubt — the standard in criminal cases. Moreover, while such a law may deter its nationals from engaging in corrupt practices, it is unlikely to be taken seriously by a foreign government official as a justification for failure to "come across".

3. *Fairness and due process.* Another possible explanation for the hesitation by states to criminalize acts done abroad lies in the two principles: a) a defendant's right not to be subject to double jeopardy and b) his right to compulsory process to obtain the attendance of witnesses.

The position of a defendant in a criminal prosecution for bribery committed abroad would be very difficult. The existence of a foreign recipient of the payment in question is an essential element of the offense and the operative acts would almost inevitably have occurred on foreign soil. Whether or not the prosecution could obtain necessary evidence, the defendant would in most cases be without the benefit of compulsory process with respect to foreign witnesses. To hypothesize an extreme situation, it would be possible for an individual who has been prosecuted in the country where the bribe occurred and acquitted through testimony of foreign witnesses given under compulsory processes available in the foreign country to be prosecuted in his home country without means to compel the testimony of the very witnesses who had influenced the acquittal in the foreign trial.

[41] McCloy, *Corporations: The Problem of Political Contributions and Other Payments at Home and Overseas*, 31 THE RECORD 306, 307 (1976).

The criminalization of foreign corrupt payments also runs counter to defendant's right not to be subjected to double jeopardy. After a prosecution in his home country, a foreign prosecutor may nevertheless feel compelled to prosecute in his own (i.e., the host country) jurisdiction the same individual subjected to jeopardy earlier. This may be to compensate for any "loss of face" occasioned by prior prosecution abroad in which his (the prosecutor's countryman was stigmatized as criminal; it may be simply to establish his official diligence. This is even more probable in case the former prosecution resulted in an acquittal since the interests of the country where the corruption took place is often more critical than that of the briber's home country.

4. *International comity.* "Comity" has been defined as "the body of rules which states observe towards one another from courtesy or mutual convenience, although they do not form part of international law".[42] Such rules reflect "the recognition which one state allows within its territory to the legislative, judicial and executive acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws".[43] Enactment of criminalizing statutes for acts performed abroad goes beyond the traditional application of international comity among nations.

The assertion of jurisdiction by a country over behaviour properly subject to the jurisdiction of another is unprecedented in the absence of significant national policy concerns which far outweigh the interests of affected foreign states. Such an assertion of jurisdiction necessarily demeans the enforcement responsibility of the foreign state for such conduct as is in question and deprives the foreign state of the often critical determination as to whether or not to initiate prosecution for a particular offense. Thus, resentment can be expected of countries considering themselves entitled to priority of regulation as the locus of the conduct in question or as the jurisdiction of incorporation of the multinational corporation — or both.

It should be noted that the criminalization of corrupt acts done abroad is a unilateral action by one nation expanding its jurisdiction to the maximum extent. This is at the other end of the spectrum of alternative international solutions of the problem which is based on respect for the primary interest of the country which is the locus of the criminal act and mutual assistance in the detection and proof of such acts.

PART III

THE CAMPAIGN AGAINST CORRUPTION IN INTERNATIONAL FORA

It is self-evident that the practice of making illicit payments in international trade is a world-wide problem. As such, any solution attempted

[42] BLACK'S LAW DICTIONARY, 334 (4th ed., 1968).
[43] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

unilaterally through legislation can, at best, meet only national or, more optimistically, regional success. Corruption cannot be controlled unless national efforts to curb it are supplemented by international agreements. As pointed out in Part One, individuals and corporations are unable to rid themselves of the bribery syndrome as long as it remains "a way of life" in societies where business is conducted.

The advocates of an international solution feel that it is possible to conclude an international agreement in view of the indubitable rectitude of the moral justification for regulating illicit payments. It is acknowledged that an international accord will take longer to negotiate than a unilateral (i.e., national legislative) measure. However, speed may not be as important as universality, equality and efficacy in international application — especially as the trauma of recent scandals has probably had some substantial impact already upon both potential bribers and solicitors of bribes. Discussion of the subject matter that should be included in any international agreement on illicit payments in international trade is facilitated by considering three topics in turn: (a) the scope of the agreement; (b) requirements imposed by the agreement; and (c) disputes arising under the agreement.

1. *Scope of international agreements.* An international agreement designed to curb illicit payments in international trade should cover both trade and investment transactions inasmuch as the problem of corruption plagues both areas of business activity. In the same vein, it should apply both to those who propose and/or make illicit payments and those who solicit and/or accept bribes. Further, the agreement should not be made to apply only to multinational enterprises since as many documented examples of abuse involve companies that do not fit this category.[44] Finally, the agreement should not apply merely to private corporations but should extend to governments and state trading organizations. Resistance to this posture can be anticipated from countries in which the government and state trading concerns are active in international trade and investment. But there is no reasonable justification for the limitation of the scope of applicability of an agreement to private enterprise; it would certainly be impractical in cases of joint ownership and joint ventures.

2. *Requirements imposed by the agreement.* To begin with, such an agreement will obligate signatories to strict enforcement of local laws proscribing payment and receipt of corrupt monies/benefits. This should be accompanied by the obligation to enact and enforce rules on disclosure. The overall position should be that enforcement will be non-discriminatory in all aspects (e.g., against bribers and recipients, nationals and foreigners, individuals and corporations). In cases where local laws proscribing corrupt

[44] Statement of the United States Delegation before the Subcommittee of the General Committee of the Organization of American States (OAS) on the Behavior of Transnational Corporations, 29 October 1975.

payments in international business transactions are inadequate or non-existent, signatory states should be obligated to enact appropriate legislation within a stated period. Equally important, arrangements should be made for the international co-operation of signatories in the enforcement of these laws and regulations — including the sharing of data and making available compulsory processes to aid in prosecuting or defending alleged malefactors.

A more ambitious but no less desirable agreement will supply its own set of standards for dealing with corrupt payments in international trade. It will contain requirements to disclose payments to government officials, contributions to political parties and their candidates, substantial financial arrangements with business intermediaries and a schedule of standardized permissible "tips", commissions, discounts and rebates. Finally, provision will be made for the international adjustment of disputes arising out of the agreement.

3. *Resolution of disputes and enforcement.* A common provision in existing or proposed international agreements on corrupt business practices is an exhortation on signatories to comply with a "code" of behaviour. The effectiveness of international efforts to combat illicit payments will, however, have to depend on more than just exhortations. Prospective action to control corruption should proceed on the basis of a *binding* international document implemented by national legislation.

A satisfactory dispute-resolution mechanism would require, at the minimum, an impartial international body with power to resolve questions of fact and to make recommendations on corrective action. Ideally, such a role would be performed by an international agency — perhaps in a manner analogous to the procedures of the General Agreement on Tariffs and Trade (GATT). An alternative would be to entrust the role of dispute-resolution to national agencies which will be charged with a duty to function impartially. Again, if submission to the jurisdiction of, and compliance with the discretion of such national agencies were left to volition by relying on exhortations to do so, effectivity of enforcement will probably be minimal. Also, while enforcement on a national level may be a more practical goal, it can scarcely be expected to result in uniformity. The setting up of an international agency with ample powers and making submission to its jurisdiction compulsory on signatory states is the more meaningful albeit difficult alternative.

International Fora

There are a number of fora in which a country may seek an international agreement proscribing corruption in international business transactions. Each one has its limitations resulting from various factors. In some cases limitations arise out of the forum's limited jurisdiction; in others they result from the forum's political processes and *raison d'être*. States are, however,

not restricted to a single forum — although resort to one with sufficient potential to meet all the goals mentioned above would be ideal. There are, today, these alternatives: (a) the United Nations; (b) the Organization of American States; (c) the Organization for Economic Cooperation and Development; (d) the International Chamber of Commerce; (e) the British Commonwealth Secretariat; (f) the European Economic Community; and (g) the Association of SouthEast Asian Nations (ASEAN). On the other hand, resort may be had to independent efforts to conclude bilateral or multilateral concordats. The EEC, ASEAN, and British Commonwealth Secretariat have, todate, no existing agreements or projects designed to achieve international co-operation in the campaign against corruption in business activities. Following is a review of those fora where such agreements have been concluded and/or serious attempts to formulate them have been made.

1. *The United Nations (UN).* The United Nations has the broadest jurisdiction in terms of membership and subject matter. Further, it already has organs working in areas related to multinational corporations and corruption in business. On 15 December 1975 the General Assembly adopted a resolution entitled "Measures against corrupt practices of transnational and other corporations, their intermediaries and other involved".[45] Governments were asked to take appropriate action and the Economic and Social Council (ECOSOC) was asked to direct the United Nations Commission on Transnational Corporations (later Centre on Transnational Corporations or CTC) to include this matter in its program of work. At the Commission's second session in Lima, Peru on March, 1976 the United States proposed the establishment of a working group to negotiate a multinational agreement to deal with corrupt practices.[46] It was pointed out that both home and host countries have responsibilities to set out and enforce rules on this problem, that the issue is not limited to transnational corporations and that it involves both trade and investment. Too, it was emphasized that "disclosure" is a potent measure to deal with corrupt international business transactions. The proposal was again put forward at the ECOSOC meeting in Geneva the same year and on 4 August the ECOSOC adopted a draft resolution in place of the American proposal. The resolution established an 18-member Ad Hoc Intergovernmental Working Group on Corrupt Practices.[47] Its mandate is to conduct an examination of corrupt practices, elaborate an international agreement to prevent and eliminate all illicit payments in connection with international commercial transactions as defined by the Working Group and to report on the matter by 1977.

[45] General Assembly Resolution 3514 (XXX), 30 UN GAOR, (No. 34), 69-70.

[46] Paper submitted by the US Delegation to the UN Centre on Transnational Corporations of UN-ECOSOC; 2nd Session, March 1-12, 1976; UN Doc. E/5782-E/c. 10/16 at pp. 37-38.

[47] ECOSOC Resolution 2041, 61 UN ESCOR 61st Session, Supp. (No. 1), 17; UN Doc. E/5889 (1976).

In spite of the broad jurisdiction of the UN and the initiatives it has taken, there remains a question as to whether the political processes in that body will permit it to arrive at a solution that meets the goals discussed above. In compliance with its mandate, the Working Group was equal to its task when it formed the UN Committee on an International Agreement on Illicit Payments which completed its formulation of just such an agreement. The draft agreement (Annex C) represents a substantial measure of unanimity among members of the Committee and resolves most of the major issues which were the subject of controversy. Not only was the definition of offenses to be proscribed settled without having to resort to brackets under Article 1[48] but a new provision was introduced in paragraph 1 of that article. The new provision requires states that do not recognize criminal responsibility of juridical persons to take appropriate measures to achieve effects "comparable" to the criminalization of acts proscribed when perpetrated by such entities.

Article 2 of the draft also resolves a major difference in opinion of the Committee members anent the definition of the terms "public official", "international commercial transaction" and "intermediary". The term "international commercial transaction" covers any application for or acquisition of proprietary interests or production rights from a government by a foreign national or enterprise. It also includes various arrangements, both contractual and proprietary, relating to the exploration and exploitation of natural resources by foreign enterprises. These include concessions, service contracts and product-sharing agreements.

The provisions on the maintenance of records and disclosure requirements (Art. 6), implementation procedures (Art. 9), intergovernmental cooperation on legal proceedings (Art. 11) all seem to be free from the more sensitive controversies usually associated with international conventions. With reference to the provisions on jurisdiction (Art. 4), although there was substantial agreement on the basis of which country may take cognizance of a case, the incidence of brackets in paragraph 1(d) and paragraph 3 shows some outstanding major differences of opinion.

The difficulties encountered in drafting the agreement were not the only source of problems for the Working Group. The work was begun in 1976 and a pattern was quickly established that was to characterize the whole negotiation process. The principal advocate for a swift conclusion of the convention was the United States; its sponsorship of the project intensified upon passing of the Federal Corrupt Practices Act (FCPA). The lobby of American businessmen who feel that they are subjected to a uniquely disadvantageous standard of conduct (see Part II) had had its

[48] Items in the draft agreement enclosed in brackets are those where no unanimity had been reached by the members of the Panel incharge of drafting the agreement; resolution of these controversies and finalization of the subject provision was reserved to later meetings.

effect and American delegation in the Working Group did its best to move the negotiations along. On the other hand, the participating members from the Communist bloc felt superior to the whole affair and declined to participate in the proceedings.[49] Third world countries, while participating in the drafting process, showed lack of enthusiasm and suspicion.[50] From the commencement of the debates these delegates insisted that the discussion ought to be secondary to the formulation and legally binding ratification of the UN Code of Conduct for Multinational Corporations that was also being debated at that time.[51] Delegates from third world countries failed to attend meetings and this posed a problem when geographical distribution of the attending delegates became a criterion for determining a quorum.[52] With a few exceptions, those delegates that did attend the meetings contributed little to the debates.[53] And those that drafted their own suggestions frequently served only to muddle matters badly;[54] others appeared to have been too diplomatic to reject redundancies or absurdities out of hand so that third world additions had to be weeded out tediously or lingered on in vestigial form.[55]

Several OECD countries were active participants in the debates; their efforts seem to have been directed towards having the convention reflect their national laws as closely as possible. Given the diversity of national legal systems, the proceedings were — naturally, protracted.

The Committee members carried on their activities until the summer of 1978 when it presented the ECOSOC with a draft paper. A second committee was created by the ECOSOC to make a final draft.[56] At the same time, a new requirement for quorums was imposed on the new committee making it necessary for four delegates from each major geographical region to be present for a formal meeting. Although the final draft is ready, no final and binding agreement has been achieved todate.

The convention thus formulated is an obscure statement of ideas replete with tentative and alternative declarations. After all the work put into it, the definition of practices to be criminalized refers to giving a public official "... undue consideration for performing or refraining from the performance

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[49] Report by J.E. Seymour to the International Symposium on Legal Problems of Codes of Conduct for Multinational Corporations; July 1979.

[50] Draft UN Document E/AC. 67/L. 3/Add. 2 (1979) in the discussion of Draft Article 13 (2).

[51] *Ibid.*

[52] Ecosoc Rec. 1978/71; 4 August 1978.

[53] One of the most active delegations from the Third World countries, *i.e.* that from Iran, ceased to participate significantly after revolution broke out in that country. Para. 2 of UN Doc. E/AC. 67/L. 1 (1970).

[54] For example, Uganda's insistence on adding redundant phrase (in brackets) to the text: "The offering ... by any person, on his own behalf or on behalf [of any enterprise] or any other person ..." *cf.* UN Document cited in 6; *see* also UN Documents cited in notes 7 and 10.

[55] Par. 1, UN Doc. E/1978/115 (1978).

[56] *See* notes 49 and 52, *supra.*

of his duties"[57] implying that a public official *is* entitled to receive *due consideration* for *refraining* from performing his duties! The article on jurisdiction contains a questionable tentative formulation that would allow a signatory state to demand the extradition of any corrupt official of whatever country as long as it is shown that his corruption had *some* effect within the territory of the requesting state. Third world countries, in addition, succeeded in creating a well-nigh insurmountable obstacle by insisting in the insertion into the draft document of a prohibition against transactions with "illegal minority regimes in southern Africa".[58]

A conference of plenipotentiaries would be able to make a conference viable only with the exercise of great diplomatic skill together with considerable political authority. With the results the Working Group has produced, the UN initiative may well have come to a dead end.

2. *The International Chamber of Commerce.* The International Chamber of Commerce is not an inter-governmental agency, nor does it have extensive representation in many of the economically developing areas of the world. Nevertheless, it is of interest because of its activity in the field of illicit payments in international trade. On 2 March 1976, the ICC announced the formation of a Commission on Unethical Practices under Lord Shawcross of the United Kingdom. Two members of the Commission and one of the rapporteurs are, significantly, American. The fact that major proposals for international agreement on the subject have been initiated by — and research conducted through U.S.-based agencies indicates the seriousness with which the United States has embarked on the crusade against corruption in international business. The Commission's mandate is:

> ... to suggest relevant guidelines for promoting correct conduct in such matters and to indicate the respective responsibilities therein of executive and non-executive directors, or officers and auditors of corporations and of the others concerned, including the relevant tax and law enforcement agencies.[59]

On 2 July 1967, at the ECOSOC meeting in Geneva the ICC supported:

> ... the concept of an international convention, under which each signatory state would be obliged to take steps to eradicate corrupt practices, including the establishment of effective enforcement machinery. Such convention should make disclosure of all political contributions mandatory; it should also prohibit companies from making political contributions *outside their home countries.*[60]

It also stated that business should address itself to the problem directly by self-regulation and that the Commission had decided to present an

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[57] *Ibid.*

[58] *Ibid.*

[59] International Chamber of Commerce (ICC) Publication No. 120, 2 July 1976, at p. 2.

[60] Economic Committee, ECOSOC (771st Mgt., 27 July 1976), UN Doc. 1/AC/6/SR. 771 (1976); emphasis supplied.

international code of (business) behaviour during 1977. In spite of the non-governmental nature of the ICC, states should support this agency and its efforts since the advice of such a distinguished group of individuals will be a significant help in the formulation and enforcement of international agreements.

Another aspect of the ICC which should be emulated is its existing procedure for dispute-resolution — which may serve as an even more useful model than that of the GATT because it is, by design, focused on corporate commercial practices. This tribunal is the ICC Council on Marketing Practice. It is charged with applying the ICC's Code on marketing, research practice, sales promotion practices, and advertising practices. The Council investigates alleged unfair practices, renders opinions, and, where disputes cannot be settled by conciliation, endeavours to dissuade the "offending" party from continuing the malpractice.[61]

The Commission, under the Chairmanship of Lord Shawcross, investigated the extent to which individual countries have enacted legislation proscribing bribery and extortion and observed that, whilst such laws do exist in most jurisdictions, the effectiveness of their enforcement varies considerably. In some states corruption does not appear to constitute a fundamental problem in business or political life. That is not to say, however, that corruption does not occur there. The authorities are vigilant to detect it, it is regarded with grave social disapprobation and, when detected, is severely dealt with. In other counrties corruption is so endemic as to have been considered a way of life.[62] In these latter jurisdictions the authorities seem unable or lack the will to obtain control over the problem.

In its Rules of Conduct to Combat Extortion and Bribery (see Annex B) the International Chamber of Commerce proclaimed:

> All governments should enact stringent and, as far as possible, comparable laws, where they do not already exist, prohibiting and punishing all forms of corruption, whether commercial or political. But this alone is not enough. There must be both the political will and administrative machinery to enforce such laws....
>
> The ICC considers that the international business community has a corresponding responsibility to make its own contribution toward the effective elimination of extortion and bribery.
>
> In this connection, it should be stressed that the promotion of self-regulation in international trade has always been one of the major objectives of the ICC, as reflected over the years in the publication of its Code of Fair Practices Marketing.[63]

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[61] International Codes of Marketing Practice, ICC Pub. No. 27 (1974).

[62] *See* discussion in Part I, *supra*. *See* also: MONTEIRO, CORRUPTION IN INDIA (1968).

[63] Report adopted by the 131st Session of the Council of the ICC, 29 November 1977.

A review of the ICC Rules of Conduct creates an impression that it is a laudable but impotent document drafted by idealists. The Rules represent, in fact, the collective feelings of the world's leading businessmen. Professor Baade has succinctly stated in his paper[64] the significance they could have. In the matter of illicit payments, it is hardly insignificant that governments allowing tax deductions for bribes paid to foreign officials[65] and those offering government funded insurance against foreign bribes[66] have declared it their policy that such payments are wrong.

Although no complaints have arisen out of the ICC Rules, tension has built up and is reflected in the policies of OECD member states that offer incentives to bribe foreign officials on the one hand while condemning illicit payments on official pronouncements. Although it is no secret that governments seldom have trouble endorsing contradictory positions simultaneously, the conflict is now, at least, explicit. And the likelihood that bribes abroad will be suppressed is now greater than before the ICC Rules were published. At any, rate, it is conceivable that ICC members can request the Council to review what steps have been taken to bring policies into conformity with the Rules — thus, errant members suffer embarrassment and pressure to put their house in order.

With its right to hold hearings only with the consent of all parties — and only in secret, the ICC's Panel appears to have power insufficient to justify its continued existence. Still, the Rules do represent the opinions of the world's foremost figures in the business community; their agreement that "[N]o enterprise, directly or indirectly, [should] offer or give a bribe in order to obtain or retain business..."[67] must be accorded some significance unless they are assumed to harbor great reserves of cynicism. Perhaps the ICC Rules have yet to become the common practice of members; at least they are now recognized standards of conduct — deviation from which leads to a call for some explanation.

No inquiry would proceed without the cooperation of the "accused" and the ICC has no effective sanction to compel it.[68] Voluntary cooperation from an alleged malefactor is unlikely to be forthcoming without confidentiality, especially in cases where accusations are prone to involve a risk of criminal prosecution somewhere in the world. Although an ICC member may be averse to allowing charges that it had not lived up to the Chamber's standards of conduct go unanswered, it would probably prefer to do so rather than risk having to face criminal prosecution in some country's courts based on allegations it failed to refute at a public ICC Panel hearing. By keeping its proceedings secret the ICC has achieved a tribunal that can be a forum from where corruption can be fought as an unfair competitive

64 Baade, P. *Tax Treatment of Bribes: A Survey*, 16 EUROPEAN TAXATION 382.
65 *Ibid.*
66 Chelminski, *Pots of Wine*, SAT. REV.; 9 July 1977.
67 ICC Pub. No. 315 (1978).
68 The ICC has no more severe sanction than expelling a member.

practice. If the Panel should function in this manner, it should at least contribute support to members' commitment against illicit payments in international trade. For not only will members have to face whatever criminal statutes a bribe may violate, they will also have to face close scrutiny of their peers.[69] In some cases the latter may well prove to be the more intimidating factor.[70]

This slow and uncertain process of establishing standards of conduct is certainly less effective in the short term than legislation such as America's FCPA (see Part II). Still, the relatively quick but shortlived effectivity of legislation will likely provoke its own opposition; the ICC's Rules will probably be more secure since it was built upon a solid foundation of consensus.

3. *The Organization of American States (OAS).* The Organization of American States is a geographically restricted group which does not include countries where the incidence and magnitude of illicit payments in international trade are most accute.[71] The Permanent Council of the OAS condemned in A Resolution on the Behavior of Transnational Enterprises (10 July 1975):

> ... in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise; any demand for or acceptance of improper payments by any public or private person, as well as any act contrary to ethics and legal procedure ...[72]

The Council resolved to make a study and draft "a code of conduct which such enterprises should observe" and to liaise with the UN organs conducting research on the subject.[73] The result is a document entitled "Behavior of Transnational Enterprises Operating in the Region and Need for a Code of Conduct to Be Observed by Such Enterprises".[74] No further projects were undertaken since the prevailing feeling among the members was that they should wait for the outcome of UN projects on such codes of conduct. Inasmuch as the UN organs, with their greater resources, have been bogged down by countless difficulties in this area, it is quite unlikely that the OAS will take further action on the subject.

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[69] The secrecy provisions will also protect the "accuser" who might otherwise be reluctant to make an accusation that may involve a public official of a country where he or his firm conducts business.

[70] The ICC has some experience in this type of activity. It has a tribunal that investigates and renders opinions on complaints of violations of its Code of Marketing Practice. ICC Pub. 275 (1974).

[71] The following countries, where the incidence and magnitude of illicit payments as revealed in the past 10 years are most alarming, are not members: India, Iran, Indonesia, Saudi Arabia and the Gulf States.

[72] "Behavior of Transnational Enterprises Operating in the Area and Need for a Code of Conduct to be Observed by Such Enterprises." OAS Doc. OEA Ser. G., CP/RES 154, (167/75), corr. 1., July 10, 1975.

[73] *Ibid.*

[74] *See* note 72, *supra.*

4. *The Organization for Economic Cooperation and Development (OECD).* Like the OAS the OECD is restricted in its membership; it is made up of Western developed nations where most multinational and large corporations are headquartered.[75] In its Declaration of 21 June 1976 the Organization adopted guidelines for multinational corporate operations. These guidelines cover a wide spectrum of activities that includes disclosure of information, competition, financing, taxation, industrial relations and the transfer of science and technology. Three general principles are addressed directly to the issue of corruption in international business. Thus, multinational corporations should:

> not render — and they should not be solicited or expected to render — any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office;
> x x x x x x
> unless legally permissible, not to make contributions to candidates for public office or to political parties or other organizations;
> x x x x x x
> abstain from any improper involvement in local political activities.[76]

The guidelines apply both to trade and investment but are *not* addressed nor in any way seek to obligate governments. Significantly, the guidelines are clearly just *recommendations* by member countries to enterprises operating in their territories; adherence to policies declared in the document is "voluntary and not legally enforceable".[77] Referring to dispute settlement, it provides:

> The use of appropriate international dispute settlement mechanisms, including arbitration, should be *encouraged* as a means of facilitating the resolution of problems arising between enterprises and member countries. Member countries have agreed to establish appropriate review and consultation procedures concerning issues arising in respect of the guidelines...[78]

The voluntary nature of the guidelines were seen as indicating no necessity to formulate a precise legal definition of multinational enterprises and the policies reflected by the guidelines were said to be "good practice for all... multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the guidelines are relevant to both."[79]

5. *The United Nations Conference on Trade and Development (UNCTAD); Principles and Rules on Restrictive Business Practices (RBP).* Over the past eight years developing countries have become more aware of the

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[75] OECD member countries are: Australia, Austria, Canada, Denmark, England, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxemburg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United States of America.

[76] Permanent Council, OECD; *"Declaration on International Investment and Multinational Corporations"*, OECD Press Release PRESS/A(76)20 Annex; 21 June 1976; General Policies, para. 7 to 9.

[77] *Ibid.*, par. 6.

[78] *Ibid.*, Par. 10-11.

[79] *Ibid.*, par. 9; emphasis supplied.

role of multinational corporations in world economy and their potential for abusing the dominant position in international trade these enjoy. And, the exposure of such abuse by the giant companies over the years has spurred activity to curb restrictive business practices. As expected, studies in this field have shown that illicit payments are just one aspect of abusive behaviour by multinational corporations. Because developing countries have no legislation or tradition in the field of restrictive business practices, they have not articulated cohesive policy on the matter beyond moves to gain control over the behavior of some firms operating within their territories. Thus, several proposals have been advanced in the UNCTAD which indicate an emerging code of rules and principles on the issue of corruption and restrictive business practices by companies in general. The UNCTAD's Third Ad Hoc Group of Experts on RBP's have progressed to drafting texts on the definition and scope of restrictive business practices. The UNCTAD's objective for international action include a model law, exchange of information on business practices, and negotiations towards formulation of a multilaterally agreed set of principles and rules for the control of RBP's. The overall objective is the effective reduction and eventual elimination of RBP's to the maximum extent possible. However, progress has been slow and laborious; a draft agreement has not met wide support, particularly from developing countries due to several controversial issues. These include:

(a) developing countries seek preferential treatment which would exempt their enterprises and government-producer cartels from the scope of the guidelines;
(b) they wish to control the internal activities of corporations (i.e., between parent and subsidiary or affiliate);
(c) some proposals have been made to illegalize export cartels from developed countries;
(d) proposals for a minimum, multilateral complaint mechanism within the UNCTAD; and
(e) objections to the application of laws extraterritorially except by a host country on its own multinational corporations.[80]

CONCLUSION

The initiatives by international agencies in the field of regulation of illicit payments in international trade reveal several factors which are likely to attend any efforts at controlling international business activities. They demonstrate that international conventions on this subject, even when confined to relatively well-defined areas (e.g., bribing government officials) are going to be extremely difficult to negotiate. It is also abundantly clear that the difficulties encountered in seeking multilateral agreements are not primarily the result of confrontations between developed countries and the

[80] US Congress, Committee on International Relations; Report of the Subcommittee on International Economic Policy and Trade; 95th Congress, 1st Session; 7 September 1977.

third world. Although some elements of that conflict of views was present in the projects reviewed, confrontations were spurred by even stronger insular or regional sentiments from third world countries amongst themselves. Finally, the UN projects — the only ones advocating a *legally binding* agreement, have emphasized the high degree of terminological exactitude required of such documents as well as the inevitability of protracted discussions, innumerable revisions, few improvements, and even less progress.

These projects have also shown that unilateral efforts to regulate corruption in international business — through legislation, can hardly be expected to achieve substantial results. Such will simply force a change in the nationality of the persons paying the bribes. Moreover, local legislation cannot be expected to have a normative influence on world attitudes. In the same vein, the UN and ICC conventions have proven to be neither effective nor practical in shaping national attitudes on the matter. At least, the ICC project, albeit seemingly feeble, has *potential* for greater acceptance and for influencing world opinion. While its legal status is more ambiguous than legislation or international treaties, it may yet prove to be the most effective tool for those who wish to use legal measures to cleanse international corporate operations of corrupt practices.

ANNEX A

QUESTIONABLE FOREIGN PAYMENTS

The following sixty-eight companies have disclosed information to U.S. SEC about questionable foreign payments that they have made:

Company	*Investigation Dates*	*Questionable Payments (in thousands of dollars)*	*1975 Foreign Sales as a % of Total Sales*	*1975 Total Sales (in millions of dollars)*
Abbot Laboratories	1973-1975	680	36	940
Allergan Pharmaceuticals	1971-1975	36	NA	NA
Amax	1972-1976	64	NA	962
American Cyanamid	1971-1976	1,225	36	1,928
American Home Products	1970-1975	3,442	30	2,258
AMF	1971-1975	1,500	NA	1,004
Ansul Corporation	1972-1976	245	NA	113
Ashland Oil	inquiry incomplete	342	NA	3,881
ATO	1968-1975	1,000	NA	480
Baxter Laboratories	1971-1975	2,160	32	564
Boise Cascade	1971-1976	376	NA	1,458
Burroughs	1973-1975	2,200	39	1,702
Carnation	1968-1975	1,261	NA	2,075
Castle & Cooke	1971-1975	570	25	843
Champion Int'l	preliminary	537	25	2,399
Colgate-Palmolive	1971-1976	865	62	2,860
Control Data	1973-1975	2,275	NA	1,218
Cook United	unspecified	6	NA	517
Core Laboratories	1968-1975	203	58	28
Dresser Ind.	unspecified	24	31	1,397
Ecodyne	1973-1976 incomplete	450	45	141
Electronic Assoc.	1971-1975	83	45	31
Exxon	1963-1975	59,000	51	44,864
Gardner-Denver	1971-1975	90	44	423
General Refractories	in progress	NA	50	329
General Tire and Rubber	in progress	549	NA	1,752
B.F. Goodrich	1971-1975	124	29	1,901
Goodyear Tire and Rubber	1970-1975	845	39	5,452
GTE	1971-1975	13,257	NA	5,948
Gulf	1969-1975	6,548	NA	18,216
Ingersoll-Rand	in progress	NA	38	1,708
Intercontinental Diversified	1972-1975	75	NA	NA
International Systems and Control	1971-1975, in progress	NA	NA	318
Johnson & Johnson	1971-1975	1,002	43	2,224
Kraftco	1970-1975	175	16	4,857
Levi-Strauss	in progress	75	32	1,015
McDonnell Douglas	1967-1975	2,500	31	3,255
Merck and Co.	1968-1975	3,761	NA	1,489
MGM	1971-1976	245	NA	1,489
NCR	1971-1975	300 to 500	52	2,165
Northrop	1969-1975	861	NA	988
Northwest Industries	1973-1975	582	NA	1

Offshore Co.	in progress	169	NA	NA
Ogden Corp.	1970-1975	2,600	NA	1,491
Otis Elevator	1971-1976	5,000 to 6,000	NA	1,182
Richardson Merrill	10/71-1975	876	52	658
Rohm & Haas	1971-1975	749	39	1,046
Rollins	1971-1975	127	NA	213
Santa Fe International	in progress	NA	NA	331
Schering-Plough	in progress	207	NA	793
SCM	1971-3/76	951	NA	1,287
Searle	1973-1975	1,303	NA	711
Smith International	1971-1975	13	NA	292
SmithKline Corp.	1971-4/76	712	31	588
Standard Oil (Indiana)	1970-1975	738	20	9,555
Stanley Home Products	1971-4/76	80	NA	NA
Sterling Drug	in progress	1,500	NA	957
Sybron	in progress	76	31	557
Tenneco	1970-10/75	510	NA	5,599
TWA	in progress	700	NA	2,640
United Brands	NA	NA	NA	2,186
United Technologies	1970-1975	1,950	NA	3,877
UOP	1975	50	NA	NA
Upjohn Co.	1971-1975	4,246	39	890
Warner-Lambert	1971-1975	2,256	44	2,172
Westinghouse	1971-1975	96	NA	5,862
Whittaker Corp.	1970-1975	433	NA	712
Zapata Corp.	1971-1975	152	NA	350

NA–Not Available

The following fifty-three companies have made disclosure to the U.S. SEC indicating that they either made foreign payments or are investigating to determine if they did, but they have released no dollar amounts or other data.

American Standard
ATT
Automation Industries
Bethlehem Steel
Bristol-Myers
Butler National
Carrier Corp.
Celanese
Cerro Corp.
Chrysler
Cities Service Corp.
Coastal States Gas
Coherent Radiation
Combank
Cook Ind.
Delmonte Corp.
Diversified Ind.
Du Pont
Fairchild
Firestone
Ford Motor Co.
Foremost-McKesson
General Electric
General Motors
Grumman
Harrah's
Hercules
Honeywell Inc.
Hospital Corp. of America
Inmont Corp.
ITT
Joy Manufacturnig Co.
Koppers Co.
Lockheed
3M
Mobil
Norlin Corp.
Norton Co.
Perkins-Elmer Corp.
Pullman Inc.
PVO Int'l Inc.
Raytheon
R. J. Reynolds
Republic Corp.
Rockwell International
Rohr Ind.
Royal Dutch Petroleum Co.
Sanders Assoc.
Scott Paper Co.
Security N.Y.S. Corp.
Singer
White Consolidated Ind.
Wrigley

ANNEX B

RULES OF CONDUCT
TO COMBAT EXTORTION AND BRIBERY

(Promulgated by the International Chamber of Commerce in November, 1977)

Article 1 EXTORTION

No one may demand or accept a bribe.

Article 2 BRIBERY

No enterprise may, directly or indirectly, offer or give a bribe in order to obtain or retain business, and any demand for such a bribe must be rejected.

Article 3 "KICKBACKS"

Enterprises should take measures reasonably within their power to ensure: that no part of any payment made by them in connection with any commercial transaction is paid back to their employees or to any other person not legally entitled to the same.

Article 4 AGENTS

Enterprises should take measures reasonably within their power to ensure:

a) that any payment made to any agent represents no more than an appropriate remuneration for the services rendered by him; and
b) that no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct.

Article 5 FINANCIAL RECORDING

a) All financial transactions must be properly and fairly recorded in appropriate books of account available for inspection by boards and auditors.

GUIDELINES FOR IMPLEMENTATION

Article 6 RESPONSIBILITIES OF ENTERPRISES

The body or individual which or who under the applicable law has the ultimate responsibility for the enterprises with which it or he is concerned should:

a) take reasonable steps, including the establishment and maintenance of proper systems of control, to prevent any payments being made by or on behalf of the enterprise which contravene these Rules of Conduct.
b) periodically review compliance with these Rules of Conduct and establish procedures for obtaining appropriate reports for the purposes of such review.
c) take appropriate action against any director or employee contravening this Rules of Conduct.

Article 7 AUDITING

Enterprises should take all necessary measures to establish independent systems of auditing in order to bring to light any transactions which contravene the present Rules of Conduct. Appropriate corrective action must then be taken.

Article 8 AGENTS

Enterprises should maintain a record of the names and terms of employment of all agents whose remuneration exceeds U.S. $50,000 a year and who are employed by them in connection with transactions with public

bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate governmental authorities.

Article 9 POLITICAL CONTRIBUTIONS

Contributions to political parties or committees or to individual politicians may only be made in accordance with the applicable local law and must be accorded such publicity as that law requires.

Article 10 COMPANY CODES

These Rules of Conduct, being of a general nature, enterprises should, where appropriate, draw up their own codes consistent with the ICC Rules and apply them to the particular circumstances in which their business is carried out. Such codes may usefully include examples and should enjoin employees or agents who find themselves subjected to any form of extortion or bribery immediately to report the same to senior management.

Article 11 PANEL

a) The ICC is establishing a Panel to interpret, promote and oversee the application of these Rules of Conduct.

b) In particular, the Panel will periodically review matters relating to the Rules of Conduct and the experience gained in their application, as well as developments in fighting extortion and bribery in business transactions.

c) The Panel may consider the interpretation and the clarification of the Rules of Conduct, and may suggest modifications thereto, as occasion requires.

d) The Panel will periodically report to the Council of the ICC on its activities.

e) The Panel may, in appropriate circumstances, consider alleged infringements of the Rules of Conduct.

ANNEX C

DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

(Prepared by the Committee on an International Agreement on Illicit Payments Submitted May of 1979 to the Economic and Social Council and the Centre on Transnational Corporations)

ARTICLE 1

Each contracting state undertakes to make the following acts punishable by appropriate criminal penalties under its national law:

(a) The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.

(b) The soliciting, demanding or accepting or receiving directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.

Each contracting State likewise undertakes to make the acts referred to in paragraph 1(a) of this article punishable by appropriate criminal penalties under its national law when committed by a juridical person or, in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate measures, according to its national law, with the objective of comparable deterrent effects.

ARTICLE 2

For the purpose of this Agreement:

(a) "Public official" means any person, whether appointed or elected, whether permanently or temporarily, who at the national, regional or local level holds a legislative, administrative, judicial or military office, or who, performing a public function, is an employee of a Government or of a public or governmental authority or agency or who otherwise performs a public function;

(b) International commercial transaction means [inter alia] any sale, contract or any other business transaction, actual or proposed, with a national, regional or local Government, or any authority or agency referred to in paragraph (a) of this article or any business transaction involving an application for government approval of a sale, contract or any other business transaction, actual or proposed, relating to the supply or purchase of goods, services, capital or technology emanating from a State or States other than that in which those goods, services, capital or technology are to be delivered or rendered. It also means any application for or acquisition of proprietary interests or production rights from a Government by a foreign national or enterprise;

(c) "Intermediary" means any enterprise or any other person, whether juridical or natural, who negotiates with or otherwise deal with a public official on behalf of any other enterprise or any other person, whether juridical or natural, in connection with an international commercial transaction.

ARTICLE 3

Each contracting State shall take all practicable measures for the purpose of preventing the offenses mentioned in Article 1.

ARTICLE 4

Each contracting State shall take such measures as may be necessary to establish its jurisdiction:

(a) Over the offenses referred to in Article 1 when they are committed in the territory of that State;

(b) Over the offense referred to in Article 1(b) when it is committed by a public official of that State;

(c) Over the offense referred to in Article 1, paragraph 1(a), relating to any payment, gift or other advantage in connection with [the negotiation, conclusion, retention, revision or termination of]* an international commercial transaction when the offense is committed by a national of that State, provided that any element of that offense, or any act aiding or abetting that offense, is connected with the territory of that State.

[(d) Over the offenses referred to in Article 1 when these have effects within the territory of that State.]

This Agreement does not exclude any criminal jurisdiction exercised in accordance with the national law of a Contracting State.

[Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction over any other offense that may come within the scope of this Agreement when such offense is committed in the territory of that State, by a public official of that State, by a national of that State, or by a juridical person established in the territory of that State.]

ARTICLE 5

A Contracting State in whose territory the alleged offender is found, shall, if it has jurisdiction under article 4, paragraph 1, be obliged without exception whatsoever to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of the State.

The obligation provided for in paragraph 1 of this article shall not apply if the Contracting State extradites the alleged offender.

ARTICLE 6

Each Contracting State shall ensure that enterprises or other juridical persons established in its territory maintain, under penalty of law, accurate records of payments made by them to an intermediary, or received by them as an intermediary, in connection with an international commercial transaction. These records shall include the amount and date of any such payments and the name and address of the intermediary or intermediaries receiving such payments.

[ARTICLE 7

Each Contracting State shall prohibit its national and enterprises of its nationality from making any royalty or tax payments to, or from knowingly transfering any assets or other financial resources in contravention of United Nations resolutions to facilitate trade with, or investment in a terrtiory occupied by, an illegal minority regime in southern Africa.

Each Contracting State shall require, by law or regulation, its nationals or enterprises of its nationality to report to the competent authority of that State any royalties or taxes paid to an alleged minority regime in southern Africa in contravention of United Nations resolutions.

* Items enclosed in brackets are those where no unanimity had been reached by the members of the Panel incharge of drafting the agreement. See footnote 48 above.

Each Contracting State shall submit annually, to the Secretary-General of the United Nations, reports on the activities of transnational corporations of its nationality which collaborate directly or indirectly with illegal minority regimes in southern Africa in contravention of United Nations resolutions.]

[ARTICLE 8

Each Contracting State recognizes that if any of the offenses that come within the scope of this Agreement is decisive in procuring the consent of a party to an international commercial transaction as defined in Article 2, paragraph (b), such international commercial transaction should be voidable and agrees to ensure that its national law provide such party may at its option institute judicial proceedings in order to have the international commercial transaction declared null and void or to obtain damages or both.]

ARTICLE 9

Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.

Each Contracting State shall furnish once every second year, in accordance with its national laws, to the Secretary-General of the United Nations, information concerning its implementation of this Agreement. Such information shall include legislative measures and administrative regulations as well as general information on judicial proceedings and other measures taken pursuant to such laws and regulations. Where final convictions have been obtained under laws within the scope of this Agreement, information shall also be furnished concerning the case, the decision and sanctions imposed insofar as they are not confidential under the national law of the State which provides the informations.

The Secretary-General shall circulate a summary of the information referred to in paragraph 2 of this article to the Contracting States.

ARTICLE 10

Contracting States shall afford one another the greatest possible measure of assistance in connection with criminal investigations and proceedings brought in respect of any of the offenses [referred to in Article 1 within the scope of this Agreement]. The law of the state requested shall apply in all cases.

Contracting States shall also afford one another the greatest possible measure of assistance in connection with investigations and proceedings related to the measures contemplated by Article 1 paragraph 2, as far as permitted in their national laws.

Mutual assistance shall include, as far as possible under the law of the State requested and taking into account the need for preserving the confidential nature of documents and other information transmitted to law enforcement authorities [and subject to the essential national interests of the requested State]:

(a) Production of documents or other information, taking of evidence and service of documents, relevant to investigations or court proceedings;

(b) Notice of the initiation and outcome of any public criminal proceedings concerning an offense referred to in Article 1, to other Contracting States which may have jurisdiction over the same offense according to Article 4;

(c) Production of the records maintained pursuant to Article 6.

Contracting States shall upon mutual agreement enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of mutual assistance in accordance with this article.

Any evidence or information obtained pursuant to the provisions of this article shall be used in the requesting State solely for the purposes for which it was obtained, for the enforcement of this Agreement, and shall be kept confidential except to the extent that disclosure is required in proceedings for such enforcement. The approval of the requested State shall be obtained prior to any other use, including disclosure of such evidence or information.

The provisions of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern in whole or in part mutual assistance in criminal matters.

ARTICLE 11

The offenses [referred to in Article 1/within the scope of this Agreement] shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Contracting States undertake to include the said offenses as extraditable offenses in every extradition treaty to be concluded between them.

If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it [may at its option/shall] recognize the offense as an extraditable offense between themselves subject to the provisions of the law of the requested State.

The offense shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish the jurisdiction in accordance with Article 4, paragraph 1.