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By H. LOWELL BROWN*

The recent prosecution of an Italian corporation, Montedison, S.p.A.,[1] by the U.S. Securities and Exchange Commission (SEC) for violation of the Foreign Corrupt Practices Act (FCPA),[2] based on conduct that occurred entirely in Italy, once again brings into sharp focus Congress' assertion of extraterritorial jurisdiction over foreign commercial activity. Recent international initiatives by the Organization of American States[3] and the Organization for Economic Co-operation and Development[4] further underscore efforts, primarily by the U.S. government, to "level the playing field" of international commerce through the prohibition of government bribery.

For U.S. companies, these developments are generally positive since the FCPA's prohibition of foreign bribery has been viewed as putting U.S. companies at a competitive disadvantage with non-U.S. companies that are not subject to the same injunction.[5] However,

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1. SEC v. Montedison, S.p.A., No. 1:96CV02631 (D.D.C. filed Nov. 21, 1996).

2. 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78ff (Supp. 1997).

3. Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724.

4. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

5. The FCPA has been perceived and criticized as disadvantaging U.S. companies doing business overseas. In a 1981 report, the Comptroller General reported to Congress that sixty percent of the companies responding to a questionnaire concerning compliance with the FCPA were of the view that they could not compete successfully against foreign competitors who paid bribes. In particular, aircraft and construction companies reported that they had lost business as a result of FCPA restrictions. The Comptroller General noted, however, that this belief could neither be supported nor rejected on the basis of verifiable data. *See*

foreign entities in which U.S. companies have an interest, such as foreign subsidiaries and overseas joint ventures, may now find themselves subject to criminal and civil liability for commercial practices which were formerly beyond the reach of the FCPA and approved, or at least condoned, in their own countries.[6] Accordingly,

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Impact of Foreign Corrupt Practices Act on U.S. Business, [1981 Transfer Binder] Fed. Sec. L. Rptr. (CCH) ¶ 82,841 (1981). Another survey of four hundred stockholders of publicly held corporations and four hundred certified public accountants also revealed the belief that the anti-bribery provisions of the FCPA caused U.S. companies to lose business. *See* Manuel A. Tipgos, *Compliance with the Foreign Corrupt Practices Act*, FIN. EXECUTIVE, Aug. 1981, at 44; *see also* HOWARD L. WEISBERG & ERIC REICHENBERG, THE PRICE OF AMBIGUITY: MORE THAN THREE YEARS UNDER THE FOREIGN CORRUPT PRACTICES ACT (1981); John Kimelman, *The Lonely Boy Scout*, FINANCIAL WORLD, Aug. 16, 1994, at 50. In contrast however, a survey of Fortune 500 companies conducted between 1977 and 1978 found that sixty-six percent of the respondents did not feel disadvantaged by the FCPA. Instead, the study found that much of the business lost by U.S. companies due to bribery was lost to other U.S. companies. The study also noted that often the corrupt payments were never delivered by intermediaries who instead kept them. *Id.* The government noted a reluctance on the part of U.S. companies to report incidents in which business was lost due to a competitor's bribery. *See, e.g., Annual Report of the Office of the United States Trade Representative on Discrimination in Foreign Government Procurement* (last modified Apr. 30, 1996) <http://www.ustr.gov/reports/ special/title7.html> ("It appears that many U.S. firms are hesitant to come forward publicly with cases in which they have seen bribery and corruption influence contract awards for fear that they may experience a commercial backlash with respect to future contracts"). The Office of the U.S. Trade Representative nevertheless reported that "[i]nformation from U.S. embassies and other sources indicate that bribery and corruption play a significant role in procurement decisions in many countries." *Id.* A 1996 study by the U.S. Department of Commerce reported that between April 1994 and May 1995 there were approximately one hundred cases in which foreign bribes "undercut" efforts to win procurements valued at $45 billion. *See* Kirk Victor, *Dirty Dealing*, NAT'L J., Apr. 20, 1996, at 870; *Administration Highlights Bribery As Trade Problem for U.S. Exporters*, 12 Int'l Trade Rep. (BNA) 1711 (Oct. 18, 1995). *But see* Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 207-10 (1994).

6. For example, the OECD Anti-Corruption Unit noted that bribes to foreign officials were tax deductible as a business expense under the laws of Australia, Belgium, Germany, Iceland, Netherlands, and Switzerland. *See Tax Treatment of Bribes in OECD Member Countries (as of 23 of October 1998)* (last modified 29 March 1999), OECD Anti-Corruption Unit, <http://www.oecd.org//daf/nocorruption/annex3.htm>. On October 23, 1998, this Unit reported that Austria, Belgium, Denmark, Germany, Iceland, Netherlands and Switzerland adopted or were in the process of adopting legislation that would deny tax-deductibility to foreign bribes. In addition, Australia, Luxembourg, New Zealand, and Sweden were considering similar legislation. *See Update on the Implementation of the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials: Report by the Committee on Fiscal Affairs*, OECD Doc. C/Min (97)17/Add.3 (May 26, 1997) [hereinafter *Implementing the OECD Recommendation*]. *See also id.*

for U.S. companies doing business internationally and their overseas partners, as well as for foreign corporations subject to U.S. jurisdiction, there is cause for concern.[7] Part I of this article provides an overview of the FCPA's regulatory scheme. Part II discusses the issues of subject matter and in personam jurisdiction arising from the assertion of extra-territoriality under the FCPA. Part III reviews various initiatives through which the United States has attempted to curb international bribery. Finally, Part IV considers the possible effects on both U.S. and foreign entities and individuals.

I. Overview of the Foreign Corrupt Practices Act

The FCPA, originally enacted in 1977,[8] had its genesis in the disclosure by the Watergate Special Prosecutor and SEC of overseas "slush funds" used by U.S. companies to make illegal political contributions to the Nixon re-election campaign and others, and to pay bribes to foreign government officials.[9] Thus, Congress intended

7. Indeed, the U.S. Securities and Exchange Commission announced its intention of increasing enforcement of the FCPA in regard to the activities of overseas offices of U.S. firms and foreign issuers whose securities are listed in the United States. *See SEC to Boost Bribery Surveillance of Overseas Firms*, Global Compliance Rep. (Oct. 6, 1997). Paul V. Gerlach, Associate Director of the SEC Division of Enforcement, signaled the likelihood of more enforcement actions like *Montedison*, "While we have not brought a lot of cases in the recent past, there will be more in the future." Dominic Benciuenga, *Antibribery Campaign: SEC Cracks Down on Illegal Payments Abroad*, N.Y.L.J., Apr. 10, 1997, at 5. The SEC Director of Enforcement expressed similar sentiments. *See* David B. Fein & Timothy A. Diemand, *Companies Face Scrutiny and Penalties Under FCPA*, CONN. L. TRIB., Jan. 19, 1998, *available in* LEXIS, News Library, CLT File; *see also* David M. Zornow & Keith D. Krakaur, *Foreign Corrupt Practices Act: Anti-Bribery Provisions Examined*, N.Y.L.J., Feb. 18, 1997, at 1.

8. The FCPA was signed into law by President Carter on December 19, 1977. PUB. PAPERS 2157 (Dec. 20, 1977). Since then, the FCPA was amended once, by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, §§ 5001-03, 102 Stat. 1107 (1988), although amendments were offered in 1980, 1981, 1983 and 1985. *See* Adam Fremantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L. LAW. 755, 759 n.27 (1989).

9. As Philip A. Loomis, Jr., a Commissioner of the SEC, explained:

> Our current involvement may be said to have grown out of the investigations made by the Watergate Special Prosecutors Office of illegal, and therefore undisclosed, corporate campaign contributions in the 1972 elections. Our staff, observing these proceedings, recognized that the activities disclosed for the first time involved questions of possible significance to the public investors and that this might have a bearing upon our responsibilities. Accordingly, the Special Prosecutor's Office referred to us information obtained in various of its investigations.

The Activities of Am. Multinational Corps. Abroad, Hearings Before the Subcomm.

the FCPA to address the problem of overseas bribery. The Act approaches this issue in two distinct, though related, ways.

First, the FCPA prohibits the payment or offer of payment[10] either directly, indirectly or through a third party,[11] of money or

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on Int'l Economic Policy of the Comm. on Int'l Relations, 94th Cong. 36 (1975) [hereinafter *June 17th Statement*]; *see also Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Protection and Fin. of the Comm. on Interstate and Foreign Commerce*, 94 Cong. 1 (1976) (remarks of Chairman John M. Murphy) ("While investigating certain contributions to the former presidential campaign, the Watergate Special Prosecutor uncovered a number of corporate political slush funds. These funds had been concealed from normal corporate accounting controls. Since such activities involved matters of possible significance to public investors, the Securities and Exchange Commission initiated its own investigation. Their investigation revealed that a number of U.S. corporations, in connection with their overseas operations, had used such secret slush funds for questionable or illegal foreign payments.") [hereinafter *Foreign Payments Disclosure Hearings*].

10. The FCPA prohibits not only payments actually made to foreign officials but also the "offer . . . promise to pay, or authorization of the giving of anything of value" to foreign officials. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. 1997).

11. The FCPA also prohibits payments made to third parties "while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official, to any foreign political party, or official thereof, or to any candidate for foreign political office." 15 U.S.C.§§ 78dd-1(a)(3), dd-2(a)(3). As enacted in 1977, the FCPA prohibited third party payments if there was "reason to know" that all or a portion of such payment would be given or promised to a foreign official. 15 U.S.C.§§ 78 dd-1(a)(3), dd-2(a)(3) (1978) (amended 1988). However, this "reason to know" standard was criticized for being so ambiguous that negligent payments could fall within its scope. *See Bus. Accounting and Foreign Trade Simplification Act Joint Hearings Before the Subcomm. on Fin. and Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Hous. and Urban Affairs*, 99th Cong. 45-46 (Malcom Baldridge, Secretary of Commerce), 85-86 (Calman J. Cohen, Emergency Committee for American Trade), 96-98 (Allen B. Green, American Bar Association Public Contract Law Section) (1986) [hereinafter *Business Accounting and Foreign Trade Simplification Act Hearings*]; *Foreign Corrupt Practices Act—Oversight Hearings Before the Subcomm. on Telecomms., Consumer Protection, and Fin. of the Comm. on Energy and Commerce*, 97th Cong. 243 (William E. Brock, U.S. Trade Representative), 278 (Sherman E. Ungar, Department of Commerce), 356 (John T. Subak, Rohm and Haas Company) (1982) [hereinafter *FCPA—Oversight Hearings*]; GEORGE C. GREANIAS & DUANE WINDSOR, THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE 96-97 (1982); Mark A. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 INT'L L. & POL'Y 627, 631 (1983); John M. Fedders, *The "Reason to Know" Standard—A Troublesome Ambiguity in the Foreign Corrupt Practices Act*, MIDDLE E. EXECUTIVE REP., July 1981, at 2; Allen B. Green & David A. Churchill, *Antibribery Problems Under the Foreign Corrupt Practices Act*, MIDDLE E. EXECUTIVE REP., Feb. 1982, at 19; Robert S. Levy, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 79-80 (1985); Ruth Aurora Witherspoon, *Multinational Corporations—Governmental Regulation of Business Ethics Under the*

"anything of value,"[12] to an official of a foreign government or political party,[13] with corrupt intent,[14] to obtain or retain business.

Foreign Corrupt Practices Act of 1977: An Analysis, 87 DICK. L. REV. 531, 562 (1983).

12. The payment, offer, gift or authorization of the giving of "anything of value" is prohibited by the FCPA. 15 U.S.C. §§ 78dd-1(a), dd-2(a). Although the prohibited corrupt payment often involves cash or cash equivalent, the term "anything of value" is not so limited. As used in the domestic bribery statute, the term "anything of value" is construed broadly to include tangible and intangible objects. 18 U.S.C. § 201(b) (1999); *see* United States v. Marmolejo, 89 F.3d 1185, 1192 (5th Cir. 1996); United States v. Nilsen, 967 F.2d 539, 542 (11th Cir. 1992); United States v. Picquet, 963 F.2d 54, 55 (5th Cir. 1992); United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979). Thus, "anything of value" has been construed as including, for example, charitable donations (*Lamb v. Philip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990)), travel expenses (*United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991)) and transportation of voters who supported the ruling party (*United States v. Kenny Int'l Corp. (D.D.C. 1979)*, 2 FOREIGN CORRUPT PRACS. ACT REP. (BNA) 649 (Dec. 31, 1982).

13. A "foreign official" is defined in the FCPA as "any officer or employee of a foreign government or any department, agency, or instrumentality." 15 U.S.C. §§ 78 dd-1(f)(1), dd-2(h)(2). As originally enacted in 1977, the FCPA definition of "foreign official" did not include "employees whose duties were primarily ministerial or clerical." H.R. CONF. REP. NO. 95-831, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4125. The 1988 amendments removed this limitation, and the U.S. Department of Justice suggested that the elimination of this exclusion was consistent with the focus of the act on the nature of the official action, rather than on the position or duties of the recipient. U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT ANTI-BRIBERY PENSIONS 5 (1992). Also, like the term "public official" in the domestic bribery statute, "foreign official" is construed broadly. *See* H. Lowell Brown, *Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 INT'L TAX & BUS. L. 260, 275-79 (1994); *see, e.g.*, United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990) (consultant to the Jamaica Tourist Board with close personal ties to the Prime Minister of Jamaica was a "foreign official" under the FCPA).

14. The legislative history in 1977 and 1988 reflects Congress' intent to use the term "corruptly" analogously to the use of the term in the domestic bribery statute. *See* S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108; H.R. REP. NO. 95-640, at 7-8 (1977); H.R. CONF. REP. NO. 100-576, at 913 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547. Accordingly, proof of the requisite corrupt intent requires evidence that the payment was made or offered with the intent of influencing an official act. *See* United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980) ("[T]he government must show that the money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced. The money must be given with more than some generalized hope or expectation of ultimate benefit on the part of the donor.... The money must be offered, in other words, with the intent and design to influence official action in exchange for the donation."); *cf.* United States v. Dorri, 15 F.3d 888, 894 (9th Cir. 1994) ("Corruptly, like 'due process', 'malice aforethought' or 'proximate cause,' is a concept that can't be easily captured in a single formula, as it varies too much from situation to situation. There's certainly a core meaning to it: conduct is corrupt if it's an improper way for a public official to benefit from his job.").

Not all payments are prohibited, however. Instead, payments, sometimes referred to as "facilitating payments" or "grease payments," which are intended only "to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party officer," are exempt.[15] Similarly, payments that are legal under the written laws of the foreign country[16] and payments related to the promotion of products or related to the performance of contracts[17] are likewise exempt from the overseas

15. What are sometimes referred to as "facilitating payments"—payments made in order "to expedite or secure the performance of a routine governmental action by a foreign official, political party or party officer"—are excepted from the prohibition against payments to foreign officials. 15 U.S.C.§§ 78dd-1(b), dd-2(b). Although not specifically referred to in the 1977 act, the original legislative history strongly suggests that the FCPA's prohibition did not apply to so-called "grease payments." *See* H.R. REP. NO. 95-640, at 8 (1977); S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108. The 1988 amendments made the exception for such payments explicit, which the House-Senate Conference made clear were for routine governmental actions, i.e., "ordinarily and commonly performed actions with respect to permits or licenses," and not for "those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of obtaining or retaining business." H. R. CONF. REP. NO. 100-576, at 921 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547. Accordingly, the FCPA defines "routine governmental action" as being:

> ordinarily and commonly performed ... in connection with: (i) obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.

Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(3)(A); dd-2(h)(4)(A) (Supp. 1997). Such "routine governmental actions" do not include:

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

15 U.S.C. §§ 78 dd-1(f)(3)(B); dd-2(h)(4)(B).

16. The Conference on the 1988 amendments noted that the absence of a prohibition against such payments under the country's laws, however, would not thereby establish the legality of payments otherwise subject to the FCPA. H. R. CONF. REP. NO. 100-576, at 922 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547. Instead, in order to fall within the statutory defense, the FCPA requires that the payment be "lawful under the *written* laws and regulations" of the country in which the payment was made. 15 U.S.C. §§ 78dd-1 (c)(1), dd-2(c)(1) (Supp. 1997)(emphasis added); *see* H. R. CONF. REP. NO. 100-576, at 921-22 (1988), *reprinted in* U.S.C.C.A.N. 1547.

17. It is also a statutory defense under the FCPA that the payment to a foreign official was directly related to the promotion, demonstration or explanation of

payment prohibitions of the Act.

In addition to these anti-bribery provisions, the FCPA established accounting and controls requirements for companies registered with the SEC pursuant to the Securities Exchange Act of 1934.[18] Establishment of these requirements represented a significant expansion of the SEC's regulatory authority and marked the first time the federal government established standards for the internal management of public companies.[19]

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products and services, or to the execution or performance of a contract. 15 U.S.C. §§ 78 dd-1(c)(2), dd-2(c)(2). The U.S. Department of Justice issued several releases concerning such payments under the review and opinion procedure mandated by the FCPA, 15 U.S.C. sections 78dd-1(e) and dd-2(f), under its regulations, 28 C.F.R. sections 80.1 to 80.16 (1997). In those releases, the Department of Justice stated that it would not take enforcement action against Iowa Beef Packers, Inc., which proposed providing samples of beef to the Soviet Ministry of Trade for inspection and tasting (Release No. 81-02); the State of Missouri Agriculture Department, which proposed to pay for the meals, lodging, entertainment and in-state travel of a ten member delegation from Mexico to sample agricultural products (Release No. 82-01); a U.S. company, which proposed to pay for meals, lodging, entertainment and domestic airfare expenses of the general manager of a foreign entity and his wife in connection with a ten day promotional tour of the company's U.S. facilities (Release No. 83-02); a U.S. company, which proposed to pay for the round-trip airfare, meals, lodging and entertainment of a Singapore official to attend demonstrations and meetings during a ten day period (Release No. 83-3); and ARCO, which proposed to pay for the travel, meals, lodging and entertainment of French officials responsible for licenses necessary for ARCO's construction of a chemical plant so that the officials could visit an ARCO plant in Texas (Release No. 85-1). The Conference on the 1988 amendments, emphasized, however, that if the payment were made with a corrupt intent, the defense that the payment was intended for product promotion or contract performance would not be available. Thus, the conference stated that "[I]f a payment or gift is corruptly made, in return for an official act or omission, then it cannot be a bona fide, good faith payment, and this defense would not be available").

18. 15 U.S.C. §§ 78a-78o.

19. Thus, it was observed in *SEC v. World-Wide Coin Invs., Ltd.*, 567 F. Supp. 724, 747 (N.D. Ga. 1983):

> The accounting provisions of the FCPA will undoubtedly affect the governance and accountability mechanisms of most major and minor corporations, the work of their independent auditors, and the role of the Securities and Exchange Commission. The maintenance of financial records and internal accounting controls are major every-day activities of every registered and/or reporting company. The FCPA also has important implications for the SEC, since the incorporation of the accounting provisions into the federal securities laws confers on the SEC new rulemaking and enforcement authority over the control and recordkeeping mechanisms of its registrants. The consequence of adding these substantive requirements governing accounting control to the federal securities laws will significantly augment the degree of federal involvement in the internal management of public corporations.

See also Barbara Crutchfield George & Mary Jane Dundas, *Responsibilities of*

Heralded as "a new era" in federal regulation,[20] the accounting and controls provisions represented a significant departure from the previous law, which established disclosure standards and prohibited the making of false entries in a company's books and records.[21] Although these provisions remained unchanged, the FCPA added

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Domestic Corporate Management Under the Foreign Corrupt Practices Act, 31 SYRACUSE L. REV. 865, 880 n.79 (1980) ("The accounting standards provisions of the FCPA regulate the everyday operations of a publicly-held corporation. Notwithstanding its other powers, the SEC has never had authority to regulate the internal operations of American corporations. This power has now been given to the SEC through section 13 (b)(2)(A) and 13 (b)(2)(B) of the 1934 Act.").

20. George & Dundas, *supra* note 19, at 866-67 ("The internal accounting provisions of the FCPA have changed the mandate of the Securities and Exchange Commission (SEC) by giving that agency the means for regulating the internal management of domestic corporations. Thus, the FCPA heralds a new era."); *see* George J. Siedel, *Corporate Governance Under the Foreign Corrupt Practices Act*, 21 Q. REV. ECON. & BUS. 43, 44 (1981) ("the accounting provisions were referred to as the most significant intrusion into corporate affairs since the 1930's when federal securities legislation was originally enacted").

21. Prior to the enactment of the accounting and control requirements, the SEC based its enforcement actions arising from overseas corrupt payments on the prohibition in the Securities Exchange Act of 1934 against making material false statements in a company's books and records. *See* 15 U.S.C. § 78m(b)(2)(A). As then-SEC Commissioner Loomis observed:

> Inquiry into illegal campaign contributions disclosed the falsification of corporate financial statements to disguise or conceal the source and application of corporate funds misused for this purpose. More specifically, they disclosed, in some instances, the existence of secret 'slush funds,' derived from the creation of expenses for fictitious purposes and disbursed without accountability by corporate executives. In our view, this type of activity necessarily rendered inaccurate the financial statements filed with the commission.

June 17th Statement, *supra* note 9, at 36. A former Deputy Director of the SEC Division of Enforcement also noted:

> In the early days when we were drafting some of the complaints in the first cases, the seeds were planted for the FCPA as we know it. For example, the first thing we did when we drafted our complaints in these cases was to seek an injunction against the falsification of books and records. At that time, there was no requirement that companies maintain accurate books and records, but we sought injunctions against false entries. That was the seed for Section 13 (b)(2)(a) of the Exchange Act.

Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 236 (1982). *See* Steven M. Morgan, *In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior*, 12 VAND. J. TRANS. L. 359, 361 n.11 (1979) ("[t]he SEC proceeded on the theory that misleading or suppressed disclosure of improper or questionable expenditures could violate § 13 (a) of the Exchange Act . . . and the rules and regulations thereunder, all of which relate to the filing of periodic and other reports with the SEC by registered companies. The SEC then brought the injunctive actions under § 21(d) of the Exchange Act").

requirements directed at the accuracy and completeness of information entered into accounting systems.[22] Thus, it was said, the FCPA sought to assure the accuracy of the "inputs" as well as the "outputs."[23]

The accounting and control provisions require issuers[24] to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[25] Issuers are also required to have internal controls in place,[26] which provide "reasonable assurances"[27] that:

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22. As one commentator noted, "[i]t is the obligation of the SEC to ensure that investors are fully informed of material financial dealings of subject corporations. It is therefore not surprising that the Commission viewed increasing evidence of foreign bribery as a frustration of the system of corporate accountability." Jean D. Reed, *Corporate Self-Investigations Under the Foreign Corrupt Practices Act*, 47 U. CHI. L. REV. 803, 806 (1980).

23. A former chief counsel to the SEC's Division of Enforcement observed:

> The [FCPA] has nothing to do with the output of the accounting system, which is reflected in the financial statements and other disclosure documents. It is a statutory requirement that regulates the input that goes into the accounting system. It regulates how individual transactions must be recorded, as distinguished from how financial information based upon the aggregate results of all transactions must be discussed.

Frederick B. Wade, *An Examination of the Provisions and Standards of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 255, 263 (1982).

24. The accounting and controls provisions of the FCPA apply to "every issuer which has a class of securities registered pursuant to [15 U.S.C. § 78e] and every issuer which is required to file reports pursuant to [15 U.S.C. § 78o]." 15 U.S.C. § 78m(b)(2) (Supp. 1997).

25. 15 U.S.C. § 78m(b)(2)(A). Use of the term "accurately" was intended to mean that transactions would be recorded in conformity with generally accepted accounting principles. Thus, in construing the accounting requirements, "standards of reasonableness must apply. In this regard, the term 'accurately' does not mean exact precision as measured by some abstract principle. Rather, it means that an issuer's records should reflect transactions in conformity with generally accepted accounting principles or other applicable criteria." S. REP. NO. 95-114, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4106.

26. Although intended to work in concert with the accounting provisions, "[t]he internal controls requirement is primarily designed to give statutory content to an aspect of management stewardship responsibility, that of providing shareholders with reasonable assurances that the business is adequately controlled." SEC v. Worldwide Coin Invs., Ltd., 567 F. Supp. at 750. As the court explained:

> Internal accounting control is, generally speaking, only one aspect of a company's total control system; in order to maintain accountability for the disposition of its assets, a business accounting controls element of a company's control system is that which is specifically designed to provide reasonable, cost-effective safeguards against the unauthorized use or disposition of company assets and reasonable assurances that financial records and accounts are sufficiently reliable for purposes of external

> (i) Transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary (a) to permit preparation of financial statement in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (b) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization, and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[28]

Enforcement of the FCPA is shared by the SEC and the U.S. Department of Justice. The SEC retained jurisdiction under the Securities Exchange Act of 1934 over issuers;[29] the FCPA gave the Department of Justice jurisdiction to bring civil actions to enjoin violations of the FCPA by "domestic concerns" other than issuers.

> reporting. 'Internal accounting controls' must be distinguished from the accounting system typically found in a company. Accounting systems process transactions and recognize, calculate, classify, post, summarize and report transactions. Internal controls safeguard assets and assure the reliability of financial records, one of their main jobs being to prevent and detect errors and irregularities that arise in the accounting systems of the company. Internal accounting controls are basic indicators of the reliability of the financial statement and the accounting system and records from which financial statements are prepared.

Id. at 750.

27. As used in the FCPA accounting and controls provisions, "reasonable assurances" and "reasonable detail" are defined as "such level and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7). This provision was added by the 1988 amendments "in order to clarify that the current standard does not connote an unrealistic degree of exactitude or precision. The concept of reasonableness of necessity contemplates the weighing of a number of relevant factors including costs of compliance." H. R. CONF. REP. NO. 100-576, at 917 (1988), reprinted in 1988 U.S.C.C.A.N. 1547; *see also Statement of SEC Chairman John S.R. Shad Before Joint Hearings of the Subcomm. on Sec. and the Subcomm. on Int'l Fin. and Monetary Policy of the Senate Comm. on Banking, Housing, and Urban Affairs Concerning S. 708*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶82, 882 (1981) [hereinafter *Statement of SEC Chairman Shad*] ("The Commission believes the 'prudent man' test eliminates issuers' concerns over de minimus inaccuracies and sets an appropriate minimum standard for publicly owned corporations").

28. 15 U.S.C. § 78m(b)(2)(B). These requirements were summarized by a former Chairman of the SEC, Harold M. Williams, as follows: "In essence, these objectives are that assets be safeguarded from unauthorized use, that corporate transactions conform to managerial authorizations, and that records are accurate." Remarks of Harold M. Williams Before the American Institute of Certified Public Accountants, SEC Release No. 34-17500, 46 Fed. Reg. 11,544 (1981).

29. 15 U.S.C. §78u.

The Department of Justice also retained jurisdiction to prosecute violations of the Act criminally.[30]

The penalties for violating the FCPA are substantial. Individuals convicted of violating the anti-bribery provisions may be sentenced for a period of up to five years imprisonment and fined $100,000.[31] A civil penalty of a maximum $10,000 also may be imposed.[32] Additionally, the act prohibits the payment by a corporation of any fine assessed against an individual.[33] A corporation may be fined up to $2,000,000.[34]

Knowing violation of the accounting and controls provisions may also constitute a crime. An individual who committed a knowing violation may be imprisoned for up to ten years and fined up to $1,000,000.[35] Under the same circumstances, a corporation may be fined up to $2,500,000.[36]

II. Extra-Territorial Criminal Jurisdiction under the FCPA

A. *Congressional Intent*

The federal government's authority to punish the extraterritorial crimes of its own citizens is among the oldest principles in U.S. constitutional jurisprudence.[37] Indeed, several scholars have noted

30. 15 U.S.C. § 78dd-2(d) (Supp. 1997). The term "domestic concern" is defined as:

> (A) any individual who is a citizen, national or resident, of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.

15 U.S.C. § 78dd-2(h)(1). Joint responsibility for enforcement has been criticized as being cumbersome and inefficient. Pines, *supra* note 5, at 193-94.

31. 15 U.S.C. §§ 78dd-2 (g)(2), 78ff (c)(2) (Supp. 1997).

32. *Id.*

33. *Id.* §§ 78dd-2 (g)(3), 78ff (c)(1).

34. *Id.* §§ 78dd-2 (g)(1), 78ff (c)(1).

35. *Id.* §78ff(a).

36. *Id.*

37. As early as 1808, Mr. Chief Justice Marshall stated, albeit in dicta, that:

> It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens.... The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

that the Constitution does not limit Congress' legislative reach.[38] Nevertheless, as broad as Congress' inchoate authority may be to govern and punish extraterritorial conduct, Congress exercises this authority only sparingly.[39] Others also suggested that Congress'

Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808).

38. In this regard, Professor Andreas F. Lowenfeld observed:

> The Constitution does not express any territorial limitation on the powers of Congress. For example, the power to regulate commerce with foreign nations and to enact criminal laws necessary and proper to carry out the regulations of commerce, might well include laws that apply outside as well as within the territory of the United States, to aliens as well as to nationals....
>
> The Constitution also grants to Congress the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. In addition, Congress must have at lease some of the powers inherent in the international sovereignty of the United States, which being unenumerated, have no express territorial limitation.

Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 881 (1989); *see* United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) ("Generally, there is no constitutional bar to the extraterritorial application of United States penal laws"). The absence of constitutional limitation on Congress' extraterritorial prescriptive jurisdiction was noted by Professor Lea Brilmayer, as well:

> In the international context... the Constitution plays virtually no role at all. The Supreme Court has never invalidated the extraterritorial application of federal law on constitutional grounds. In fact, none of the Court's decisions on extraterritorial application even seriously discuss the constitutional issues. The most attention these decisions ever give to the issue is a back handed reference to the Constitution at the outset of the discussion about congressional intent.

Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & CONTEMP. PROB. 11, 24 (1987). Professor Brilmayer also suggested that the extraterritorial effect of legislation is nevertheless subject to the requirements of due process. *Id.* at 27-28; *see also* Christopher J. Lord, *Stapled Stock and I.R.C. Section 269B: Ill-Conceived Change in the Rules of International Tax Jurisdiction*, 71 CORNELL L. REV. 1066, 1067 (1986) ("Except for the due process clause, which proscribes arbitrary taxation, no constitutional provision or international law restricts the scope of United State tax jurisdiction"); Bret A. Sumner, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U.L. REV. 907, 908-09 (1997).

39. *See* Lowenfeld, *supra* note 38, at 882 ("Whatever the answers that an uncertain constitutional jurisprudence might give [as to the limits of Congress' extraterritorial authority], Congress has in fact respected the territorial limitations imposed by international law, at least until recently. In that policy, I think Congress has followed the lead of the framers"); Stephen B. Swigert, *Extra-Territorial Jurisdiction in Criminal Law*, 13 HARV. INT'L L.J. 346, 348 (1972) ("Although the Supreme Court recognized the federal government's power to punish extraterritorial offenses as early as 1808, Congress has only rarely indicated an express intent either to restrict the application of its criminal statues to acts committed within United

extraterritorial jurisdiction, at least with respect to crimes, should be exercised in accordance with the norms of international law.[40]

There are five generally recognized theories of extraterritorial criminal jurisdiction under international law. These are the territorial, protective, nationality, universal, and passive personality theories.[41] Of these theories, territoriality and nationality

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States territory or to authorize their application to acts committed abroad").

40. *See* Lowenfeld, *supra* note 38, at 881-82 ("It is arguable that the Constitution permits Congress to make acts committed abroad crimes under United States law only to the extent permitted by international law. It is arguable that, especially when Congress acts under its power to define offenses against the law of nations, it cannot violate territorial limitations imposed by that law"). Mr. Chief Justice Marshall made this point as well in *Rose v. Himely*, 8 U.S. at 276-77 ("if [the court of a foreign nation] exercised a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts"). For a discussion and critical analysis of the integration of "customary international law" into U.S. federal common law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

41. These five theories of jurisdiction were identified in the seminal study: *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (1935) [hereinafter *Harvard Research*]. As the introductory comment explained:

> An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five principles are: first, the *territorial principle*, determining jurisdiction by reference to the place where the offense is committed; second, the *nationality principle*, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the *protective principle*, determining jurisdiction by reference to the national interest injured by the offence; fourth, the *universality principle*, determining jurisdiction by reference to the custody of the person committing the offense and fifth, the *passive personality* principle determining jurisdiction by reference to the nationality or national character of the person injured by the offence.

Id. at 445 (emphasis added). These five theories of jurisdiction are incorporated in the Restatement, as well. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmts. c-g (1986). In his paper prepared for the Eighth Congress of the International Academy of Comparative Law, Professor Rollin M. Perkins suggested four theories of criminal jurisdiction: territorial, Roman, injured forum and cosmopolitan. Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 155 (1971). Under Professor Perkin's construct, the "Roman" theory is, in essence, the same as the "nationality" theory (i.e., "[t]he perpetrator, rather than the place of perpetration, is the determinant under the Roman theory. A nation, in this view, has jurisdiction over its national wherever he may be and hence can hold him

predominate in their acceptance as bases for extraterritorial assertion of a State's prescriptive jurisdiction.[42]

Congress has exercised its prescriptive jurisdiction consistently with each of these theories.[43] However, absent clear guidance from

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accountable for his criminal misdeed wherever committed. It is the logical outgrowth of the conception of law enforcement as a means of disciplining members of the tribe or clan"). *Id.* Similarly, Perkins' "injured forum" theory places emphasis upon the effect of the crime (i.e., "[t]he injured forum theory places emphasis upon the effect of crime. A nation may take jurisdiction of any crime which has the effect of causing harm to it"). *Id.* The "cosmopolitan" theory appears to be a synthesis of the "universality" and "passive personality" theories (i.e., "this theory is drawn upon the extent necessary to authorize any nation having actual control of a pirate, and evidence of his piracy, to convict him no matter who he may be, wherever his acts of piracy were committed, and without reference to the harm resulting therefrom"). *Id.* at 1156.

42. As the Harvard study noted:

> Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the context to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

Harvard Research, *supra* note 41, at 445.

43. For a general discussion of laws affecting U.S. business overseas, see Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749 (1996). The "territorial principle" has been described as "the primary principle applied by U.S. courts." *See* Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. 1109. 1114-23 (1982); Lowenfeld, *supra* note 38, at 883; Perkins, *supra* note 41; Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 342 (1997). *See, e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927); United States v. Pacific and Arctic Ry. and Navigation Co., 228 U.S. 87, 106 (1913). Prosecution of extraterritorial crime has been upheld on the basis of the other theories of jurisdiction as well.

With regard to the protective theory, see, for example, *Ford v. United States*, 273 U.S. 593, 619-20 (1927); *Strassheim v. Dailey*, 221 U.S. 280, 285 (1911); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997); *United States v. Caicedo*, 47 F.3d 370, 371 (9th Cir. 1995); *United States v. Juda*, 46 F.3d 961, 966 (9th Cir. 1995); *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir. 1994); *United States v. Harvey*, 2 F.3d 1318, 1327 (3d Cir. 1993); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991); *United States v. Davis*, 905 F.2d 245, 249 (9th Cir. 1990); *United States v. Goldberg*, 830 F.2d 459, 462 (3rd Cir. 1987); *United States v. Wright-Palmer*, 784 F.2d 161, 168 (3rd Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308, 1312 (9th Cir. 1984); *In re Grand Jury Subpoena* (Marc Rich & Co., A.G.), 707

Congress, either in the statute or its legislative history, courts will indulge in a presumption of territoriality. That is, courts will presume that U.S. law does not have extraterritorial effect.[44] Where

F.2d 663, 666 (2d Cir. 1983); *United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir. 1982); *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1973); *Stegman v. United States*, 425 F.2d 984, 986 (9th Cir. 1970); *United States v. Pizzarusso*, 388 F.2d 8, 9-10 (2d Cir. 1968); *United States v. Braverman*, 376 F.2d 249, 251 (2d Cir. 1967); *Marin v. United States*, 352 F.2d 174, 177-78 (5th Cir. 1965); *Rocha v. United States*, 288 F.2d 545, 548-49 (9th Cir. 1961). *See also* Blakesley, *supra* note 43, at 1123-39, Podgor, *supra* note 43, at 342-43.

With regard to the "nationality theory," see, for example, *Kawakita v. United States*, 343 U.S. 717, 732-36 (1952); *Skiriotes v. Florida*, 313 U.S. 69, 76-77 (1941); *Blackmer v. United States*, 284 U.S. 421, 436-38 (1932); *United States v. Bowman*, 260 U.S. 94, 102 (1922); *Jones v. United States*, 137 U.S. 202 (1890); *United States v. Juda*, 46 F.3d at 966; *United States v. Harvey*, 2 F.3d at 1328-29; *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990); *United States v. Goldberg*, 830 F.2d at 463-64; *United States v. Walczak*, 783 F.2d 852, 854 (9th Cir. 1986); *United States v. Rech*, 780 F.2d 1541, 1543 n.2 (11th Cir. 1986); *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976); *United States v. Cotten*, 471 F.2d at 750; *Rocha v. United States*, 288 F.2d 545, 548 (9th Cir. 1961); *Chandler v. United States*, 171 F.2d 921, 929-31 (1st Cir. 1948).

With regard to the "universal theory," see, for example, *United States v. Yunis*, 924 F.2d 1086, 1090 (D.C. Cir. 1991). *See also* Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States' Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 YALE J. INT'L L. 121, 136 (1990); Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violations of International Law Under FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

With regard to the "passive personality theory," see, for example, *United States v. Vasquez-Velasco*, 15 F.3d at 841; *United States v. Yunis*, 924 F.2d at 1090. *See also* Blakesley, *supra* note 43, at 1139-41; Mason H. Drake, *United States v. Yunis: The D.C. Circuit's Dubious Approval of U.S. Long-Arm Jurisdiction over Extraterritorial Crimes*, 87 Nw. U.L. Rev. 697, 704-13 (1993); Lowenfeld, *supra* note 38, at 886-91.

44. Notwithstanding this evolution of extraterritorial jurisdiction, in the absence of clear congressional guidance, courts continue to indulge a presumption against extraterritoriality. As the Supreme Court explained in *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991):

> Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority . . . is a matter of statutory construction.
>
> It is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. This canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained. It serves to protect against unintended clashes between our laws and those of other nations, which could result in international discord.
>
> In applying this rule of construction, we look to see whether language in the relevant act gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of control. We assume that Congress legislates against the

extraterritorial effect is asserted, courts often weigh principles of international law in an attempt to ascertain, post hoc, Congressional will.[45] In contrast, when Congress enacts legislation specifically directed at governing conduct abroad, it may be assumed that Congress weighed the implications and likely effect of the legislation on international law and foreign relations. The FCPA plainly qualifies as such legislation.[46]

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backdrop of the presumption against extraterritorality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.

(Citations omitted). *See also* Foley Bros., Inc. v. Filardo, 336, U.S. 281, 285-88 (1949). The task of discerning Congressional intent and applying these presumptions is not so simple, however. As Professor Brilmayer pointed out:

> The most important consideration governing the extraterritorial application of American law is hybrid legislative/judicial construct. By and large, the issue is governed by presumptions which are judicially created and which often show the influence of international law. At the same time, these presumptions are presumptions about congressional intent and thus acquire the status of legislation. It is this hybrid nature of the dominant element in the methodology that accounts for a substantial part of the problem with our current situation. Presumptions of legislative intent are something of a Frankenstein's monster: easy to create, but hard to control.

Brilmayer, *supra* note 38, at 16.

45. *See* Podgor, *supra* note 43, at 340 ("When a statute is silent as to its external application, courts bear the ultimate responsibility of determining the congressional intent. Since Congress has often failed to focus on extraterritoriality in drafting statutes, courts are frequently left to consider the international ramifications of an extraterritorial application"). *See generally* Kelly Christie, Commentary, *To Apply or Not to Apply: Extraterritorial Application of Federal RICO Laws*, 8 FLA. J. INT'L L. 131 (1993). In this regard, it has been suggested that political objectives guided courts in determining issues of extraterritoriality. *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992) ("[E]xtraterritorial application of American law has become a potent tool for effectuating American foreign policy"); Jonathan Turley, *'When in Rome': Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 608-38 (1990) (arguing that courts favored extraterritoriality in "market cases", i.e., statutes geared toward preserving free markets such as the antitrust and securities laws, while creating an irrebutable presumption against extraterritoriality in "nonmarket cases," i.e., those involving employment and environmental law, or that U.S. law was applied extraterritorially when to do so "has served the national interest of the United States or its corporate actors"); Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, The Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 304-05 (1996); *see also* Brilmayer & Norchi, *supra*, at 1223.

46. In this connection, it was observed:

> When Congress drafts a statute specifically focused on international activities, it is likely that there has been congressional reflection on the international ramifications of the criminal application. The enactment of the

Congress, in enacting the FCPA, intended not only to outlaw foreign bribery, but also to eliminate the establishment of overseas "slush funds" used to finance these bribes.[47] Indeed, prior to the final

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Foreign Corrupt Practices Act demonstrates a clear intent on the part of Congress to transcend the borders of the United States with regard to specific conduct. Congress has, however, tailored the statute to encompass limited conduct and individuals.

Podgor, *supra* note 43, at 332.

47. As the House-Senate Conference Report on the 1977 Act noted, the FCPA's amendment of the record keeping requirements of the Securities Exchange Act "ma[de] clear the issuer's records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payment of bribes." H.R. CONF. REP. NO. 95-831, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4122. Former SEC Division of Enforcement Deputy Director Wallace Timmeny also observed:

> The internal control provisions . . . are designed to deal with the problems of off-the-books slush funds or company employees going beyond company policy and using corporate assets to make payments . . . in a way the management would not want them used. They were also designed to ensure that there are controls on the company assets—that a company knows what assets it has and that management is aware of what is going on within a company concerning its assets.

Timmeny, *supra* note 21, at 240. Nevertheless, violation of the accounting and controls provisions do not necessarily involve either maintenance of off-the-books "slush funds" or corrupt overseas payments. As former SEC Chairman Shad explained, "[a]s the legislative history of the Foreign Corrupt Practices Act makes clear, the accounting provisions were enacted in part to facilitate the disclosure provisions of the federal securities laws and in part to provide for greater accountability of corporate assets. They were not intended exclusively to curb foreign bribery." *Statement of SEC Chairman Shad*, *supra* note 27, at 882. Indeed, the FCPA accounting and controls provisions are considered rules of general applicability, adopted for the protection of all investors. *See* SEC v. World-Wide Coin Invs., Ltd., 567 F. Supp. 724, 746 (N.D. Ga. 1983) ("The FCPA was enacted on the principle that accurate recordkeeping is an essential ingredient in promoting management responsibility and is an affirmative requirement for publicly held American corporations to strengthen the accuracy of corporate books and records, which are the bedrock elements of our system of corporate disclosure and accountability. A motivating factor in the enactment of the FCPA was a desire to protect the investor, as was the purpose behind the enactment of the securities acts. It is apparent that investors are entitled to rely on the implicit representations that corporations will account for their funds properly and will not channel funds out of the corporation or omit to include such funds in the accounting system so that there are no checks possible on how much of the corporation's funds are being expended in the manner management later claims"); *see also* S. REP. NO. 95-114, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101 ("[t]he establishment and maintenance of a system of internal controls is an important management obligation. A fundamental aspect of management's stewardship responsibility is to provide shareholders with reasonable assurances that the business is adequately controlled. Additionally, management has a responsibility to furnish shareholders and potential investors with reliable financial information on a timely basis. An adequate system of internal

enactment of the FCPA, a substantial amount of testimony arose concerning the overseas practices of many of America's largest corporations.[48]

For example, Lockheed Aircraft Corporation made disclosures of overseas bribery to the SEC in June 1975. As a result, the Senate Committee on Banking, Housing and Urban Affairs held hearings primarily directed toward whether Lockheed was forthright with Congress and the Emergency Loan Guarantee Board with regard to the guaranty of $250 million in loans made to Lockheed in the early 1970s.[49] In the course of those hearings, the Committee heard the testimony of then-Lockheed Chairman D.J. Houghton who acknowledged that 15 percent of the total commissions paid to foreign agents between 1970 and 1975 were in turn been paid to foreign officials.[50] This was estimated to be $22 million.[51]

Lockheed's overseas payment practices were also the subject of

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accounting controls is necessary to management's discharge of these obligations"). This is the construction of the FCPA endorsed by the SEC. *See In re* Grant, Exchange Act Release No. 31069 (1992); *In re* Martirossian, Exchange Act Release No. 30870, 51 S.E.C. Docket 1315 (1992); *In re* Abbington BanCorp, Inc., Exchange Act Release No. 30614 (1992); *In re* Amre, Inc., Exchange Act Release No. 30431, 50 S.E.C. Docket 1474 (1992); *see also* SEC Release No. 17500, 46 Fed. Reg. 11,544 (1981) ("The primary thrust of the act's accounting provisions, in short, was to require those public companies which lacked effective internal controls or tolerated unreliable record keeping to comply with the standards of their better managed peers. *That* is the context in which these provisions should be construed.") (emphasis in original); SEC Release No. 34-15570, 44 Fed. Reg. 10,964, 10,967 (1979) ("the maintenance of accurate books and records by reporting companies is one of the foundations of the system of corporate disclosure embodied in the Securities Exchange Act"). Thus, a corporation that conducts no overseas business may nonetheless be liable for violations of the FCPA accounting and controls provisions. *See* KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY 61 (2d ed. 1991); Hubert Lenczowski, *Questionable Payments by Foreign Subsidiaries: The Extraterritorial Jurisdictional Effect of the Foreign Corrupt Practices Act of 1977*, 3 HASTINGS INT'L & COMP. L. REV. 151, 158-59 (1979); Morgan, *supra* note 21, at 369.

48. Congress was also aware of the disclosures made to the Watergate Special Prosecutor of illegal campaign contributions that often were financed through off-shore entities and accounts, as well as the criminal prosecutions of twenty-two corporations and twenty-one individuals. *See Abuses of Corp. Power, Hearings Before the Subcomm. on Priorities in Gov't of the Joint Econ. Comm.*, 94th Cong. 91 (1976) [hereinafter *Abuses of Corp. Power Hearings*]; GREANIAS & WINDSOR, *supra* note 11, at 17-19; Charles R. McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215 (1976).

49. *See Lockheed Bribery Hearings Before the Comm. on Banking, Hous. and Urban Affairs*, 94th Cong. (1975).

50. *Id.* at 27.

51. *Id.* at 40.

hearings held the following year before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations.[52] In the course of those hearings, the Subcommittee heard the testimony of board chairmen and senior executives of five major corporations, which acknowledged their involvement in improper domestic and overseas payments.

Mr. Haughton reprised his earlier testimony concerning Lockheed's overseas payments. In particular, Mr. Haughton and other Lockheed officials described their dealings with Adnan Khashoggi and his company, Triad Corporation, in regard to aircraft sales in Saudi Arabia. The Lockheed officials acknowledged paying $400,000 to a Saudi official using funds from Swiss and Liechtenstein entities.[53] Their testimony indicated that over a five-year period, Lockheed paid over $100 million in commissions to Triad in connection with sales in Saudi Arabia alone.[54]

There was also testimony concerning other overseas payments by Lockheed. For example, it was disclosed that after Lockheed's agent in Indonesia was let go following the change in regimes, the company paid subsequent sales commissions directly to the Indonesian Air Force. These payments were made to the Swiss account of the "Widows and Orphans Fund."[55]

A second major aircraft manufacturer, Northrop Corporation, also testified before the Subcommittee. Northrop also was represented in Saudi Arabia by Khashoggi and Triad. Richard W. Millar, Chairman of the Executive Committee of Northrop's Board, testified that in 1971 and 1972, Northrop made payments totaling $450,000 to two Saudi Air Force officers through Khashoggi's good offices.[56] Mr. Millar also testified that approximately $476,000 in payments to a foreign consultant were used to make unlawful contributions to the 1972 Nixon re-election campaign.[57]

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52. *See Multinational Corps. and U.S. Foreign Policy, Hearings Before the Subcomm. on Multinational Corps. of the Comm. on Foreign Relations*, 94th Cong. (1975) [hereinafter *Multinational Corps. and U.S. Foreign Policy*]. These revelations resulted in shareholder derivative litigation, as well. *See* Gaines v. Haughton, 645 F.2d 761 (9th Cir. 1981).

53. *Multinational Corps. and U.S. Foreign Policy*, *supra* note 52, at 349-51.

54. *Id.* at 352-53.

55. *Id.* at 372-76.

56. *Id.* at 112-13. Northrop's Chairman, Thomas V. Jones, also referred to these payments during his subsequent testimony before the Subcommittee. *Id.* at 180-83.

57. *Id.* at 110-11.

Executives of several major oil companies also testified during the hearings. B.R. Dorsey, Chairman of Gulf Oil Corporation, told the Subcommittee that an internal corporate review conducted under the direction of John J. McCloy revealed that between 1960 and 1973 approximately $10.3 million of corporate funds were used for political contributions, of which approximately $5 million were foreign political contributions.[58] Mr. Dorsey detailed contributions in 1966 and 1970 totaling $4 million to a political party in the Republic of Korea, which were channeled through a Gulf Oil subsidiary in the Bahamas.[59] However, there was no specific quid pro quo for these contributions.[60] Mr. Dorsey stated that the Bahamian subsidiary was used to make contributions totaling $460,000 (including payments for a helicopter) to the election campaign of the President of Bolivia and to a fund in Beirut, Lebanon to promote better U.S. understanding of the Arab-Israeli conflict.[61]

Archie L. Monroe, Controller of Exxon Corporation, testified concerning political contributions made in Italy by its subsidiary, Esso Italiana.[62] Mr. Monroe stated that between 1963 and 1972, Esso Italiana made political contributions to campaigns in Italy totaling between $46 and $49 million.[63] The sources of the funds were off-book bank accounts controlled by the country manager and the identities of the recipients of the contributions were camouflaged.[64] The contributions were made in exchange for specific political favors.[65]

Everett S. Checket, Executive Vice President of Mobil Oil Corporation, also testified concerning political contributions in Italy. Mobil Oil Italiana, Mobile Oil's subsidiary, made contributions between 1970 and 1973 that averaged $534,000 annually over the four-year period.[66] According to Mr. Checket, these contributions were made to an Italian trade association, Unione Petrolifera, from normal business accounts and did not involve off-book funds or out-

58. *Id.* at 5-8.
59. *Id.* at 8-10.
60. *Id.* at 10.
61. *Id.* at 11-12.
62. *Id.* at 24. The contributions also were subject of shareholder derivative litigation. *See* Gall v. Exxon Corp., 418 F. Supp. 508 (S.D.N.Y. 1976).
63. *Multinational Corps. and U.S. Foreign Policy*, *supra* note 52, at 241-49.
64. *Id.* at 248-49.
65. *Id.* at 259.
66. *Id.* at 316. These contributions totaled approximately $2,135,000. *Id.* at 323.

of-country transactions.[67] However, Mobile listed these expenses on their books as advertising expenses or research, which Mr. Checket conceded were mischaracterizations.[68] Although disputed by Mr. Checket, it was suggested that these contributions were in exchange for subsidies and favorable tax treatment.[69]

Congress also heard extensive testimony from the SEC concerning the results of the Commission's various inquiries into corrupt overseas payments. For example, then-SEC Chairman Roderick M. Hills testified concerning actions brought by the SEC against several companies.[70] Chairman Hills stated, before the Joint Economic Committee, that the SEC believed that United Brands had paid $1.25 million to officials of a Central American country in exchange for reduction of an export tax.[71] He also testified that the SEC believed United Brands paid approximately $750,000 to officials of two European countries "to secure favorable business opportunities."[72] In addition, Chairman Hills testified that actions were brought against the following companies: General Refactories, alleging that approximately $400,000 was paid to European government officials; Phillips Petroleum Company, alleging that $2.8 million was disbursed to two overseas corporations and then returned to the United States to fund illegal campaign contributions; Gulf Oil Corporation, alleging that $10 million in corporate funds were given to a foreign subsidiary, of which $4.5 million was returned to the United States for illegal campaign contributions; Northrop Corporation, alleging that $450,000 in payments to a European consultant were used to make political contributions in the United States; and Ashland Oil Corporation, alleging that $780,000 was diverted to a secret fund used to make illegal campaign contributions.[73]

The SEC also provided Congress with a report[74] based on disclosures made by corporations under the SEC's voluntary

67. *Id.* at 316.
68. *Id.* at 317.
69. *Id.* at 317-18.
70. *Abuses of Corporate Power, Hearings*, *supra* note 48, at 4-6.
71. *Id.* at 5.
72. *Id.*
73. *Id.* at 5-6.
74. *See Report of the Sec. and Exch. Comm'n on Questionable and Illegal Corporate Payment and Practices Submitted to the Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1976) [hereinafter *SEC Report*].

disclosure program,[75] as well as information obtained in the Commission's enforcement actions.[76] The SEC found:

> The almost universal characteristic of the cases reviewed to date by the Commission has been the apparent frustration of our system of corporate accountability which has been designed to assure that there is a proper accounting of the use of corporate funds and that documents filed with the Commission and circulated to shareholders do not omit or misrepresent material facts. Millions of dollars of funds have been inaccurately recorded in corporate books and records to facilitate the making of questionable payments. Such falsification of records has been known to corporate employees and often to top management, but often has been concealed from outside auditors and counsel and outside directors.[77]

Ultimately, the SEC's voluntary disclosure program resulted in discoveries of payments by over four hundred publicly-held companies in excess of $300 million.[78]

Despite evidence of fairly widespread "questionable overseas payments," opinions differed substantially as to how the problem of overseas corruption should be addressed. Some advocated public disclosure as the most appropriate means of inhibiting questionable payments. Others advocated criminalization.

On March 31, 1976, President Ford instituted a Cabinet-level task force, the Task Force on Questionable Foreign Payments Abroad, to review the problem of questionable payments and

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75. For a discussion of the SEC's voluntary disclosure program, see GREANIAS & WINDSOR, *supra* note 11, at 75-78; NEIL H. JACOBY ET AL., BRIBERY AND EXTORTION IN WORLD BUSINESS 46-58 (1977); John Sweeny, *The SEC Interpretive and Enforcement Program Under the FCPA*, 9 SYRACUSE J. INT'L L. & CO. 273, 275 (1982); Timmeny, *supra* note 21, at 235-37; Note, *Disclosure of Payment to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848, 1851-52 (1976).

76. *SEC Report*, *supra* note 74, at 1.

77. *Id.* at a.

78. *See* H. REP. NO. 95-640, at 4 (1977)("[m]ore than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries"); S. REP. NO. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101("Recent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars").

propose remedial legislation.[79] The Task Force was chaired by Secretary of Commerce Elliot L. Richardson. The Task Force issued an interim report on June 14 and a final report, which accompanied proposed legislation on August 3, 1976.[80]

In its final report, the Task Force concluded that a "disclosure approach" was preferable to a "criminalization approach."[81] According to the Task Force, legislation criminalizing overseas bribery "would have represented the most forceful possible *rhetorical* condemnation of such conduct."[82] However, it was the task force's view that "the criminalization approach would represent little more than a policy assertion, for the enforcement of such a law would be very difficult, if not impossible."[83] Thus, the Task Force concluded that "unless reasonably enforceable criminal sanctions were devised, the criminal approach would represent poor public policy."[84]

The Task Force also considered, and unanimously rejected, a legislative scheme that required disclosure of foreign payments and that made some of those payments a violation of U.S. criminal law.[85] The Task Force concluded, in this regard, that the "disclosure-plus-criminalization scheme would, by its very ambition, be ineffective. The existence of U.S. criminal penalty for certain questionable payments would deter their disclosure and thus the positive value of the disclosure provisions would be reduced. In the Task Force's opinion, the two approaches cannot be compatibly joined."[86]

The Task Force and the Ford administration proposed requiring reports to the Secretary of Commerce "of all payments made in connection with sales to or contracts with foreign governments or official actions by foreign public officials, where such are for the commercial benefit of the payor or his foreign affiliate."[87]

The view that criminalization of foreign bribery would represent bad public policy was also adopted a year later by an ad hoc committee of the Association of the Bar of the City of New York in

79. *See Foreign Payments Disclosure Hearings*, *supra* note 9, at 31.
80. *Id.* at 40 (Richardson Task Force Report).
81. *Id.* at 49.
82. *Id.* at 50 (emphasis in original).
83. *Id.*
84. *Id.* at 51.
85. *Id.* at 49.
86. *Id.* at 49-50.
87. *Id.* at 51.

its report on questionable foreign payments.[88] Indeed, the ad hoc committee observed that Secretary Richardson's comment, "reflects the sound principle that laws which cannot be enforced 'represent poor public policy' because, after the failure in enforcement becomes evident, the credibility of the government enacting them is diminished."[89] The ad hoc committee went on to observe that, "[w]hile a statute criminalizing foreign payments may continue to deter some United States citizens even after the failure to enforce it becomes evident, it is unlikely to be accepted by any foreign official as a serious justification for the failure to make such a payment."[90]

Under the chairmanship of Roderick M. Hills, the SEC strongly supported the view of the Richardson Task Force that keep disclosure was the most effective approach to addressing foreign bribery.[91] In

88. AD HOC COMMITTEE ON FOREIGN PAYMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION (1977) [hereinafter NYC BAR REPORT].

89. *Id.* at 9.

90. *Id.* The disclosure rather than criminalization approach was supported by other industry groups as well. The U.S. Chamber of Commerce argued that "[t]he criminalization of questionable overseas business payments would contribute little to deterring such payments beyond that which is already accomplished by existing securities, tax and criminal law." *Unlawful Payments Act of 1977, Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 235 (1977) (statement of J. Jefferson Staats for the U.S. Chamber of Commerce) [hereinafter *Unlawful Payments Act Hearings*]. The Chamber also suggested that because prosecution of violations would rely on evidence located outside the United States, the prohibition of foreign payments "would be very difficult to administer and enforce." *Id.* at 236. The National Association of Manufacturers raised similar objections. *See id.* at 238 (statement of the Nat'l Ass'n of Mfrs.). The Federal Regulation of Securities Committee of the American Bar Association Section of Corporation, Banking and Business Law characterized as "unrealistic" the prohibition of foreign payments, "which assumes that a multinational corporation will be able to prevent all corrupt offers or promises by every employee, including foreign nationals whose concepts of business morality differ from our own. . . ." Instead, the Committee urged that criminal sanctions be reserved for instances in which a corporation's directors or executive officers approved or had actual knowledge of corrupt payments. *Id.* at 251-52 (letter from the Fed. Reg. Sec. Comm'n to the Hon. Bob Eckhardt, dated Apr. 19, 1997).

91. The disclosure approach to overseas corruption was not without its critics, however. One commentator observed that there were already a variety of federal disclosure requirements including the regulations of the Agency for International Development, the Export-Import Bank, the Department of Defense Foreign Military Sales Program and the Internal Revenue Service. Although the federal securities laws were the only requirement for general public disclosure, those requirements became mired in issues of materiality and accuracy. Further, the SEC's jurisdiction was limited to compelling disclosure of material information of interest to investors,

part, this perspective was due to the general orientation of the federal securities laws to disclosure and the SEC's experience in administering those laws. As Chairman Hills observed, "as a matter of long-standing tradition and practice, the Securities and Exchange Commission has been a disclosure agency. Causing questionable conduct to be revealed to the public has a deterrent effect."[92]

Thus, in fashioning legislation in light of the voluntary disclosures and enforcement actions, the SEC did not propose prohibiting foreign corrupt payments. Instead, the SEC believed that the legislation should (1) prohibit the falsification of corporate accounting records; (2) prohibit the making of false and misleading statements by corporate officials and agents to auditors of the books and records; and (3) require the establishment and maintenance of a system of accounting controls.[93] Indeed, in testimony two years later, Chairman Hills reiterated the SEC's view that these proposals were the most efficacious approach to the problem: "The Commission continues to believe that they represent the most effective solution to the problem of questionable or illegal payments, and that they go to

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and not the general public, only as to corporations offering federally registered securities. McManis, *supra* note 48, at 226-28. Thus, it was suggested that "[t]he focus of SEC law enforcement efforts is simply too narrow to comprehend the problem of overseas corporate payments." *Id.* at 228. Theodore C. Sorenson was also of this view. In his influential article on overseas improper payments published in *Foreign Affairs*, Mr. Sorenson noted:

> Disclosure . . . cannot carry the whole burden of law enforcement. It would be illogical to punish more severely than at present the nondisclosure of an activity not now illegal under U.S. law. Moreover, when the general or stockholding public proves to be indifferent to a company's disclosure of wrong doing, as is often the case, no penalty and no reform may follow.

Theodore C. Sorenson, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFF. 719, 731 (1976).

92. *Foreign Payments Disclosure Hearings*, *supra* note 9, at 25 (statement of Hon. Roderick M. Hills, SEC Chairman).

93. *SEC Report*, *supra* note 74, at 58-59. As Chairman Hills subsequently explained:

> In my view, an effective system of corporate accountability requires that the facts pertaining to illegal payments not be concealed from a corporation's independent accountants or its board of directors. This is the key point. The system of government regulation of business disclosure by the Securities and Exchange Commission will not work unless the books and records are kept in good faith.

Abuses of Corp. Power Hearings, *supra* note 48, at 12. In this connection, Professor McManis noted the difference between the Richardson Task Force approach and the SEC approach to the problem of corrupt payments by U.S. firms. "For the Task Force, the problem is one of diplomacy, for the SEC, it is one of accountability to shareholders." McManis, *supra* note 48, at 222.

the underlying conditions, which have permitted the abuses, which we have seen."[94]

On several occasions, Chairman Hills made clear that the SEC did not envision its role as an enforcer of criminal laws. So, while the SEC did not actively oppose the prohibition of foreign corrupt payments, the SEC eschewed enforcement responsibility. Chairman Hills testified in this regard:

> The Commission does not oppose direct prohibitions against these payments, but we have previously stated that as a matter of principle, we would prefer not to be involved even in the civil enforcement of such prohibitions. As a matter of long experience, it is our collective judgment that disclosure is a sufficient deterrent to the improper activities with which we are concerned.[95]

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94. *Foreign Corrupt Practices and Domestic and Foreign Inv. Disclosure, Hearings Before the Comm. on Banking, Hous. and Urban Affairs*, U.S. Senate, 95th Cong. 122 (1977) [hereinafter *Foreign Corrupt Practices Hearings*]. Chairman Hills went on to state that legislation following that proposed by the SEC would underscore the need for accurate books and records and would clarify the SEC's role in dealing with foreign corrupt payments. Chairman Hills also stated that the legislation would provide the Commission and private parties with the ability to reach the underlying causes of concealment of such payments:

> Enactment of legislation of this nature would demonstrate a strong and affirmative congressional endorsement of the need for accurate corporate records, effective internal control measures, and management candor in connection with the work of independent auditors. Such an endorsement would end any debate concerning the commission's proper role in the solution to the problem of questionable payments. Most importantly, the bill would furnish the Commission and perhaps private plaintiffs with potent new tools to employ against the underlying conditions, which permit corporate insiders to conceal from the investing public the manner in which corporate funds have been utilized.

Id.; *see also id.* at 139; Questionable or Illegal Corporate Payment Practices, Proposed Promotion of Reliability of Financial Information and Prevention of Concealment, 42 Fed. Reg. 4854 (Jan. 26, 1977).

95. *Foreign Payments Disclosure Hearings*, *supra* note 9, at 20, 23. As Commissioner Hills testified at another hearing:

> While on balance the Commission does not oppose the enactment of prohibitions of this nature, it would prefer not to be involved in civil enforcement of such prohibitions since they embody separate and distinct policies from those underlying the federal securities laws. The securities laws are designed primarily to insure disclosure to investors of all of the relevant facts concerning corporations, which seek to raise their capital from the public at large. The prohibitions...on the other hand would impose substantive regulation on a particular aspect of corporate behavior.

Foreign Corrupt Practices Hearings, *supra* note 94, at 125.

During an earlier colloquy with Senator William Proxmire concerning whether criminalization of books and records violations would assist the Commission,

Harold M. Williams, who succeeded Roderick Hills as SEC Chairman, had a very different view of the prohibition of overseas corrupt payments and the SEC's role in enforcing the prohibition. During his testimony concerning House bill H.R. 3815, and Senate bill S. 305, which made foreign corrupt payments criminal, Chairman Williams signaled this change in viewpoint when he stated:

> I have spent most of my life in industry. I might note that the objectives of H.R. 3815 are objectives I strongly support. My feeling is that they are a part of the basic morality of our society and the conduct that H.R. 3815 is designed to prescribe is conduct which is not supported in our society and tends to erode not only ethical standards but the free, competitive and effective market place and is conduct which is not needed or justifiable.[96]

With respect to the SEC's role in addressing violations, Chairman Williams observed that:

> Violations of this new prohibition [i.e., against foreign corrupt payments]—like any other provision of the federal securities laws—would be investigated by the Commission's staff and could be made the subject of civil proceedings to enjoin further misconduct. Similarly, where appropriate, the Commission would refer its files to the Justice Department for criminal prosecution.[97]

Chairman Williams also observed that Senate bill S. 305 not only imposed a prohibition against corrupt payments but took a broader approach that included prohibiting falsification of records or deceiving auditors. On behalf of the Commission, Chairman Williams endorsed this expanded approach:

> The Commission believes that, from the standpoint of investor protection, this broader legislation represents a more effective and meaningful approach to the problem of improper or illegal corporate payments. We do not, of course, oppose the enactment of the direct prohibition incorporate[d] [in] both H.R. 3815 and S. 305. The Commission stands ready to accept the expanded

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Chairman Hills remarked, "Whether or not what they have done [i.e., falsify corporate records] should constitute a crime, be prosecuted by the Department of Justice, is a matter that will not either aid or abet us." When Senator Proxmire pressed the point, Chairman Hill replied, "[I]f you were a behavioral scientist you might say that a man would be less likely to give evidence if it showed his actions were a crime, but that is not a concern of ours." *Abuses of Corp. Power Hearings*, *supra* note 48, at 33-34.

96. *Unlawful Payments Act Hearings*, *supra* note 90, at 196.

97. *Id.* at 196-97.

> mandate which enforcement of those prohibition would entail. The Commission does not believe, however, that prohibitions against bribery are the full answer. In our view, the long-term solution requires a fundamental strengthening of the record keeping, auditing, and internal control systems, which are the foundation of any modern multinational corporation. For these reasons, I urge the subcommittee to broaden its approach beyond direct prohibitions against foreign bribery.[98]

Chairman Williams' support of the criminal prohibition of overseas payments concurred with the position taken by the Carter Administration in support of the legislation. Speaking for the administration, Treasury-Secretary W. Michael Blumenthal unequivocally voiced the administration's support for the antibribery provisions in the House[99] and Senate bills.[100]

A central concern with regard to criminalization, for proponents and critics, was the extraterritorial effect of the antibribery prohibitions.[101] Indeed, the issue of extraterritoriality was raised in the earliest hearings on corrupt practices by U.S. corporations. For example, during the 1975 hearings concerning the activities of U.S. multinational corporations, the Deputy Legal Advisor of the U.S. State Department testified that:

> Although investors operating in foreign lands would be wise to

98. *Id.* at 197.

99. *See id.* at 175, 179.

100. *See Foreign Corrupt Practices Hearings, supra* note 94, at 67, 92. The Federal Deposit Insurance Corporation also supported criminalization. *See id.* at 89 (letter from Robert E. Barnett, Chairman of the F.D.I.C., to Sen. William Proxmire, dated Mar. 24, 1977).

101. *See, e.g., Foreign Payments Disclosure Hearings, supra* note 9, at 50-51 (statement of Commerce Secretary Richardson) ("[s]uccessful prosecution of offenses—and fair defense in relation to such prosecutions—would typically depend upon access to witnesses and information beyond the reach of U.S. judicial process. Other nations, rather than assisting in such prosecutions, might resist cooperation because of considerations of national preference or sovereignty. Other nations might be especially offended if we sought to apply criminal sanctions to foreign incorporated and/or foreign-managed subsidiaries of American corporations"); *Foreign Corrupt Practices Hearings, supra* note 94, at 70 (statement of Treasury-Secretary Blumental) ("turning to the central aspect of S. 305, the criminalization of corrupt payments made to foreign officials, as I said, we support it. At the same time, the Administration recognizes that great care must be taken with an approach which makes certain types of extraterritorial conduct subject to our country's laws"); *Unlawful Payment Act Hearings, supra* note 90, at 238 (statement of the Nat'l Ass'n of Mfrs.) ("a unilateral, criminalization approach such as proposed in H.R. 3815 would pose serious problems of extraterritorial enforcement, particularly regarding constitutional due process guarantees").

> avoid even the appearance of impropriety in those countries, we believe it would not be advisable for the United States to try to legislate the limits of permissible conduct by our firms abroad.
>
> It would be not only presumptuous but counter productive to seek to impose our specific standards in countries with differing histories and cultures. Moreover, enforcement of such legislation ... would involve surveillance of the activities of foreign officials as well as U.S. businessmen and would be widely resented abroad.
>
> Extraterritorial application of U.S. law—which is what such legislation would entail—has often been viewed by other governments as a sign of U.S. arrogance or even as interference in their territorial affairs. U.S. laws are normally based on territorial jurisdiction and, with rare exceptions, we believe that is sound policy.[102]

Congress had the benefit of a searching and thorough analysis of the implications of extraterritoriality by the Ad Hoc Committee of the Association of the Bar of the City of New York. In its report,[103] the committee observed:

> As a general proposition, States have been reluctant to extend the reach of their criminal law to acts done abroad. In part this reluctance stems from concepts of sovereignty and the territorial supremacy of States.
>
> Criminalization of the act of paying a bribe necessarily involves the characterization of the act of receiving it as a criminal act under United States law. Thus, inherent in criminalization is a reaching out by the United States to characterize acts done in a foreign country by foreign national as 'criminal.' The possible foreign

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102. *June 17th Statement*, *supra* note 9, at 24. Gerald L. Parsky, Assistant Secretary of the Treasury for International Affairs also stated this view:

> Any attempt to apply a U.S. criminal statute to acts consummated abroad would involve an extraterritorial application of U.S. law. While there are no absolute legal prohibitions on such extraterritorial application, attempts by the United States to apply our anti-trust and export control laws in a similar way have created substantial problems in the past. The application of our laws abroad often conflicts with foreign laws or practices and is looked upon as an unwarranted intrusion into the sovereignty of other states. The history of the extraterritorial application of our laws shows all too clearly that foreign nations may react strongly when we attempt to enforce our laws with respect to acts consummated in their territories. It can be expected that similar reactions would be forthcoming in the present instance.

Foreign Payments Disclosure Hearings, *supra* note 9, at 89.

103. NYC BAR REPORT, *supra* note 88.

> relations impact of this is such that the wisdom of criminalization should be carefully considered.[104]

The committee recognized Congress' broad jurisdiction over U.S. citizens abroad and noted that the proposed legislation would punish those who paid bribes but not the foreign officials who received them.[105] However, the committee also noted that the legislation would represent an exercise of jurisdiction over foreign corporations registered under the Securities Exchange Act of 1934 and foreign corporations owned or controlled by U.S. citizens. In the view of the ad hoc committee, "The validity under international law of these . . . proposed exercises of jurisdiction would depend on the occurrence of a substantial impact on the United States."[106]

The committee noted as well that the criminalization of acts committed outside the United States, involving foreign nationals, raised significant issues of fairness and due process. The chief concern in this connection was the unavailability of compulsory process over foreign witnesses, which might preclude a defendant from mounting a defense to a charge of foreign bribery:

> The position of the defendant before a United States court indicted for the crime of making a foreign payment would indeed be difficult. The existence of a foreign recipient of a payment is an essential element of the crime 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.[107]

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104. *Id.* at 5-6.

105. *Id.* at 6.

106. *Id.* The ad hoc committee further observed in this regard:

> Consistent with an approach that considers foreign interests, Congress has rarely used the expanded territorial jurisdiction in the area of criminal law. Where Congress has exercised this jurisdiction, the acts proscribed are usually acts committed within the United States and/or acts of United States nationals related to conduct taking place in and adversely affecting a foreign state.

Id. at 8.

107. *Id.* at 10. The ad hoc committee also suggested the risk of double jeopardy resulting in prosecutions both in the country in which the bribe was paid and the United States. *Id.* at 10-11. As examples of the difficulties encountered by U.S. regulatory agencies in serving process on foreign nationals, see *In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987); *Nahas v. Commodity Futures Trading Comm'n*, 738 F.2d 487 (D.C. Cir. 1984); *United States v. First Nat'l Bank of Chicago*, 699 F.2d 341 (7th Cir. 1981); *Fed. Trade Comm'n v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636

Finally, the committee warned that the extraterritorial reach of the proposed legislation would offend international comity.[107] Criminalization for foreign bribery would represent an usurpation of the authority and discretion of the foreign prosecutor as well as an assertion of dominance of U.S. law over that of the foreign sovereign in which the conduct occurred:

> The assertion of jurisdiction by the United States over behavior properly subject to the jurisdiction of a foreign country is unprecedented in the absence of significant policy concerns which outweigh the interests of any affected foreign State regarding such behavior. Such an assertion of jurisdiction by the United States over conduct in a foreign country . . . demeans the enforcement responsibility of the foreign State for such conduct, discredits the applicable foreign law and deprives the foreign States of the often critical determination as to whether, in the light of relevant legal and political considerations, to initiate prosecution for a particular offense.
>
> To the extent that any United States criminal law permits

F.2d 1300 (D.C. Cir. 1980); *In re Grand Jury Subpoena* (First Nat'l City Bank), 396 F.2d 897 (2d Cir. 1968); *United States v. Chase Manhattan Bank*, 590 F. Supp. 1160 (S.D.N.Y. 1984); *In re Grand Jury 81-2*, 550 F. Supp. 24 (W.D. Mich. 1982); *FCPA—Oversight Hearings*, *supra* note 11, at 195, 204 (statement of Jonathan C. Rose, Asst. Att'y Gen. of the Dep't of Justice, Office of Legal Pol'y). To address these jurisdictional problems, U.S. regulators entered into cooperative agreements with their overseas counterparts to facilitate sharing of information. *See* United States v. Davis, 767 F.2d 1025 (2d Cir. 1985); Ellen R. Levin, *The Conflict Between United States Securities Laws on Insider Trading and Swiss Bank Secrecy Laws*, 7 J. INT'L L. & BUS. 318, 332-46 (1985); Paul G. Mahoney, *Securities Regulation by Enforcement: An International Perspective*, 7 YALE J. REG. 305, 317-18 (1990); Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. REG. 149, 216 (1990); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry Into the Vitality of a 'Choice-of-Law' Approach*, 70 TEX. L. REV. 1799, 1826 (1992).

108. The ad hoc committee, citing *Black's Law Dictionary*, defined "comity" as "the body of rules which States observe toward one another from courtesy or mutual convenience, although they do not form part of international law." BLACK'S LAW DICTIONARY 12 (4th ed. 1968). The ad hoc committee commented further:

> Such rules reflect 'the recognition which one nation allows within its territory to the legislative, executive, or judicial 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.' Enactment of criminalization legislation goes beyond the traditional application of the principles of comity to and by the United States.

NYC BAR REPORT, *supra* note 88, at 12 (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)).

> prosecution of foreign companies in the United States for bribery in their own or a third country, special 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 foreign company, or both.[109]

In the end, Congress concluded that criminalization was a more effective deterrent than simply requiring disclosure. As the report on the House bill explained:

> The committee determined that disclosure can never be an effective deterrent because the anticipated benefit of making a bribe, such as winning a multimillion dollar contract, generally exceeds the adverse effect, if any, of disclosing 1 year later a lump sum figure without names, amounts or even countries. Criminalization, on the other hand, has proven an effective deterrent. Although a vast number of questionable corporate payments have been disclosed, subsequent management changes have been attendant only to disclosure of domestic bribery. The reason is obvious: domestic bribes are clearly illegal whereas foreign bribes are not.[110]

The Senate Committee on Banking, Housing and Urban Affairs reached a similar conclusion in reporting out its bill.[111] Nevertheless, Congress was plainly aware that the exercise of extraterritorial jurisdiction remained subject to a requirement of reasonableness.[112]

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109. NYC BAR REPORT, *supra* note 88, at 12-13.

110. H. REP. NO. 95-640, at 6 (1977).

111. S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4107 ("[t]he committee considered the matter [of criminalization] extensively in the 94th Congress and concluded that the criminalization approach was preferred over a disclosure approach").

112. In addition to the issue of *vel non*, whether a basis of extraterritorial prescriptive jurisdiction exists, there is the question of whether the exercise of jurisdiction is reasonable in light of the interests of other States, the character of the activity and its importance to the regulating State, and the links between the actors whose conduct is regulated and the regulating State. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2) (1986) (listing factors for determining the reasonableness of the exercise of jurisdiction). Thus, it was observed that "[t]he realization that the effects approach could potentially lead to worldwide jurisdiction, coupled with the fact that jurisdiction has often not been exerted over conduct within the United States or involving United States nationals, suggests that states, in effect, temper the power of territoriality and citizenship with other considerations." Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1277 (1990). Courts consider the reasonableness of exercising jurisdiction in a particular setting when determining whether Congress intended a law to have extraterritorial effect. *See, e.g.*, United States v. Javino, 960 F.2d 1137, 1142-43 (2d Cir. 1992) (concluding that

Accordingly, in establishing the classes of persons and entities to whom the various provisions of the FCPA would apply (i.e., issuers and domestic concerns), Congress attempted to accommodate the concerns expressed with regard to the international law implications of the FCPA.

B. Prescriptive Jurisdiction over "Issuers"

The FCPA's accounting and control provisions and the anti-bribery provisions apply to "issuers" with "a class of securities registered pursuant to Section [78(l) of the Exchange Act]" or "which [are] required to file reports pursuant to Section [78(d) of the Exchange Act]."[113] Under the Exchange Act, "any person who issues or proposes to issue any security" is an issuer.[114] Both individuals and entities are included within the Exchange Act's definition of "issuer."[115]

The FCPA does not distinguish between domestic and foreign persons who are issuers. Foreign firms may register stock under the Exchange Act. Indeed, a foreign entity may be subject to the

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the requirements of the National Firearms Act did not apply to manufacturers outside the United States); United States v. Felix-Gutierrez, 940 F.2d 1200, 1204-05 (9th Cir. 1991) (holding that the crime of "accessory after the fact" gives rise to extraterritorial jurisdiction to the same extent as the underlying offense); United States v. Wright-Barker, 784 F.2d 161, 168 (3d Cir. 1986) (holding that extraterritorial jurisdiction over a conspiracy to import twenty-three tons of marijuana was reasonable). In this connection, RESTATEMENT (THIRD) OF FOREIGN RELATIONS section 403(1) provides that "[e]ven when one of the bases of jurisdiction ... is present, a State may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another State when the exercise of such jurisdiction is unreasonable." *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS pt. IV, intro. note. As Learned Hand observed in his opinion in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945), "[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences in the United States." Thus, comment a to RESTATEMENT (THIRD) OF FOREIGN RELATIONS section 403 explains:

> There is a wide international consensus that the links of territoriality or nationality, § 402, while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction. Legislatures and administrative agencies, in the United States and in other states, have generally refrained from exercising jurisdiction where it would be unreasonable to do so, and courts have usually interpreted general language in a statute as not intended to exercise or authorize the exercise of jurisdiction in circumstances where application of the statute would be unreasonable.

113. 15 U.S.C. §§ 78m(b)(2) and 78dd-1(a) (1998).

114. 15 U.S.C. § 78c(a)(8).

115. 15 U.S.C. § 78c(a)(9).

Exchange Act's registration requirements even though its securities are not traded in the United States, so long as certain conditions are met.[116]

Commonly, issuers of foreign securities seek access to U.S. capital markets through the sale of American Depository Receipts ("ADR") thereby avoiding the expense and delay attending registration of their securities.[117] Having its origins in the "substitute

116. A foreign entity that has $5 million in assets at the end of its most recent fiscal year is required to register its securities if the class of securities is held by five hundred or more persons throughout the world, including at least three hundred shareholders in the United States. *See* 15 U.S.C. § 78l(g); 17 C.F.R. §§ 240.12g-1, 240.12g3-2(a) (1998). However, a foreign issuer can petition the SEC for exemption from this requirement of registration. *See* 17 C.F.R. § 240.12g3-2(a). As one commentator noted:

> There has been a dramatic increase in the number of foreign companies that have entered the U.S. capital markets in recent months. In the last year and a half, more than 140 foreign issuers from twenty-seven countries have entered the U.S. public market for the first time—companies like Daimler-Benz, Shanghai Petrochemical, Enterprise Oil and Alcatel Alsthom are just a few of the major companies that have recently entered the U.S. market. Today, more than 550 foreign companies are reporting, for one reason or another, to the Securities and Exchange Commission in Washington about their on-going activities.

James R. Silkenat, *Overview of U.S. Securities Markets and Foreign Issuers*, 17 FORDHAM INT'L L.J. 54, 55 (1994).

117. *See* Joseph Velli, *American Depository Receipts: An Overview*, 17 FORDHAM INT'L L.J. S38 (1994). Trading in ADRs and other foreign securities is very significant in U.S. markets. For example, it was reported that "[f]rom January to August 1995, ADRs accounted for nine percent of volume on the New York Stock Exchange (NYSE), where all foreign stocks accounted for 10.7 percent of volume. Of the 220 companies now listed on the exchange, 161 are in ADR format." GLOBAL INV. MAG., Dec. 1995, at 28. In May 1996, the Securities Industry Association reported that U.S. investors purchased $51.2 billion in foreign equity securities in 1995. *U.S. Bought $98 Billion in Foreign Securities in '95*, REUTERS FIN. SERVICE, May 8, 1996. According to a 1996 report commissioned by Citibank, approximately one thousand depository receipt programs were established between 1991 and 1996, and U.S. portfolio managers indicated their intent to increase their holdings of ADRs. *Growth Seen in U.S. Foreign Investment*, FIN. TIMES (London), Sept. 5, 1996, at 34. For a discussion of the globalization of the securities markets and the attendant U.S. regulatory issues, see Brandon Becker, *A Regulatory Perspective on the Global Securities Market*, 1987 COLUM. BUS. L. REV. 309 (1987); James R. Doty, *The Role of the Securities and Exchange Commission in an International Marketplace*, 60 FORDHAM L. REV. 77 (1992); Jay D. Hansen, *Other International Issues: London Calling? A Comparison of London and U.S. Stock Exchange Listing Requirements for Foreign Equity Securities*, 6 DUKE J. COMP. & INTL. L. 197 (1995); Michael V. Hurley, *International Debt and Equity Markets: U.S. Participation in the Globalization Trend*, 8 EMORY INT'L REV. 701 (1994); Bevis Longstreth, *A Look at the SEC's Adaptation to Global Market Pressures*, 33 COLUM. J. TRANSNAT'L L. 319 (1995).

certificates" developed in the 1920s to facilitate trading in foreign securities,[118] ADR certificates are issued by a depository in the United States (i.e., a bank or trust company) representing an ownership interest in securities deposited with the financial institution and held overseas.[119] ADRs offer the U.S. investor the advantage of buying a foreign security denominated in dollars, that pays a dividend in dollars and can be purchased from a U.S. broker through a U.S. clearance and settlement system.[120]

The foreign securities underlying an ADR may be either debt or equity instruments.[121] Once established, an ADR trades like any other security, either over-the-counter or on an established exchange.[122] ADRs offered to the public in this fashion require SEC registration.[123]

Thus, foreign issuers whose securities are sold in the United States in the form of ADRs listed on a U. S. exchange are subject to the requirements of the FCPA. This was the jurisdictional basis of the SEC's action against Montedison, S.p.A.

In *Montedison* the SEC brought an action under the FCPA's accounting provisions against an Italian corporation headquartered in

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118. LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 246 (1983).

119. *See* Mark A. Saunders, *American Depository Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 FORDHAM INT'L L.J. 48, 52 (1994); Velli, *supra* note 117, at S39.

120. James L. Cochrane, *Are U.S. Regulatory Requirements for Foreign Firms Appropriate?*, 17 FORDHAM INT'L L.J. S58, S60 (1994); Hansen, *supra* note 117, at 208-09.

121. Saunders, *supra* note 119, at 50.

122. Velli, *supra*, note 117, at S39. An ADR is established when foreign securities are purchased on their home market and deposited overseas with a U.S. depository, which issues the ADR in the United States. When an investor wishes to sell an ADR, the ADR can be sold to another purchaser or canceled. Cancellation of an ADR involves re-selling the underlying securities in their home market. *Id.*

123. Section 30(b) of the Exchange Act, 15 U.S.C. section 78dd(b), and SEC Rule 12g3-2(a) exempt from registration persons who transact "a business in securities without the jurisdiction of the United States . . . ." Thus, ADRs are exempt from the registration requirements of the Exchange Act. However, if an ADR is traded on a national exchange, the registration requirements apply and the company whose securities comprise the ADR is an "issuer" pursuant to 15 U.S.C. section 78l(a) and subject to the accounting and controls requirements of the FCPA. *See* Doty, *supra* note 117, at 87-88; Merrit B. Fox, *Securities Disclosure in a Globalizing Market, Who Should Regulate Whom*, 95 MICH. L. REV. 2498, 2608-17 (1997); Hansen, *supra* note 117, at 205-06; Saunders, *supra* note 119, at 66; Velli, *supra* note 117, at S44; Roberta S. Karmel, *New Initiatives for Foreign Issuers*, N.Y.L.J., Dec. 16, 1993, at 3; *see also* Selzer v. Bank of Bermuda, 385 F. Supp. 415, 418 (S.D.N.Y. 1974).

Milan, Italy.[124] The SEC contended, inter alia, that Montedison materially misstated its financial condition and results of operations in reports filed with the SEC between 1988 and 1993.[125]

Specifically, the SEC alleged that Montedison's filings misrepresented the true nature of two transactions. In the first, which the SEC characterized as the "Exilar loan," payments were allegedly made by Montedison or its agents and not documented in Montedison's records.[126] These payments, which took the form of deposits of bearer bonds by Montedison subsidiaries in Swiss accounts for the benefit of unnamed third parties, were effected on oral instructions without formal procedures and authorizations.[127] In order to account for these payments, a fictitious account receivable of approximately $272 million (435 billion lire) was created and then "loaned" to a wholly owned Curacao corporation, Financing and Investments NV, which in turn "loaned" the same amount to a second company, Elixar International S.A., a Virgin Islands company.[128] This "loan" was subsequently determined to be "uncollectible" and a write-down in the amount of $272 million (435 billion lire) was attributed to 1992.[129]

In the second transaction, which the SEC described as the "Enimont Affair," Montedison entered into a joint venture with the Italian State energy agency, ENI.[130] Under the joint venture agreement, Montedison and ENI each held forty percent ownership and the remaining twenty percent ownership was offered to the public.[131] Montedison unsuccessfully attempted to gain control of the joint venture through the purchase of eleven percent ownership through nominees, which resulted in a Milan Court ordering Montedison's interest be put in the custody of a third party.[132]

At the same time, ENI and Montedison entered into a "cowboy pact" arrangement that permitted ENI to set the price and conditions under which it would buy Montedison's forty percent interest.

124. SEC v. Montedison, S.p.A., Civil Action No. 1:96CV02631 (H.H.G.) (D.D.C. Nov. 21, 1996).
125. SEC v. Montedison, S.p.A., at Compl. ¶ 1.
126. *Id.* ¶ 11.
127. *Id.*
128. *Id.* ¶ 12.
129. *Id.* ¶ 13.
130. *Id.* ¶ 14.
131. *Id.*
132. *Id.*

Montedison was then obliged to either purchase ENI's forty percent interest on that basis or sell its interest to ENI.[133] The terms set by ENI virtually ensured that electing to purchase ENI's interest would bankrupt Montedison.[134]

Nevertheless, according to the SEC, Montedison persisted in its efforts to gain control of the ENIMONT joint venture by securing political support to either change the terms of the "cowboy pact" or overturn the decision concerning custody of Montedison's forty percent interest.[135] The complaint alleged that "Montedison determined that to achieve these ends, the company would need to pay extensive bribes."[136] In order to fund this bribery scheme, Montedison entered into real estate purchases and sales with a developer in Rome at inflated prices.[137] In this way, hundreds of millions of dollars were transferred to the developer who used the money to make bribes on Montedison's behalf to Italian officials and others.[138] Montedison was again unsuccessful in gaining control of ENIMONT and eventually sold its interest to ENI.[139]

As a result of these transactions, Montedison overstated the value of the properties purchased through the developer.[140] Montedison eventually wrote down the value of these properties by approximately $126,250,000 (202 billion lire) in its Form 20-F filing for the fiscal year ending December 31, 1993.[141] Montedison characterized the write down as a "prior period adjustment" without specifying when the "prior period" was.[142]

In addition to constituting a scheme to defraud in violation of section 10(b) of the Exchange Act[143] and Commission Rule 10b-5,[144]

133. *Id.* ¶ 15.
134. *Id.*
135. *Id.* ¶ 16.
136. *Id.*
137. *Id.*
138. *Id.* As an example of such a transfer, the SEC alleged that in November and December 1990, a wholly owned subsidiary of Montedison overpaid the developer approximately $95 million (153 billion lire) and agreed to pay an additional $123 million (197 billion lire) for properties owned by or connected to various Italian politicians. The developer paid a "fee" of approximately $106 million (170 billion lire) to a third party who acted as an intermediary with the politicians. *Id.* at ¶ 17.
139. *Id.* ¶ 18.
140. *Id.* ¶ 19.
141. *Id.*
142. *Id.*
143. 15 U.S.C. § 78j(b) (1998).

the SEC charged that Montedison created and maintained false books and records[145] and failed to devise and maintain a system of internal controls with respect to the disbursement of corporate funds.[146]

Jurisdiction over Montedison was grounded on the trading of Montedison ADRs on the New York Stock Exchange (NYSE).[147] The SEC's complaint noted that between January 1993 and the filing of the complaint, one million ADRs, each representing ten shares of Montedison common stock, were traded each month on the NYSE.[148] The complaint also noted that as of May 31, 1995, U.S. residents owned the equivalent of 6.1 percent of Montedison's common stock.[149] Thus, notwithstanding the fact that all of the conduct constituting the violations occurred in Italy, the United States asserted jurisdiction over Montedison as an issuer that offered registered securities to U.S. investors and that filed periodic reports with the SEC.

This extraterritorial assertion of prescriptive jurisdiction[150]

144. 17 C.F.R. § 240.10b-5 (1998).

145. 15 U.S.C. § 78m(b)(2)(A).

146. 15 U.S.C. § 78m(b)(2)(B). The SEC also charged that as a result of the EXILAR and ENIMONT transactions, Montedison filed false annual reports on Form 20-F for the years 1989-1992 in violation of section 13(a) of the Exchange Act, 15 U.S.C. section 78m(a), and Commission Rules 12b-20 and 13a-1, 17 C.F.R. sections 240.12b-20 and 240.13a-1.

147. SEC v. Montedison, S.p.A., Civil Action No. 1:96CV02631 (H.H.G.) (D.D.C. Nov. 21, 1996), Compl. ¶ 7. A similar commercial relationship with the United States formed the basis of extraterritorial jurisdiction under the money laundering statute, 18 U.S.C. sections 1956-1957, in *United States v. Banque Leu (Luxembourg), S.A.*, Cr. No. 93-0607 (N.D. Cal. 1993), in which:

> A Luxembourg bank with no offices in the United States was charged and convicted of money laundering in the United States on the basis of clearing U.S. negotiable instruments drawn on a U.S. bank, but deposited by non-U.S. citizens in Luxembourg. In other words, acceptance of U.S. dollar negotiable instruments by a bank anywhere in the world outside of the United States renders the bank susceptible to U.S. criminal jurisdiction in the money laundering area because all such instruments most necessarily clear through the United States.

Kirk W. Monroe, *Surveying the Solution: The Extraterritorial Reach of the United States*, 14 DICK. J. INT'L L. 505, 521 (1996).

148. SEC v. Montedison, S.p.A., at Compl. ¶¶ 7, 8.

149. *Id.* at ¶ 8.

150. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS divides jurisdiction into three categories:

> (a) jurisdiction to prescribe, i.e., the authority of a state to make its law applicable to persons or activities; (b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and (c) jurisdiction to enforce, i.e., the authority of a state to use the

appears grounded on the theory that Montedison's conduct, although wholly outside the territory of the United States, had a substantial effect within the United States (i.e., the filing of inaccurate reports with the SEC and the dissemination of false or misleading information to U.S. investors).[151] This "effects doctrine"[152] has served

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resources of government to induce or compel compliance with its law.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS pt. IV, intro. note (1986). Courts view the Restatement as "an illuminating outline of central principles of international law." United States v. Nippon Paper Indus. Co., 109 F.3d 1, 11 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). As Mr. Justice Scalia recently observed (albeit in dissent) with regard to Congress' jurisdiction to prescribe:

> There is... a type of 'jurisdiction' relevant to determining the extraterritorial reach of a statute; it is known as 'legislative jurisdiction'... or 'jurisdiction to prescribe'.... This refers to the authority of a State to make its law applicable to persons or activities, and is quite a separate matter from 'jurisdiction to adjudicate'.... Congress has broad power under Article I, § 8, cl. 3, to regulate commerce with foreign nations, and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected.

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813-14 (1993) (J. Scalia dissenting); *see* Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("[b]oth parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States").

151. Under the Restatement view, among the enumerated bases for the State's jurisdiction to prescribe is "conduct outside its territory that has or is intended to have substantial effect within its territory...." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402.

152. See, for example, *Strassheim v. Daly*, 221 U.S. 280, 285 (1911) in which Mr. Justice Holmes stated that, "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."

See also the opinion of Mr. Chief Justice Taft in *Ford v. United States*, 273 U.S. 593, 623 (1927), stating that:

> The principle that a man who outside of a country willfully puts in motion a force to take effect in it, is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application.

Assertion of jurisdiction over extraterritorial conduct having effects in the regulating State is also referred to as "objective territoriality." *See* Blakesley, *supra* note 43, at 1123 ("American law has traditionally allowed the assertion of jurisdiction over offenses when the conduct giving rise to the offense has occurred extra-territorially, as long as the harmful effect(s) or result(s) take place within the jurisdiction's territorial boundaries (objective territoriality)"); Donald I. Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 37 (1974) ("Suffice it to say, however, that it is no longer the place of the act that is key. When the act or agreement can be shown to have a direct effect on the markets

as the basis for the assertion of extraterritorial jurisdiction in other securities law cases,[153] although the doctrine's applicability to

within the United States, our law should reach it—and this is especially so where the act was clearly intended to affect our market. Of course, under our traditional jurisprudence, it is necessary to have personal jurisdiction over the party committing the act. This normally presents no problem with respect to the subsidiary of an American corporation, let alone the corporation itself. It may, of course, pose a problem where the potential defendants are foreign corporations which do no business in the United States"); *see also* Podgor, *supra* note 43, at 342. Professor Perkins has referred to this basis of jurisdiction as the "injured forum theory." Perkins, *supra* note 41, at 1155.

153. *See* Itoba Ltd. v. Lep Group PLC, 54 F.3d 118, 124 (2d Cir. 1995); Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-62 (2d Cir. 1989), *amended by*, 890 F.2d 569 (2d Cir. 1989); Bersch v. Drexel Firestone Inc., 519 F.2d 974, 989 (2d Cir. 1975); SEC v. United Fin. Group, 474 F.2d 354, 356-57 (9th Cir. 1973); Roth v. Fund of Funds, Ltd., 405 F.2d 421, 422 (2d Cir. 1968); Schoenbaum v. First Brook, 405 F.2d 200, 208 (2d Cir. 1968), *modified as to liability of some defendants*, 405 F.2d 215 (2d Cir. 1968). The U.S. Court of Appeals for the Second Circuit has had the greatest impact on the development of the law with respect to the extraterritorial application of U.S. securities law. *See* Russell J. Weintraub, *supra* note 107, at 1812 ("The decisions of the Second Circuit because of its location at the financial center of the country, have had the greatest impact on the development of the law"); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (The Second Circuit Court of Appeals is regarded as the "Mother Court" of securities law). However, other circuits also have grounded extraterritorial application of the securities law on an effects analysis. *See, e.g.*, Des Brisay v. Goldfield Corp., 549 F.2d 133, 135-36 (9th Cir. 1977); SEC v. United Fin. Group, 474 F.2d 354, 356-57 (9th Cir. 1973); Selas of Am. (Nederland) N.V. v. Selas Corp. of Am., 365 F. Supp. 1382, 1386 (E.D. Pa. 1973). Additionally, extraterritoriality based on effects in the United States has been the long rule with respect to the antitrust laws. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. at 796 ("it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) ("Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"); *see also* Michael Goldsmith & Vicki Kinne, *Civil RICO, Foreign Defendants, and 'ET'*, 73 MINN. L. REV. 1023, 1028 (1989) ("[A]bsent extraterritorial application of the antitrust laws, United States producers and consumers could be victimized by foreign anti-competitive activity"). Effects-based liability extends to criminal violations of the Sherman Act, as well. United States v. Nippon Paper Indus., Co., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). *See generally* Stephen Boatwright, *Reversing the Trend of Extraterritorial Subject Matter Jurisdiction over Bad Conduct Under Rule 106-5 of the Securities Exchange Act of 1934*, 23 TEX. INT'L L.J. 487 (1988); Russell E. Brooks, *The Extraterritorial Reach of the Securities Exchange Act*, 24 SEC. REG. L.J. 306, 310-13 (1996); Donald H.J. Hermann, *Extraterritorial Criminal Jurisdiction in Securities Laws Regulation*, 16 CUMBERLAND L. REV. 207, 213-22 (1988); John D. Kelly, *Let There Be Fraud Abroad: A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 L. & POL'Y INT'L BUS. 477 (1997); Louis Loss, *Extra-Territoriality in the Federal Securities Code*, 20 HARV. INT'L L.J. 305, 313-19 (1979); Turley, *supra*

instances of solely economic effect within U.S. territory has been questioned.[154] The effects doctrine supports the assertion of jurisdiction over non-U.S. citizens in criminal prosecutions as well.[155]

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note 45, at 613-17; Note, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553, 556-63 (1976). In contrast, where a cognizable effect in the United States was not shown or where the object of the securities law violation was a security traded on a foreign exchange, the U.S. court would not have jurisdiction. *See, e.g.*, MCG, Inc. v. Great W. Energy Corp., 896 F.2d 170, 174 (5th Cir. 1990); Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 31-33 (D.C. Cir. 1987); Butte Mining PLC v. Smith, 876 F. Supp. 1153, 1163 (D. Mont. 1995).

154. For example, the Reporter for the American Law Institute noted with regard to limitations on the jurisdiction to prescribe that "[s]ome states, particularly the United Kingdom, have questioned various applications of United States laws as 'exorbitant.'... [I]n particular, some states have questioned the lawfulness of applying the 'effects doctrine' ... to economic effects. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403, rep. note 1 (1986); *see also* Weintraub, *supra* note 107, at 1807 ("[i]t is the 'effects' basis for jurisdiction to prescribe ... that creates the most problems and controversy, particularly when asserted to apply United States antitrust or securities law to activities abroad"). See for example, *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), in which the governments of Australia, Canada, Northern Ireland, South Africa and the United Kingdom appeared as amici curie questioning the jurisdiction of the U.S. district court.

155. *See, e.g.*, Ford v. United States, 273 U.S. 593, 621-22 (1927) (conspiracy to import liquor into the United States); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 9 (1st Cir. 1997)(conspiracy among Japanese facsimile paper manufacturers in Japan to fix prices in the United States); *In re* Grand Jury Subpoena (Marc Rich & Co, A.G), 707 F.2d 663, 666 (2d Cir. 1983) (Alleged conspiracy by a Swiss corporation to commit tax fraud in Switzerland could be prosecuted in the United States); Rivard v. United States, 375 F.2d 882, 885-86 (5th Cir. 1967) (Canadian nationals conspired in Canada to smuggle heroin into the United States); United States v. Gilboe, 684 F.2d 235, 238 (2d Cir. 1982) (telephone conversations between Hong Kong and New York and the transfer of funds from Hong Kong to the Bahamas through New York, all in furtherance of a wire fraud scheme, was sufficient to establish U.S. jurisdiction over the defendant who was a citizen of Norway residing in Hong Kong); United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1968) (false statement by foreign citizen on U.S. visa application); *see also* Strassheim v. Daily, 221 U.S. at 284-85 (defendant engaged in a scheme in Illinois to defraud the state of Michigan). U.S. citizens also have been prosecuted for crimes in the United States based on acts outside U.S. territory that had an effect in the United States. *See, e.g.*, United States v. Bowman, 260 U.S. 94, 98 (1922) (conspiracy to defraud a shipping company owned by the United States by mailing false claims for fuel on the high seas and in Rio de Janeiro); United States v. Goldberg, 830 F.2d 459, 463-64 (3rd Cir. 1987) (defendant, while in prison in the United States, caused fraudulently obtained wire transfers of funds to be made from Canada to the Bahamas); Stegemen v. United States, 425 F.2d 984, 986 (9th Cir. 1970) (concealment of debtor's assets in Canada); United States v. Braverman, 376 F.2d 249, 251 (2d Cir. 1967) (defendant cashed forged money order in Rio de Janeiro that was drawn on a Brooklyn bank); Londos v. United States, 240 F.2d 1 (5th Cir. 1957) (defendants, acting solely in Mexico, caused the transportation of worthless securities into the United States); United States v. Layton, 509 F. Supp. 212 (N.D. Cal. 1981) (conspiracy and aiding and abetting the murder of a U.S. congressman in Jonestown, Guyana). Congress

Indeed, Congress authorized this "jurisdiction to prescribe" in enacting a variety of criminal statutes.[156]

In enacting the FCPA, Congress attempted to remedy the domestic effects of overseas bribery. During its consideration of legislation relating to foreign corrupt practices, Congress was confronted with evidence that U.S. interests were affected by the corrupt activities of U.S. companies overseas. For example, in reporting on S.305 (the Senate version of the FCPA), the Committee on Banking, Housing and Urban Development stated:

> Recent investigations by the SEC have revealed corrupt foreign payments by over 300 companies involving hundreds of millions of dollars. These revelations have had severe adverse effects. Foreign governments friendly to the United States in Japan, Italy and the Netherlands have come under intense pressure from their own people. The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient function of our capital markets has been hampered.[157]

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has extended U.S. territorial jurisdiction to crimes committed on the high seas as well as other geographical areas not under the jurisdiction of another government. For example, in *Jones v. United States*, 137 U.S. 202 (1890), the U.S. Supreme Court upheld the jurisdiction of the U.S. district court, under the Guano Islands Act of August 18, 1856, over a murder that occurred on the uninhabited island of Navassa in the Caribbean Sea.

156. In addition to the Sherman Act, 15 U.S.C. § 1 (1999), see, for example, Violence at International Airports, 18 U.S.C. § 37 (1999); Animal Enterprise Protection Act, 18 U.S.C. § 43 (1999); Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175 (1999); Conspiracy, 18 U.S.C. § 371 (1999); Solicitation to Commit Crime, 18 U.S.C. § 373 (1999); Counterfeiting Outside the United States, 18 U.S.C. § 470 (1999); Smuggling Goods into Foreign Countries 18 U.S.C. § 546 (1999); Espionage, 18 U.S.C. § 793 (1999); Interstate Communication of Demands for Ransom, 18 U.S.C. § 875 (1999); Mailing a Threatening Communication from a Foreign Country, 18 U.S.C. § 877 (1999); Threats Against Foreign Officials, 18 U.S.C. § 878 (1999); Unlicensed Transport of Firearms, 18 U.S.C. § 922 (1999); Foreign Murder of U.S. Nationals, 18 U.S.C. § 1119 (1999); Hostage Taking, 18 U.S.C. § 1203 (1999); International Parental Kidnapping, 18 U.S.C. § 1204 (1999); Piracy, 18 U.S.C. § 1651 (1999); Assassination of the President and Presidential Staff, 18 U.S.C. § 1751 (1999); Economic Espionage Act, 18 U.S.C. § 1831 (1999); Travel Act, 18 U.S.C. § 1952 (1999); Money Laundering, 19 U.S.C. § 1956 (1999); Racketeering, 18 U.S.C. § 1961 (1999); Destruction of Vessels, 19 U.S.C. § 2271 (1999); Transportation of Stolen Property, 18 U.S.C. § 2312 (1999); Terrorism, 18 U.S.C. § 2331 (1999); Inciting to Rebellion, 18 U.S.C. § 2383 (1999); Trafficking in Controlled Substances, 21 U.S.C. § 841 (1999); Arms Export Control Act, 22 U.S.C. § 2778 (1999); and Trading with the Enemy Act, 50 U.S.C. § 1702, app. § 3 (1999).

157. S. REP. NO. 95-114, at 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101. The report of the Committee on Interstate and Foreign Commerce concerning H.R.

In view of the significant U.S. interests at stake, the exercise of Congressional authority to regulate commerce outside the territorial United States was clearly warranted.[158] Likewise, although there is a presumption that absent a clear intent otherwise, laws have effect only within the territory of the United States,[159] Congressional intent to give the FCPA extraterritorial effect is explicit,[160] and for that

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3815 (the House version of the FCPA) contained similar observations:

> Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American free enterprises exert a corrupting influence on the political processes of their nations. For example, in 1976, the Lockheed scandal shook the government of Japan to its political foundation and gave opponents of close ties between the United States and Japan an effective weapon with which to drive a wedge between the two nations. In another instance, Prince Bernhardt of the Netherlands was forced to resign from his official position as a result of an inquiry into allegations that he received $1 million in pay-offs from Lockheed. In Italy, alleged payments by Lockheed, Exxon, Mobil Oil, and other corporations to officials of the Italian Government eroded public support for that government and jeopardized U.S. foreign policy, not only with respect to Italy and the Mediterranean area, but with respect to the entire NATO alliance as well.

H. REP. 95-640, at 5 (1977).

158. *See* Sidney G. Wigfall, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Second Circuit's Extraterritorial Application of the Anti-Fraud Provisions of the 1934 Exchange Act and Congressional Intent*, 5 INT'L L. REV. 233, 249-50 (1994).

159. Thus, the Supreme Court observed:

> It is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.... [W]e assume that Congress legislates against the backdrop of the presumption against extra-territoriality. Therefore, unless there is the affirmative intention of Congress clearly expressed,... we must presume it is primarily concerned with domestic conditions.

Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citations and internal quotations omitted); *accord* Sale v. Haitian Ctrs. Counsel, Inc., 113 S. Ct. 2549, 2567 (1993). Congress also legislates against the backdrop of due process, and accordingly, it is necessary to determine both that Congress intended to exercise extraterritorial prescriptive jurisdiction and was permitted to do so under the due process clause. *See American Adjudication of Transnational Securities Fraud*, *supra* note 153, at 554; John W. Curtis, *The Extraterritorial Application of the Federal Securities Code*, 9 CONN. L. REV. 67, 71-72 (1976).

160. In this regard, it was observed that "[w]here Congress explicitly enacts a statute with the intent to control conduct occurring outside it borders, the decision to focus on international activity is clear. In the white-collar area, several criminal

reason, the FCPA has been described as sui generis.[161]

Commendably, in the *Montedison* case, the SEC limited its enforcement action to the accounting and controls provisions of the FCPA rather than seeking to impose liability under the anti-bribery provisions as well. The SEC did so in recognition that the alleged corrupt payments that resulted in the accounting and controls violations were purely internal to Italy.[162] By doing so, the SEC avoided an assertion of extraterritorial jurisdiction that surely would have been viewed as "unreasonable" under international law, since the center of gravity of the conduct occurred in Italy.[163]

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statues fall within this realm. Perhaps the most noteworthy is the Foreign Corrupt Practices Act." Podgor, *supra* note 43, at 329.

161. The FCPA has been described as sui generis in that the FCPA is "a domestic criminal law that applies extra-territorially to U.S. citizens and companies to prohibit bribery of foreign government officials in a foreign country." DONALD ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 1-2 (1995).

162. *See* INT'L SEC. REGULATION REP., Apr. 10, 1997 ("Because the payments were intra-national, they did not violate the FCPA [anti-bribery provisions], an SEC attorney explains, but that did not shield it from FCPA's bookkeeping obligations when filing U.S. regulatory reports."); John F.X. Pelso, *SEC Rejuvenates Foreign Corrupt Practices Act*, N.Y.L.J., May 21, 1997, at 2 ("Because the purported illicit payments were made in Montedison's home country and did not involve the mails or any instrumentality of interstate commerce, they did not violate the FCPA antibribery provisions. However, the alleged corresponding falsification of the company's books and records, as well as Montedison's failure to have adequate internal accounting controls to prevent such conduct, allegedly violated the FCPA. The Montedison action, which is still pending, reportedly represents the first time that the Commission has brought an FCPA enforcement action where the issuer is a foreign company and all the alleged misconduct occurred outside of the United States").

163. It is presumed that in enacting legislation, Congress acted within the bounds of "customary international-law limits on jurisdiction to prescribe." *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993). Thus, as Mr. Chief Justice Marshall cautioned, "An act of Congress ought never be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." Murray v. Schooner Charming Betsy, 6 U.S. 64, 81 (2 Cranch 1804). As the Restatement notes:

> International law has long recognized limitations on the authority of states to exercise jurisdiction to prescribe in circumstances affecting the interests of other states. In the past, the jurisdiction of a state to make its law applicable in a transactional context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. In principle, it was accepted that a state had jurisdiction to exercise its authority within its territory and with respect to its nationals abroad.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS, pt. IV, ch. 1, intro. note (1986).

However, largely as a result of the hostility engendered by some countries' attempts to construe jurisdictional concepts of territoriality and nationality broadly

(primarily the United States), the assertion of extraterritorial prescriptive jurisdiction is tempered by reason and reasonableness to adapt to the complexities of international commerce. As the Restatement explains:

> Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. State sovereignty was to be controlled by law, and its power tempered by reason and reasonableness. States have not in fact regulated all the foreign activities of their nationals (or affiliates of their nationals), nor every activity that could be said to have some effect in their territory.

Id. As a result of this accommodation, formal criteria and strict rules of extraterritorial jurisdiction were supplanted by concepts of reasonableness in which the interests of all involved States are weighed and considered:

> Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria embracing principles of reasonableness and fairness to accommodate overlapping or conflicting interests of states, and affected private interests. Courts and other decision makers, learning from the approach to comparable problems in private international law, are increasingly inclined to consider various interests, examine contacts and links, give effect to justified expectations, search for the "center of gravity" of a given situation, and develop priorities.

Id. Thus, the Restatement provides that "[e]ven when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Id.* § 403(1). The Restatement recites a variety of factors to be considered in determining the reasonableness of a state's exercise of jurisdiction to prescribe:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

Id. § 403(2). These factors are to be considered particularly when "one state exercises jurisdiction over activity in its territory and the other [state's territory] on the basis of the effect of that activity in its territory." *Id.* § 403 cmt. d. Accordingly, "[w]here regulation of transnational activity is based on its effects in the territory of

In a second case filed subsequently to *Montedison*, the SEC sought enforcement of the FCPA's anti-bribery and accounting provisions against a domestic issuer based primarily on corrupt payments and associated recordkeeping violations by the issuer's subsidiary in Indonesia.[164] The domestic issuer, Triton Energy Corporation, is a Delaware corporation headquartered in Dallas, Texas.[165] Triton Energy's stock is registered with the SEC and trades on the New York Stock Exchange.[166] The subsidiary, Triton Indonesia, Inc., was also a Delaware corporation and wholly owned by Triton Energy.[167]

In its complaint, the SEC alleged that in September of 1988, Triton Indonesia assumed control over an oil and gas recovery project, known as the Enim Project, under contract with the National Oil Company, owned by the Republic of Indonesia.[168] The Enim Project was subject to taxation in Indonesia and the taxes could be reduced by the amount of "recoverable costs" determined by National Oil Company's auditors.[169]

Triton Energy's management informed a manager, Philip W. Keever, assigned to Triton Indonesia in 1988, that his performance would be evaluated on the extent to which expenditures were found to be cost-recoverable.[170] Keever understood this to mean that ninety-five percent of the expenditures on the Enim Project would have to be certified as recoverable costs in order for him to receive a satisfactory performance review.[171]

Enim Project's recoverable costs were determined largely through negotiations between Triton Indonesia and National Oil

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the regulating state, the principal of reasonableness calls for limiting the exercise of jurisdiction so as to minimize conflict with the jurisdiction of other states, particularly with the state where the act takes place." *Id.* § 403 rep. n.3. The requirement of reasonableness in the exercise of extraterritorial jurisdiction is not simply a matter of comity, but a rule of international law. *See id.* § 403 cmt. a ("Some United States courts have applied the principle of reasonableness as a requirement of comity, that term being understood not merely as an act of discretion and courtesy but as reflecting a sense of obligation among states. This section states the principal of reasonableness as a rule of international law.").

164. SEC v. Triton Energy Corp., Civ. Action No. 97-0401 (filed Feb. 27, 1997).
165. *Triton Energy Corp.* Compl. ¶ 6.
166. *Id.*
167. *Id.*
168. *Id.* ¶ 9.
169. *Id.* ¶¶ 11-12.
170. *Id.* ¶ 19.
171. *Id.*

Company auditors.[172] That is to say, the auditors performed annual audits and prepared preliminary findings, which were presented at an exit conference.[173] Triton Indonesia then was permitted to respond to audit exceptions in the findings after which Triton Indonesia and the auditors negotiated whether to exclude the exceptions in the auditors final report.[174]

According to the SEC, between 1989 and 1990, Keever and the General Manager of Triton Indonesia, Richard L. McAdoo,[175] authorized at least eight payments to the auditors and Indonesian tax officials for the purpose of receiving favorable tax treatment.[176] These

172. *Id.* ¶ 14.

173. *Id.*

174. *Id.*

175. Both Keever and McAdoo also were named, individually, as defendants in the SEC action.

176. *Id.* ¶ 20. In July 1989, following the assessment of taxes in the amount of $350,000 relating to technical services, Keever and McAdoo authorized Triton Indonesia's agent, Roland Siouffi, to make payments of $150,000 to the auditors and $165,000 to Indonesian tax officials to obtain a favorable ruling on the recoverability of the technical services fees. Shortly thereafter, the Indonesian Auditing Board accepted Triton Indonesia's position that no additional taxes were due in regard to technical services. *Id.* ¶¶ 22-23. In August 1989, the Indonesian government informed Triton Indonesia that it still owed $233,000 in taxes. In December 1989, on Siouffi's instructions, McAdoo offered to comprise a claim for taxes at $80,000 less than the amount claimed by tax authorities. Keever and McAdoo authorized Siouffi to pay the auditor $20,000 in order to reduce the taxes. Approximately two weeks later, the Indonesian government accepted the proposed compromise. *Id.* ¶¶ 24-26.

Corrupt payments were also made in connection with certification of the unrecovered cost pool in the 1988 and 1989 audits. In April 1989, Keever and McAdoo authorized Siouffi to pay the auditors $20,000 to certify the 1988 cost pool. The auditors allowed all but $139,000 of over $8 million in unrecovered costs. *Id.* ¶¶ 27-29. Similarly, in March 1990, Siouffi was paid $38,500 to obtain favorable tax treatment of the 1989 cost pool. The auditors made only $275,000 in reductions and certified over $8 million in costs. *Id.* ¶¶ 30-32.

Payments were made to Siouffi in order to obtain a refund for taxes paid by Triton Indonesia's predecessor at the Enim Project. In that connection, in May 1989, Keever and McAdoo agreed to pay Siouffi $7,500, and in June, Triton Indonesia received a tax refund in the amount of $94,000 from the Ministry of Finance. *Id.* ¶¶ 33-36.

Between May and September 1989, Triton Indonesia submitted invoices totaling $119,000 to the national oil company for the purpose of determining the amount of valued-added tax (VAT) to be refunded. Siouffi informed Keever and McAdoo that a favorable tax decision would require a payment of $10,000, which was made. In November 1989, Triton Indonesia received a VAT reimbursement of $109,000. *Id.* ¶¶ 37-39.

Finally, in April 1990, Triton Indonesia sought a refund of $50,000 for purported overcharges of pipeline fees by the national oil company. Siouffi was paid $10,000 to obtain a revision of the pipeline rates. In June 1990, the national oil company agreed

payments were conveyed through an agent, Roland Siouffi, who acted as the intermediary between Triton Indonesia and the Indonesian government.[177] False entries were made in the books and records of Triton Indonesia to disguise payments to Siouffi.[178]

The liability of the parent corporation, Triton Energy, for the acts of its subsidiary was grounded on the apparent knowledge of and acquiescence to the corrupt payments. The SEC's complaint cited a variety of "danger signals," which "should have led to a heightened degree of vigilance about the possibility of violations" of the FCPA, but which Triton Energy's management ignored.[179] The SEC also noted that in 1989 and 1990, Keever informed Triton Energy's management that payments to Siouffi were for the purpose of obtaining favorable government action, but management had not directed Keever to discontinue the practice.[180]

As further evidence of Triton Energy's knowledge and acquiescence in the FCPA violations, the SEC pointed to the response of the former president of Triton Energy to the findings of an internal audit concerning the activities of Keever, McAdoo and Siouffi.[181] The SEC noted that rather than verifying the audit findings,

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to the refund. *Id.* ¶¶ 40-43.

177. *Id.* ¶¶ 16, 20.

178. The payments to Siouffi were recorded in the books and records of Triton Indonesia as payments to entities controlled by Siouffi. Thus, between May 1989 and June 1990, payments totaling $114,500 were made to P.T. Windusari Danuta for equipment service and repair. In August 1989, payments totaling $165,000 were made to Orix Resources, Inc. for the purchase of seismic data, and in October 1989, Development Engineering and Rehabilitation Company S.A. was paid $23,000 for acquisition and interpretation of seismic data. *Id.* ¶¶ 17, 23, 26, 29, 32, 36, 39, 43. Triton Indonesia also falsely documented and recorded payments of $13,500 to the oil company auditors to develop good will and payments of $1,000 a month between January 1987 and May 1992 to oil company clerical employees to expedite payment of crude oil invoices. *Id.* ¶ 44.

179. In this regard, the SEC noted that, although Triton Energy's management had concerns about the vagueness of Siouffi's duties, the amounts of money he received and his honesty, the management did not establish policies and procedures governing the activities in which Siouffi was authorized to engage or under which payments to Siouffi could be made. *Id.* ¶¶ 45-46. The SEC also noted that management was aware of the predecessor's practice of making payments to the oil company and its auditors, and even though the person responsible for making the payments had been terminated, he was reinstated at the insistence of the national oil company and continued to be employed by Triton Indonesia after Triton Energy's management was informed of the corrupt payments referred to in the SEC's complaint. *Id.* ¶ 47.

180. *Id.* ¶ 48.

181. According to the SEC's complaint, in 1989, Triton Energy's internal auditor

the former president attempted to cover up the audit report[182] and withheld pertinent information from Triton Energy's independent auditors.[183] Triton Energy, Keever and McAdoo consented to the entry of a permanent injunction without admitting or denying the allegations in the SEC's complaint.[184]

Imposition of liability on Triton Energy and the individual

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visited Triton Indonesia where he reviewed documents and interviewed Keever, McAdoo and others. Based on that information, the auditor submitted a written report in which he expressed his concerns about, among other things, improper payments by Triton Indonesia to Indonesian government officials. The auditor specifically reported that Triton Indonesia paid oil company auditors "in order to have their audit exceptions taken care of." The auditor further reported that these payments were documented in a "creative way" to make them cost recoverable. The internal auditor's report was distributed to senior management at Triton Energy. *Id.* ¶ 49.

182. Rather than attempting to discern whether the report was accurate, Triton Energy's then-president ordered the internal auditor to collect all copies of the report and destroy them. Triton Energy's senior management dismissed the allegations in the report, and as the SEC observed, "No investigation was conducted and no policies or procedures were revised as a consequence of the conduct described" in the report. *Id.* ¶¶ 49-50.

183. During their audit of fiscal year 1991, Triton Energy's outside auditors became aware of the internal audit report and raised concerns about possible unlawful activities by Triton Indonesia. Keever prepared a report delineating the payments made to Indonesian officials and the false books and records created by Triton Indonesia. However, as the SEC stated in its complaint:

> Rather than fully disclosing each of these transactions to the auditors, Triton Energy management made a partial disclosure, omitting most of the improper payments and most of the false books and records. At a meeting with the auditors, Triton Energy's then senior management represented that there was no evidence that money was paid to Indonesian auditors.

Id. ¶ 51.

184. See Exchange Act Release No. 889, Fed. Sec. L. Rep. (CCH) 63 SEC Docket 2490-1, n.2 (Feb. 27, 1997) describing orders of permanent injunction as to Triton Energy Corporation and Phillip W. Keever entered on March 3, 1997. In addition to the entry of orders of permanent injunction, Triton Energy was ordered to pay a civil penalty of $300,000, and Keever was ordered to pay a penalty of $50,000. *Id.*; *see also* SEC Litigation Release No. 15266, Fed. Sec. L. Rep. (CCH) 63 SEC Docket 2490-1 (Feb. 27, 1997). McAdoo subsequently consented to the entry of an order of permanent injunction and was ordered to pay a civil penalty of $35,000. *See* SEC Litigation Release No. 15396 Fed. Sec. L. Rep. (CCH) 63 SEC Docket 2490-1(June 26, 1997). The SEC also brought an administrative action pursuant to section 21c of the Exchange Act, 15 U.S.C. § 78u-3 (1998), against four other employees of the Triton Energy Corporation concerning their roles in approving the payments to Siouffi and the falsification of Triton Indonesia's books and records. In re David Gore, Robert Puetz, William McClure and Robert P. Murphy, Exchange Act Release No. 889, Fed. Sec. L. Rep. (CCH) 63 SEC Docket 2490-1 (Feb. 27, 1997). The respondents consented to the entry of cease and desist orders. SEC Litigation Release No. 15266, Fed. Sec. L. Rep. (CCH) 63 SEC Docket 2490-1 (Feb. 27, 1997).

defendants for their acts and the acts of Triton Indonesia was in accordance with controlling principles of international law. To the extent that the falsification of Triton Indonesia's books and records resulted in false or inaccurate filings with the SEC by the issuer-parent corporation, as in *Montedison*, prescriptive jurisdiction would be warranted under the effects principle.[185]

Additionally, one can justify prescriptive jurisdiction in the case of Triton Energy and the individuals involved on the nationality principle.[186] That is, a State is recognized as having jurisdictional authority to govern the conduct of its citizens even for acts committed outside the State's territorial jurisdiction.[187] Since all of the defendants appear to be citizens and residents of the United States, prescriptive jurisdiction on the basis of nationality would lie as well.

C. Prescriptive Jurisdiction over "Domestic Concerns"

In addition to "issuers," the FCPA also applies to "any domestic concern, other than an issuer."[188] Within this class of persons and entities are the following:

> (A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state of the United States, or a territory, possession, or commonwealth of the United States.[189]

In fashioning this definition of "domestic concern," Congress was

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185. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 112, § 403(2).

186. As the Supreme Court stated in *Blackmer v. United States*, 284 U.S. 421, 438 (1932), "The jurisdiction of the United States over its absent citizen, so far as the binding effect of the legislation is concerned, in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them."

187. Thus, the Restatement provides that "a state has jurisdiction to prescribe law with respect to . . . the activities, interests, status or relations of its nationals outside as well as within its territory . . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(2) (1986). Although nationality is considered an "exceptional" basis for the exercise of prescriptive jurisdiction (territoriality being considered the "normal" basis for jurisdiction), the nationality principle of jurisdiction is applicable to "juridical" persons, and the nationality of a corporation is determined by the state of incorporation. *Id.* § 402(2) cmt. b. *See, e.g.*, Steele v. Bulova Watch Co., Inc., 344 U.S. 280, 282 (1952).

188. 15 U.S.C. § 78dd-2(a) (Supp. 1997).

189. 15 U.S.C. § 78dd-2(d)(1).

attentive to the international law implications arising from the assertion of prescriptive jurisdiction beyond readily definable bounds of nationality and territoriality. Congress was well aware of the role played by foreign agents and consultants as intermediaries in corrupt payments to foreign officials.[190] Likewise, Congress had substantial evidence of the use of foreign subsidiaries as repositories for off-book "slush funds" and as conduits for corrupt payments.[191]

To address the problem of foreign subsidiaries, the House bill included within the definition of "domestic concern" an entity:

> (1) which is owned or controlled by individuals who are citizens or nationals of the United States; (2) which has its principal place of business in the United States; or (3) which is organized under the laws of a state of the United States or any territory, possession or commonwealth of the United States.[192]

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190. For example, Richard W. Millar, a member of Northrop Corporation's board of directors, testified that between 1961 and 1974 a foreign consultant secretly returned approximately $476,000 in fees to Northrop officials who used the funds to make unlawful political contributions. *Multinational Corps. and U.S. Foreign Policy*, *supra* note 52, at 110. Mr. Millar testified that payments totaling $450,000 also were made to Adnan Khashoggi, ostensibly to pay two Saudi Air Force generals. *Id.* at 112. D.J. Houghton, Chairman of Lockheed Corporation, testified that Lockheed too paid Mr. Khashoggi $400,000 as a payoff to a Saudi official. *Id.* at 350. Deputy Assistant Attorney General John C. Keeny also testified during consideration of the 1988 amendments that "[t]he majority of the FCPA cases which have been investigated involve payments made to agents." *Business Accounting and Foreign Trade Simplification Act Hearings*, *supra* note 11, at 64.

191. Congress was well aware of the role foreign subsidiaries played as repositories of slush funds and conduits for corrupt payments. The Chairman of Gulf Oil Corporation testified that political contributions in South Korea ($10 million) and Bolivia ($460,000) were made through Gulf's subsidiary, Bahamas Exploration Company. *Multinational Corps. and U.S. Foreign Policy*, *supra* note 52, at 8-58. Senior officials of Exxon and Mobil Oil Corporations similarly testified concerning millions of dollars in political contributions made in Italy through their Italian subsidiaries. *Id.* at 241-340. The Chairman of Lockheed Corporation also testified concerning payments to Mr. Khashoggi through Lockheed's Swiss subsidiary. *Id.* at 345-92. The SEC's report on questionable payments noted payments through foreign subsidiaries by General Tire and Rubber, Ashland Oil Company, Gulf Oil Corporation and Minnesota Mining and Manufacturing Company. *SEC Report*, *supra* note 74, at app. B. Indeed, in reporting out its bill, the House Committee on Interstate and Foreign Commerce noted that "[a] survey of public documents filed with the Securities and Exchange Commission which disclose questionable or improper payment activities shows that at least 64 U.S. public corporations made such payments through foreign subsidiaries. Of those companies, 19 corporations have made payments aggregating $1 million or more over various periods of time." H. REP. NO. 95-640, at 12 n.2 (1977).

192. H.R. CONF REP. NO. 95-831, at 13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4126. In this regard, the Senate bill defined "control" to mean:

As the House Committee on Interstate and Foreign Commerce explained:

> By so defining domestic concern, the Committee intends to reach not only all U.S. companies other than those subject to SEC jurisdiction, but also foreign subsidiaries of any U.S. corporation. The Committee found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent.[193]

The Senate's definition of "domestic concern" was not so expansive.[194] In conference, the House receded to the Senate definition "with an amendment to make clear that any company having a principal place of business in the United States would be subject to the bill."[195]

The conferees adopted the Senate's more restrictive approach because of their concern for the possible conflict with international law principles if Congress exercised prescriptive jurisdiction over foreign subsidiaries. The conferees emphasized, however, that the U.S. entity, either issuer or domestic concern, would remain liable if it engaged in violative conduct indirectly through a third party. As the conference stated:

> In receding to the Senate, the conferees recognized the inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill. However, the conferees intend to make it clear that any issuer or domestic concern, which engages in bribery of foreign officials indirectly through any other person or entity, would itself be liable under the bill. The conferees recognized that

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> The power to exercise a controlling influence over the management or policies of a domestic concern, unless such power is solely the result of an official position with such domestic concern. In determining whether a person controls a domestic concern for purposes of this section, any person who owns beneficially, either directly or through one or more controlled domestic concerns, more than 50 per centum of the voting securities of a domestic concern shall be presumed to control such domestic concern, and any person who does not so own more than 50 per centum of the voting securities of a domestic concern shall be presumed not to control such domestic concern.

Id. at 3-4.

193. H. REP. NO. 95-640, at 12 (1977).

194. *See* S. REP. NO. 95-114, at 17, *reprinted in* 1977 U.S.C.C.A.N. 4098, 4115.

195. H.R. CONF. REP. NO. 95-831, at 13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4126.

> such jurisdictional, enforcement, and diplomatic difficulties may not be present in the case of individuals who are U.S. citizens, nationals or residents.[196]

Because different jurisdictional considerations apply to U.S. citizens, nationals and residents than apply to foreign nationals or residents, the conferees restricted the liability of persons involved in the affairs of a foreign subsidiary, other than those persons specified in the definitions of "issuer" and "domestic concern," to U.S. citizens, nationals or residents.[197] Foreign nationals or residents who are otherwise subject to U.S. jurisdiction would remain liable for violations of the FCPA in the same way as an issuer or domestic concern.[198] However, this jurisdictional basis over foreign nationals

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196. *Id.* at 14; *see* Jeffrey P. Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Dealing with Illicit Payments in Transitional and Emerging Economies*, 8 INT'L Q. 183, 184-85 (1996). However, one commentator noted that, as a practical matter, the FCPA's requirements and prohibitions may be imposed by the parent on the subsidiary because of the parent's third party liability:

> [A]s a practical matter, because of its broad wording, the law does affect subsidiaries indirectly. For example, if a U.S. corporation owns a foreign subsidiary in Switzerland, and knows or has reason to know that this foreign subsidiary's business depends upon the making of bribes to a foreign government official, the U.S. company may be in violation of the law. One consequence is that the foreign subsidiary must conform its behavior to the requirements of U.S. law even though neither it, nor its officers, directors, or employees may be penalized directly, or risk having its parent found to be in violation of U.S. law and subject to penalties. There is thus some extraterritorial consequence, regardless of whether one characterizes the act as an extraterritorial application of U.S. law.

Stanley J. Marcuss, *Extraterritoriality: U.S. Anti-Boycott Law and the Foreign Corrupt Practices Act*, 15 L. & POL'Y INT'L BUS. 1135, 1144-45 (1983). The U.S. parent will be subject to taxation on any income a foreign subsidiary uses to make corrupt payments. Lord, *supra* note 38, at 1072 n.34.

197. In this connection, the conferees stated:

> Individuals other than those specifically covered by the bill (e.g., officers, directors, employees, agents, or stockholders acting on behalf of an issuer or domestic concern) will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern if they are citizens, nationals, or residents of the United States.

Id. Jurisdiction over foreign nationals who have no direct contacts with the United States is highly problematic. *See* Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487 (D.C. Cir. 1984); Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. REG. 149, 215 (1990).

198. As explained in the 1977 Conference Report, "The conferees determined that foreign nationals or residents otherwise under the jurisdiction of the United States would be covered by the bill in circumstances where an issuer or domestic concern engaged in conduct proscribed by the bill." H.R. CONF. REP. NO. 95-831, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4126.

and residents is not a model of clarity.[199]

The only reported decision in this regard[200] is equally unenlightening. An employee of Sikorsky Aircraft brought a civil action under the Racketeer Influenced and Corrupt Organization Act (RICO)[201] alleging "a wide-ranging conspiracy encompassing foreign and domestic corporations, individuals and governments."[202] The gravamen of the claim was that Sikorsky and its U.S. parent, United Technologies Corporation, conspired with various British and Saudi

199. The conferees did not explain what was meant by "otherwise under the jurisdiction of the United States." It would appear, however, that foreign nationals or foreign residents who are subject to the adjudicative jurisdiction of the United States will be subject to prosecution (civil or criminal) for violations of the FCPA. The Restatement explains that "[a] State may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the State to the person or thing is such as to make the exercise of jurisdiction reasonable." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421(1) (1986). Among the bases of adjudicative jurisdiction enumerated in the Restatement are the following: being present (other than transitory presence) in the territory; carrying on business regularly in the State; carrying on the activity in the State that is the subject of the adjudication; and carrying on activity outside the State that has a "substantial, direct, and foreseeable effect within the State," if that activity is the subject of the adjudication. *Id.* § 421 cmt. c. The Reporter for the American Law Institute noted that, "[t]he modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution." *Id.* at rep. note 1.

Under U.S. law, the jurisdiction to adjudicate is subject to the requirements of the due process clause of the Fifth Amendment. Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court has personal jurisdiction flows not from Art. III, but from the due process clause."). Thus, the exercise of adjudicative jurisdiction must "not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Typically, this requires that a defendant have established certain "minimum contacts" with the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (quoting Int'l Shoe Co. v. Washington, 326 U.S. at 316). These "minimum contacts" must have a basis in "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). Thus, the U.S. Supreme Court said that "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state." Burger King Corp. v. Rudzewicz, 471 U.S. at 475; *accord* Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 113-14 (1987); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 413-16 (1983). In addition, there must be authorization for service on the defendant. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).

200. Dooley v. United Techs. Corp., 803 F. Supp. 428 (D.D.C. 1992).

201. 18 U.S.C. §§ 1961-1968 (1999).

202. *Dooley*, 803 F. Supp. at 431.

Arabian individuals and entities to bribe members of the Saudi royal family in order to sell twelve Black Hawk helicopters to the Saudi Ministry of Defense.[203] Among the predicate acts of racketeering underlying the plaintiff's claim[204] were violations of the Travel Act[205] and the FCPA.[206]

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203. *Id.* at 432.

204. Under 18 U.S.C. §§ 1962 and 1964(c) (1999), a person "injured in his business or property" by reason of a RICO violation may bring an action to recover treble damages. However, to establish RICO liability it must be shown that the defendant participated in the affairs of an "enterprise" through "a pattern of racketeering activity." 18 U.S.C. § 1962(c). Establishment of such a pattern of racketeering activity requires proof of at least two predicate acts of racketeering activity. *See* 18 U.S.C. § 1961(5); H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). RICO enumerates criminal acts constituting "racketeering activity." *See* 18 U.S.C. § 1961(1).

205. 18 U.S.C. § 1952(a).

206. *Dooley*, 803 F. Supp. at 428. Although recommended by the House Committee on Interstate and Foreign Commerce (see H. REP. NO. 95-640, at 10 (1977)), Congress did not provide a private right of action under the FCPA and courts have declined to imply one. *See* Lamb v. Philip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990); McLean v. Int'l Harvester Co., 817 F.2d 1214, 1218-19 (5th Cir. 1987); Citicorp Int'l Trading Co. v. Western Oil & Ref. Co., 771 F. Supp. 600, 606 (S.D.N.Y. 1991); Shields v. Erickson, 710 F. Supp. 686, 688 (N.D. Ill. 1989); Lewis v. Sprock, 612 F. Supp. 1316, 1332-33 (N.D. Cal. 1985); *see also* Eisenberger v. Spectrex Indus., Inc., 644 F. Supp. 48 (E.D.N.Y. 1986) (no private right of action under the books and records provisions); Pines, *supra* note 5, at 216; Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085, 1114 (1979) ("The Act reflects Congress' condemnation of bribery by imposing both civil and criminal penalties on those who make payments in violation of the Act. These penalties demand that the business community conform to a certain standard of conduct. As such, the Act's purpose is to deter bribery, not to compensate those injured by the prohibited payments."). However, private plaintiffs were able to assert claims based on violations of the FPCA under the civil provisions of RICO, since interstate or foreign travel in furtherance of foreign bribery may constitute a violation of the Travel Act, 18 U.S.C. § 1952(a)(3) (1999), which is a specified racketeering activity under RICO, 18 U.S.C. § 1961(1)(B). *See* Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3rd Cir. 1988); United States v. Young & Rubicam Inc., 741 F. Supp. 334 (D. Conn. 1990) (decided under 18 U.S.C. § 1962(c)); *see also* Perrin v. United States, 444 U.S. 37 (1979) (commercial bribery constitutes an "unlawful activity" under the Travel Act). Plaintiffs grounding civil RICO claims on wrongful terminations resulting from their exposure to FCPA violations have not fared as well due to a lack of standing. *See, e.g.*, Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990); Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987); *see also* Adler v. American Standard Corp., 830 F.2d 1303 (4th Cir. 1987) (employee who claimed he was terminated because he was going to disclose foreign corrupt payments did not state a cause of action under Maryland law). *But see* Williams v. Hall, 683 F. Supp. 639, 643 (E.D. Ky. 1988) (plaintiff who proved the existence of a RICO conspiracy would have standing to recover damages resulting from overt acts in furtherance of the conspiracy). Civil damages may also be available under federal antitrust laws. *See* Lamb v. Phillip Morris, Inc., 915 F.2d at

On defendants' motions to dismiss the complaint, the district court first found that in personam jurisdiction under the District of Columbia "long arm" statute[207] was proper[208] but concluded that a claim grounded on violations of the FCPA was not actionable under RICO.[209]

The district court noted that neither the British defendants nor Saudi defendants met the FCPA's definitions of "issuer" or "domestic concern."[210] Instead, the foreign defendants were either foreign corporations or employees of those corporations.[211] The plaintiff contended that the defendants were subject to the FCPA's anti-bribery prohibitions as agents of a U.S. issuer,[212] but the district court disagreed.

Although the district court read the conferees' reference to "foreign nationals or residents otherwise under the jurisdiction of the United States" to mean that "in certain circumstances, foreign nationals may be subject to the provisions of the FCPA," it also interpreted the conferees' comment as limiting the FCPA's applicability to "foreign individuals who act as agents" of U.S. companies.[213] Further, the district court concluded that the phrase "foreign nationals or residents" was intended to apply only to individuals.[214] The court based this determination on the conferees' expressed concerns as to "the inherent jurisdictional, enforcement, and diplomatic difficulties" arising from assertion of the FCPA's prohibitions to foreign subsidiaries of U.S. companies (in contrast to

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207. D.C. Code § 13-423(a)(1) (1998).

208. Dooley v. United Techs. Corp., 803 F. Supp. 428, 435-37 (D.D.C. 1992).

209. *Id.* at 438.

210. *Id.*

211. *Id.* at 431.

212. *Id.* at 438. The plaintiff contended that the foreign defendants had acted as agents of "one of the UTC defendants." *Id.* at 438 n.19.

213. *Id.* As the district court explained, "While the language itself is not limiting, the logic of the Conference Report's explanation implies that the Act is limited to individuals who act as agents." *Id.* at 439.

214. *Id.* As the district court observed:

> [I]t is implausible that Congress intended to exclude U.S.-controlled foreign subsidiaries, but not non-subsidiary foreign companies, as plaintiff Dooley suggests. The Conference Report clearly indicates that the authors of the Act were concerned with international comity. The same concerns over diplomatic difficulties and jurisdictional contacts would apply whether a U.S.-owned foreign subsidiary or a foreign corporation was involved.

Id.

the liability of the U.S. parent, and U.S. citizens, nationals and residents involved in the affairs of a foreign subsidiary). Accordingly, the court dismissed the complaint as to the foreign corporation defendants.[215] With respect to the individual defendants subject to the court's jurisdiction who had acted as agents for a U.S. issuer or domestic concern, the district court held that subject matter jurisdiction existed, and that the plaintiff could pursue a RICO claim against them, grounded on the FCPA's anti-bribery provisions.[216]

The district court's decision was not wholly satisfactory. Indeed, it is clear that a foreign corporation, either a subsidiary or a separate corporation, can act as an agent of a U.S. company.[217] Although jurisdiction over a foreign corporation based solely on an overseas payment to a foreign official would be problematic, it would seem a foreign corporation that engaged in foreign bribery as the agent of a U.S. company would remain subject to the prohibitions of the FCPA if U.S. jurisdiction otherwise existed over the foreign entity.[218] Thus, it would appear to be equally implausible that Congress would establish agency liability for foreign individuals while at the same time excluding foreign entities from liability under the same circumstances.

Congress clearly contemplated some degree of third party liability under the FCPA. Reporting on the House bill, the Committee on Interstate and Foreign Commerce observed that "the concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts

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215. *Id.* at 439-40.

216. *Id.* at 441.

217. Indeed, that is a basis on which the parent corporation can be held vicariously liable for the acts of a subsidiary corporation. *See* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1 (1997); Glenn R. Sarno, *Haling Foreign Subsidiary Corporations into Court Under the 1934 Act: Jurisdictional Bases and Forum Non Conveniens*, 55 LAW & CONTEMP. PROB. 379, 385-88 (1992).

218. As Professor Robert Thompson noted, "United States policy sometimes requires that the subsidiary's foreign character be disregarded in order to reveal the essential U.S. character of the enterprise, which must then abide by the laws of the United States." Robert B. Thompson, *United States Jurisdiction over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 LAW & POL'Y INT'L BUS. 319, 321 (1983). Although there is precedent for disregarding the corporate separateness of a foreign subsidiary and asserting jurisdiction over the subsidiary, as Professor Thompson pointed out, the rules for piercing the corporate veil, where the interests of the State of incorporation of the parent and the subsidiary's State of incorporation conflict, are murky at best. *Id.* at 372-80.

have always applied in both civil actions and implied private actions brought under the securities laws generally."[219] This comment may relate only to officials or employees of the U.S. company with knowledge of the corrupt payment.[220] The reference to agents in both the anti-bribery prohibitions respecting issuers[221] and domestic concerns,[222] however, strongly suggests that even a foreign national, acting with the knowledge or at the direction of an official or employee of the U.S. company, and over whom U.S. jurisdiction otherwise exists, would be subject to FCPA liability.

However, third-party liability, as an aider, abettor or co-conspirator, does not extend to the foreign official who accepted the corrupt payment. The fact that Congress demonstrated its intent to reach at least some non-citizens, but did not do so explicitly with regard to foreign officials, persuaded the U.S. Court of Appeals for the Fifth Circuit that Congress had not intended to exercise prescriptive jurisdiction over foreign officials.[223] The court also concluded that because foreign officials were excluded from prosecution for the substantive offense of accepting a bribe in violation of the FCPA,[224] their conduct could not be prosecuted derivatively under the conspiracy statute[225] either.[226]

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219. H. REP. NO. 95-640, at 8 (1977).

220. The Committee noted in this connection:

> The committee fully recognizes that the proposed law will not reach all corrupt payments overseas. For example, Sections 2 and 3 [the anti-bribery provisions] would not permit prosecution of a foreign national who paid a bribe overseas acting entirely on his own initiative. The committee notes, however, that in the majority of bribery cases investigated by the SEC some responsible official or employee of the U.S. parent company had knowledge of the bribery and either explicitly or implicitly approved the practice. Under the bill as reported, such persons could be prosecuted. The concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts have always applied in both SEC civil actions and in implied private actions brought under the securities laws generally.

Id.

221. 15 U.S.C. § 78dd-1(a) (1999).

222. 15 U.S.C. § 78dd-2(b).

223. United States v. Castle, 925 F.2d 831 (5th Cir. 1991) (adopting the opinion of the district court in *United States v. Blondek*, 741 F. Supp. 116 (N.D. Tex. 1990)).

224. United States v. Blondek, 741 F. Supp. at 117.

225. 18 U.S.C. § 371 (1999).

226. 741 F. Supp. at 118. It was similarly observed in this regard that:

> When Congress drafts a statute specifically focused on international activities, it is likely that there has been congressional reflection on the international ramifications of the criminal application. The enactment of the

Even if U.S. jurisdiction otherwise existed over a foreign official, prosecution for violation of the FCPA would implicate the act of state doctrine, which in essence provides that a U.S. court will not question the public acts of a foreign sovereign undertaken within its own territory.[227] The Act of State Doctrine is not a rule of international law,[228] rather, the doctrine is a principle of decision[229] or rule of

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Foreign Corrupt Practices Act demonstrates a clear intent on the part of Congress to transcend the borders of the United States with regard to specific conduct. Congress has, however, tailored the statute to encompass limited conduct and individuals.

Podgor, *supra* note 43, at 332.

227. The act of state doctrine is set forth in the Restatement, which states that "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from . . . sitting in judgment on . . . acts of a governmental character done by a foreign State within its own territory and applicable there." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 443(i) (1986). The U.S. Supreme Court also stated the doctrine as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691 n.7 (1976) (plurality opinion) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory"). For a discussion of the development of the act of state doctrine, see Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PENN. L. REV. 325, 330-65 (1986); Daniel C.K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 404-30 (1987); Bernard Ilkhanoff, *United States v. Noriega: The Act of State Doctrine and the Relationship Between the Judiciary and the Executive*, 7 TEMP. INT'L & COMP. L.J. 345, 352-56 (1993); Tracie A. Sundack, *Republic of the Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U. L. REV. 225, 228-31 (1988); Christopher B. Walther, *Motivation Cases and W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 80 KY. L.J. 269, 272-75 (1992); Note, *IAM v. OPEC: "Acts of States" and "Passive Virtues,"* 5 LOY. L.A. INT'L & COMP L.J. 159, 161-65 (1983).

228. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 421 ("[t]hat international law does not require application of the doctrine is evidenced by the practice of nations").

229. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 406 (1990); *See* Banco Nacional de Cuba, 376 U.S. at 427; Kathleen Karelis, *Comment: The Act of State Doctrine; Reconciling Justice and Diplomacy on a Case-by-Case Basis*, 43 U. MIAMI L. REV. 1169, 1169 (1989); Veronica Ann Deberardine, Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203, 203-05 (1984).

abstention.[230] Although the doctrine is not of constitutional dimension,[231] its "underpinnings" lie in the Constitution's separation of powers clause.[232] The doctrine, therefore, "is a reflection of the executive's primary competency in foreign affairs, and an acknowledgment of the fact that in passing upon foreign governmental acts the judiciary may hinder or embarrass the conduct of our foreign relations."[233]

The act of state doctrine pertains to a foreign official's public or official acts and not to actions that official takes in a private capacity.[234] Conceivably, acceptance of a corrupt payment by an official could be construed as a private act and, as a result, not be shielded from judicial scrutiny by the act of state doctrine.[235] Indeed,

230. *See* Lynn E. Parseghian, *Comment: Defining the "Public Act" Requirement in the Act of State Doctrine*, 58 U. CHI. L. REV. 1151, 1153 n.12 (1991). This led to some confusion as to the nature and scope of the doctrine. *See* Chow, *supra* note 227, at 399-400.

231. Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 423 ("The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of State").

232. *Id.* ("The act of state doctrine does, however, have 'constitutional underpinnings.' It arises out of the basic relationships between branches of government in a system of separation of powers").

233. Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 108-09 (C.D. Cal. 1971); *see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). Indeed, one commentator suggested that an exception to the doctrine should be recognized when the Executive Branch seeks to prosecute a foreign official for acts having a "catastrophic effect" in the United States. Ilkhanoff, *supra* note 227, at 364-66.

234. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1974) (plurality opinion); *see also* Ilkhanoff, *supra* note 227, at 362-63; Sundack, *supra* note 227, at 237-38; *see generally* Parseghian, *supra* note 230, at 1158-67.

235. *See* Sage Int'l, Ltd. v. Cadillac Gage Co., 534 F. Supp. 896, 909-10 (E.D. Mich. 1981) ("[I]t is noteworthy that support exists for the proposition that corrupt activity by foreign sovereigns is beyond the umbrella of the Act of State Doctrine. This concept rests on the idea that such activity would be violative of the Foreign Corrupt Practices Act . . . and on the premise that to shield such activity would be violative of the spirit of the Act . . . . Because the claims in the instant case properly are viewed as avoiding allegations of direct wrongdoing by the foreign sovereigns themselves, final resolution of whether, if allegations of corruption were made, the Act of State Doctrine could be avoided is not necessary at this time. It is enough simply to observe, on the basis of these comments, that there is a likelihood that the doctrine could be avoided were the allegations such as to call for review of foreign sovereign corruption charges"); Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 690 (S.D.N.Y. 1979) ("The allegations here that government actions were procured by fraud and coercion thus suffice to preclude application of the act of state doctrine even to the expropriation issue at this stage of the litigation"); *see generally* Maureen A. Dowd & Theodore B. Eichelberger, *Act of State Doctrine: An*

there are cases that suggest bribery is not within the ambit of the doctrine.[236] It has also been suggested that because the enforcers of

Emerging Corruption Exception in Antitrust Cases?, 59 NOTRE DAME L. REV. 455 (1984). It was observed in this regard that "[s]ince acceptance of corporate payments seems to violate foreign laws and judging from the recent reactions of foreign governments, to overstep the limits of official authority, it would be inappropriate to invoke the act of state doctrine to protect corporations that induce such conduct by government officials." McManis, *supra* note 48, at 237.

236. *See* Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962) (former Venezuelan President's "acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuela sovereignty"). For example, Environmental Tectonics Corporation (ETC) brought a RICO and antitrust action against W.S. Kirkpatrick & Co., Inc. and others for damages in connection with Kirkpatrick's award of a contract with the Nigerian government to construct an air force base that ETC alleged was procured by Kirkpatrick through bribery of Nigerian government officials. The district court dismissed ETC's complaint on the grounds that proof of ETC's claim would require "establishment of corruption by high Nigerian Government and military officials and necessarily implies a criticism of the Republic of Nigeria . . . ," and accordingly, the act of state doctrine barred the action. Environmental Tectonics Corp. v. W.S. Kirkpatrick & Co., Inc., 659 F. Supp. 1381, 1398 (D.N.J. 1987). The U.S. Court of Appeals reversed the dismissal of ETC's complaint. Environmental Tectonics v. W.S. Kirkpatrick & Co., Inc., 847 F.2d 1052 (3d Cir. 1987). Although the appellate court agreed with the district court that the award of a government procurement contract could be "a sufficiently formal expression of a government's public interests to trigger application of the [act of state] doctrine," it concluded that the district court would simply have to determine as a factual matter that the bribery of the Nigerian officials motivated the award. *Id.* at 1058, 1061. Thus, the district court would not have to inquire into the legality of the contract and, therefore, the act of State doctrine did not apply. *Id.* at 1062. The Court of Appeals also noted that the defendants failed "to demonstrate that the litigation process was bound to result in the type of institutional conflict between the political and judicial branches that would justify invoking the doctrine." *Id.* The U.S. Supreme Court affirmed the appellate court's decision to reinstate the complaint. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400 (1990). The Court agreed that the effect of an action by a foreign sovereign was not at issue; accordingly, the act of state doctrine was not implicated. As the Court explained:

> Act of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the Act of State doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the Act of State doctrine requires.

Id. at 406; *see also* Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. at 690 ("Even an unrepudiated act of state may be scrutinized by the courts if it resulted from corruption of government officials"); *see generally* Deberardine, *supra* note 229; Maureen A. Dowd & Theodore B. Eichelberger, *Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases*, 59 NOTRE DAME L. REV. 455, 467-69 (1984); Sundack, *supra* note 227, at 248-50.

the FCPA, the SEC and the Department of Justice, consult with the U.S. Department of State regarding the foreign relations impact of proposed enforcement actions, the interests the doctrine seeks to protect are adequately safeguarded; therefore, the act of state doctrine should not apply to public prosecutions.[237]

Nevertheless, although a foreign official's acceptance of a corrupt payment could be viewed as a private act not subject to the Act of State Doctrine, the official action that the payment was intended to influence, would be a public act to which the doctrine would apply. It is for that reason courts are reluctant to inquire into the motivation for official conduct and held, instead, that such inquiry is barred by the act of state doctrine.[238]

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237. Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 409 (9th Cir. 1982); *see also* Bernstein v. N.Y. Nederlandsche-Amerikaansche Stoomvaart-Maatschappis, 173 F.2d 71 (2d Cir. 1949); *compare* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 420 (1964) ("Respondents do not ... contest the view that these letters [from the Legal Advisor to the State Department] were intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation"); *see generally* Karelis, *supra* note 229, at 1197-1201; Sundack, *supra* note 227, at 235-37.

238. *See* Republic of the Phillipines v. Marcos, 818 F.2d 1473, 1482 (9th Cir. 1987) ("Plaintiff's case implicates the Act of State Doctrine in its most fundamental sense. In order to resolve plaintiff's various claims against Marcos, the court will have to adjudicate whether Marcos' actions as president were lawful under Philippine law. A number of the acts plaintiff challenges are purely governmental ones, such as expropriation of property and creation of public monopolies. These were not merely the acts of Ferdinand Marcos, private citizen, while he happened to be president; they were an exercise of his authority as the country's head of state and, as such, were the sovereign acts of the Philippines"); Republic of the Philippines v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986) ("Appellants simply fail to make the crucial distinction between acts of Marcos as head of state, which may be protected from judicial scrutiny even if illegal under Philippine law, and his purely private acts"); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d at 407 ("In this case ... the very existence of plaintiffs' claim depends upon establishing that the motivation for the sovereign act was bribery, thus embarrassment would result from adjudication"); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 113 (C.D. Cal. 1971) ("Nor is this conclusion [that the act of state doctrine applies] disturbed, as regards [the Ruler of] Sharjah, by plaintiffs' assertion that some of the conduct of its ruler was motivated by 'his own personal gain and benefit' .... [T]he complaint clearly indicates that the Ruler of Sharjan acted at all times in his official capacity and on behalf of his State. In these circumstances ... the act of state doctrine applies"); *see also* O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 452-53 (2d Cir. 1987) ("O.N.E.'s allegations make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the District Court would be called on to examine and pass judgment on .... When the causal chain between a defendant's alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed."); West v.

D. Summary

In enacting the Foreign Corrupt Practices Act, Congress exercised prescriptive jurisdiction to the fullest extent consistent with due process under the Commerce Clause.[237] Congress was deeply concerned by the role that foreign nationals played and the matter in which foreign entities were used in the incidents of foreign bribery that gave rise to the FCPA. Nevertheless, Congress took care not to exercise its prescriptive jurisdiction in a way that conflicted with

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Multibanco Comertrex, S.A., 807 F.2d 820, 828 (9th Cir. 1987) ("The evaluation by one sovereign of foreign officers' compliance with their own laws would, at least in the absence of the foreign sovereign's consent, intrude upon that State's coequal status.... [T]hus, further inquiry into the actual operation of the nationalized Mexican banking system to the extent that it implicates the non-compliance of officials with their own laws is barred under the act of state doctrine."); Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 326 (5th Cir. 1982) ("Resolution of the charges made by CGNL would require a determination of the legality of the Mexican government's action in appointing an 'intervenor' to take over CGNL's operations in Nuevo Laredo, and the validity of such action under Mexican law."); Hunt v. Mobil Oil Corp., 550 F.2d 68, 77 (2d Cir. 1977) (examination of Libyan officials' motivation in nationalizing oil holding would inevitably involve determination of the validity of the official action, an inquiry barred by the act of state doctrine). *See generally* Karelis, *supra* note 229, at 1186-91; Walther, *supra* note 227, at 277-92.

239. The FCPA is not the only U.S. law implicated by the payment of a foreign bribe. As previously noted, international travel in connection with the payment of a bribe would violate the Travel Act, 18 U.S.C. sections 1961-68 (1999). In like fashion, the use of the manner and means of interstate communication in furtherance of a bribery scheme could form the predicate of a mail or wire fraud violation under 18 U.S.C. sections 1341 and 1343. Felony violation of the FCPA is a "specified unlawful activity" under the money laundering statute, which makes the transmission of funds from the United States to a place outside the United States with the intent to promote the carrying on of a "specified unlawful activity" a violation of 18 U.S.C. section 1956(a)(2). The unreported transportation of $10,000 in cash or a cash equivalent outside the United States violates the Currency and Foreign Transactions Reporting Act, 31 U.S.C. sections 5311-5330 (1999). The United States also imposes various disclosure requirements concerning overseas payments in connection with the licensing of exports, particularly military goods. Under the Arms Export Control Act, 22 U.S.C. section 2779 (1999) and the implementing International Traffic in Arms Regulation, 22 C.F.R. pt. 130 (1999), sellers of defense articles valued at $500,000 must disclose to the U.S. Department of State if aggregate political contributions of $5,000 or more were made or if fees or commissions in excess of $100,000 were paid. 22 C.F.R. § 130.9(a). If the overseas sale of military goods is funded through the Foreign Military Sales (FMS) or Foreign Military Financing (FMF) programs, there are additional disclosure requirements. FMS sales require certification that commissions paid were "bona fide" (i.e., not more than $50,000) and identified to the customer (some of whom prohibit commissions or require advance approval). FMF sales do not permit the payment of commissions or agent's fees with federal funds. *See* Defense Security Assistance Agency Guidelines § 225.7303-4.

accepted principles of international law or would otherwise offend the sovereignty of other nations. The actions brought to enforce the provisions and prohibitions of the FCPA, including the recent SEC actions against Montedison, S.P.A. and Triton Energy Corporation, reflect the wariness of the executive and judiciary in asserting enforcement jurisdiction in accordance with international law and the intentions of Congress.

Nevertheless, while confirming the FCPA's extraterritorial reach, Congress made clear its wish that the problem of international bribery be addressed globally, on a multilateral basis, and not simply by the unilateral prohibition against bribery by U.S. firms alone. Indeed, the need for an international solution to official corruption has been a recurring theme since the earliest Congressional hearings on questionable payments in 1976. Since that time, U.S. government agencies have undertaken a variety of initiatives aimed at securing international agreement to outlaw bribery. Most recently, these efforts produced official actions by the Organization of American States ("OAS") and the Organization for Economic Co-operation and Development ("OECD"), which, if implemented, could substantively address international bribery and level the playing field of international commerce.

III. International Anti-Corruption Initiatives

Public corruption is rightly viewed as "an international problem that requires an international solution."[240] International corruption not only adversely affects the political, economic and moral fiber of the "receiving country,"[241] it also significantly harms vital U.S.

240. THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK ch. 8 (1997); *see also* Robert H. Sutton, *Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption*, 20 FORDHAM INT'L L.J. 1427, 1470-72 (1997).

241. Corruption at the public and private levels has significant adverse effects on the country in which the corrupt payments are made. A recent study by the International Monetary Fund notes that "the amount of corruption is negatively linked to the level of investment and economic growth, that is to say, the more corruption, the less investment and the less economic growth." PAOLO MAURO, WHY WORRY ABOUT CORRUPTION (1997). As another commentator noted:

> The payment of bribes is wasteful and inefficient and has been found to be associated with low economic growth as measured by gross domestic product. Bribery pollutes the purity of transactions in a free market place, in which buyers and sellers ideally compete for business on the basis of value optimization. Without bribes, buyers purchase from the best bidder in terms of relevant issues of transactional value such as price, service and quality.

interests.[242] The expansion of cross-border trading and the

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> Bribery subverts the underlying transaction by diverting decisionmaker attention to extraneous considerations. When a seller wins a contract by paying a bribe, the buyer is replacing consideration of price, service, and quality with an interest in transactionally irrelevant side payments. This phenomenon harms rejected potential sellers who might have won a contract in the absence of bribery, as well as a public that relies on government officials to optimize value in purchasing decisions.

Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 249 (1997); *see also* Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 434 (1997); Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385, 390-92 (1995); Sutton, *supra* note 240, at 1430-41. The insidious effects of corruption are particularly severe in developing nations. *See* Jennifer M. Hartman, *Government By Thieves: Revealing the Monsters Behind the Kleptocratic Masks*, 24 SYRACUSE J. INT'L L. & COM. 157, 159 (1997) ("The destabilizing effects of corruption pose an even greater threat to developing countries, which are attempting to build economies to compete in the international market. High levels of corruption have, in fact, been shown to preclude high growth of a nation's gross domestic product. When this occurs, the general population of a state pays a price that is far greater than that which is gained by the conspirators, thus, the ultimate victims . . . are ordinary citizens."); David G. Scalise & Patricia J. DeGuzman, *Foreign Investment in the Philippines*, 29 GEO.WASH. J. INT'L L. & ECON. 145, 187-90 (1995). These effects are also severe in transitional economies. *See* Karl M. Meessen, *The Role of International Law in the Twenty-First Century: Fighting Corruption Across the Border*, 18 FORDHAM INT'L L.J. 1647, 1647 (1995) ("Times of [economic] transition are times of corruption. To some extent one will therefore simply have to wait for the new structures to become firmly established. In the east of Europe, however, the process of consolidation could easily be overtaken by a gradual or even sudden return to the authoritarian structures. Corruption both in government and private business has no small role in discrediting freshly installed free market systems."); *see also* Bialos & Husisian, *supra* note 196, at 183-84; Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 130 (1996) ("Bribery in the public sector . . . touches upon more than economic issues; it concerns the legitimacy of the state."). An example of the destabilizing effect of corruption is the partnership between the Russian "Mafiya" and Russian government officials discussed by Scott P. Boylan in *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Organized Crime and Corruption in Russia: Implications For U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2004-13 (1996).

242. At the time of the original enactment of the FCPA, Congress found that questionable overseas payments by U.S. companies adversely affected U.S. diplomatic and political interests by embarrassing or destabilizing governments allied with the United States. *See* text accompanying note 57, *supra*. As Theodore Sorensen noted at the time:

> Even before they were uncovered, these bribes—merely by being offered and accepted—had damaged American foreign policy and made it more vulnerable to its adversaries. By engaging in such debilitating practices, U.S. businessmen, who in most countries are more visible representatives of the

concomitant premium on "hard" currencies increased the incentives for both demanding and making corrupt payments.[243]

Virtually all countries, and certainly all industrialized countries, prohibit the payment of bribes domestically.[244] Nevertheless, the United States is the only country to criminalize the payment of bribes to foreign officials.[245] Similar assertions of extraterritorial jurisdiction engendered hostility among the community of nations,[246] and the FCPA in particular has been susceptible to the charge of moral imperialism.[247]

> American way of life than our diplomats, tarnished our country's image; subverted the lawful basis of friendly governments; aggravated the economic inequities and instability that inevitably accompany this subsidization and corruption of a power elite; and rendered both the host government and our own government more susceptible to an ultimate backlash.

Sorensen, *supra* note 91, at 128. Additionally, however, foreign corruption can have a larger, more direct effect in the United States. For example, Scott Boylan attributes the growing power of the Russian Mafiya in America to its involvement in the corruption of the former Soviet Republics. *See* Boylan, *supra* note 241, at 2004-14.

243. *See* Meessen, *supra* note 241, at 1648 ("Foreign hard currency often provides the strongest incentive for bribes").

244. *See FCPA—Oversight Hearings*, *supra* note 11, at 67 (statement of Professor Marshall B. Clinard); *id.* at 73 (statement of former Ambassador James E. Akins); Almond & Syfert, *supra* note 241, at 428; Hartman, *supra* note 241, at 168; Seymour Rubin, *International Aspects of the Control of Illicit Payments*, 9 SYRACUSE J. INT'L L. & COM. 315, 315 (1982); *see also* Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749, 788-94 (1996) (citing examples).

245. Boylan, *supra* note 241, at 2020; Hartman, *supra* note 241, at 168; Salbu, *supra* note 241, at 231; THE WORLD BANK, *supra* note 240.

246. As one commentator wryly observed, "In the past twenty-five years the United States has had three major exports: rock music, blue jeans, and United States law. The first two have acquired an acceptance the last can never achieve. People resent being told what to do." V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980). As noted in the Restatement, "Attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS ch. IV, intro. note (1986).

247. *See, e.g.*, Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 552 (1997) ("While agreeing that egregious forms of influence buying should be prohibited ... objecting countries similarly decry that forcing them to enact [laws prohibiting international bribery] represents no more than extraterritorial bullying that infringes upon their national sovereignty. In particular, demands against countries that they must adopt expansive anti-bribery legislation such as the Foreign Corrupt Practices Act raises these various concerns"); Kimelman, *supra* note 5, at 50 ("Rarely have the puritanical roots of this

When the FCPA was first considered, Congress was aware that international initiatives, rather than simple unilateral action, would be necessary to address the problem of international corruption.[248] It was recognized that absent international agreement and cooperation in eliminating official corruption, U.S. companies would be left standing alone.[249] Congress made its view on this subject explicit in the 1988

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country come back to life so forcefully in recent years as with the passage of the Foreign Corrupt Practices Act of 1977"); Salbu, *supra* note 241, at 275 ("Commentators have observed that Americans abroad should acknowledge cultural differences and avoid imposing controversial values on hosts operating in their own countries. The disturbing image of the ugly, ethnocentric American stands in bold relief when Congress imposes its will beyond the confines of the United States. Legislative overreaching evokes concerns that the United States is engaging in moral imperialism").

248. Prior to consideration of the FCPA, the Senate adopted Resolution 265 on November 12, 1975, which called on all U.S. negotiators to urge the adoption of codes of conduct by all appropriate international forums to "eliminat[e] bribery, kickbacks, unethical political contributions and other such similar disreputable activities." *See Foreign Payments Disclosure Hearings*, *supra* note 9, at 43; NYC BAR REPORT, *supra* note 88, at 34-35. In its report, the Association of the Bar of the City of New York stated:

> It is clear that the problem of questionable foreign payments is an international problem. As such, any solution attempted unilaterally through legislative action by one state is necessarily incomplete and may also be unwise .... United States business cannot be taken out of the bribery syndrome so long as it remains a 'way of life' for competing firms not subject to United States jurisdiction.

Id. The Richardson Task Force, on behalf of the Ford Administration, also advised Congress:

> It is the view of the President and the task force that the ultimate legal basis for adequately addressing the questionable payments problem must be an international treaty along the lines proposed by the United States. A treaty is required to make the "criminalization" of foreign bribery fully enforceable—for, in the absence of foreign cooperation, it would be extremely difficult, and in many cases impossible, for U.S. law enforcement officials and potential defendants to be assured of access to relevant evidence. A treaty is also required to treat the actions of foreign as well as domestic parties to a questionable transaction. And a treaty is required to assure that all nations, and the competing firms of differing nations, are treated on the same basis.

Foreign Payments Disclosure Hearings, *supra* note 9, at 45-46. The Carter Administration, National Association of Manufacturers and the Chamber of Commerce were of a similar view. *See Unlawful Payments Act of 1977*, *supra* note 90, at 179 (statement of Secretary of the Treasury Blumenthal), 245, 237.

249. *See Foreign Payments Disclosure Hearings*, *supra* note 9, at 46. Commentators at the time also emphasized the need for multinational agreement so as not to disadvantage U.S. businesses in competition with others that were not subject to the prohibition against corrupt payments. *See, e.g.*, Steven Morgan, *In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt*

amendments to the FCPA.[250] However, even before the passage of the FCPA in 1977, intermittent efforts were made to address official corruption multilaterally. These efforts continued over the following two decades and within the past several years resulted in potentially significant breakthroughs by the OAS and the OECD.

A. *Early Efforts at Achieving an International Consensus Against Bribery*

1. *The General Agreement on Tariffs and Trade (GATT)*

Senate Resolution 265 [251] directed the Special Representative for Trade Negotiations to "initiate at once negotiations within the framework of the current multilateral trade negotiations in Geneva"[252] to reach an international consensus against bribery. The efficacy of the GATT negotiations as a forum for a multinational agreement on prohibiting government bribery has been questioned,[253]

Practices Act of 1977 on Corporate Behavior, 12 VAND. J. TRANSNAT'L L. 359, 385 (1979) ("Actions by the United States government, acting alone, will not be fully effective in dealing with bribery until those efforts are matched by similar action by other nations. Critics of the FCPA assert that if only United States corporations are prohibited from bribing foreign officials, then United States corporations are likely to lose their competitive position vis-à-vis foreign corporations whose governments take a more benign view toward the payment of corporate funds to foreign officials").

250. Section 5003(d) of the Foreign Corrupt Practices Act Amendments of 1988, Pub .L. No. 100-418, 102 Stat. 1415, provided:

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

It has been suggested that this provision of the 1988 amendments intended to underscore Congressional concern that U.S. companies should not be disadvantaged by being alone in their injunction against corrupt payments. *See* Adam Freemantle & Sherman Katz, *The Foreign Corrupt Practices Act Amendments of 1988*, 23 INT'L LAW. 755, 764 (1989) ("It appears that the purpose of this requirement is to respond to the concern that other nations do not have the same standards Congress has enshrined in the FCPA. If not, American corporations will continue to be at a competitive disadvantage. Some commentators have suggested that, should such negotiations fail, the bribery provisions of the FCPA may be completely eliminated from U.S. law.").

251. S. RES. 94-265 (1975).

252. *See* NYC BAR REPORT, *supra* note 88, at 41.

253. *Id.* As the Association's Report noted:

> It is ... open to question whether the fact that GATT is concerned with trade, but not with investment, impairs its suitability as a forum. Although the negotiators at the Multinational Trade Negotiations are engaged in an

and the Special Trade Representative's proposal was met with what was described as "polite silence."[254] When the multilateral trade negotiations concluded in 1979, public corruption was not one of the trade distorting practices addressed.[255]

2. *The Organization of American States*

Somewhat greater success was achieved in the OAS.[256] On July 10, 1975, the Permanent Council of the OAS adopted a resolution on the behavior of transnational enterprises.[257] The resolution condemned, "in the most emphatic terms any act of bribery, illegal payment or offer of payment by any transnational enterprise; any demand for acceptance of improper payments by any public or private person, as well as any act contrary to ethics and legal procedures ... ."[258] The OAS resolution urged its members to conform to its laws regarding such payments.[259] As a statement of policy, however, the resolution made no provision for enforcement.[260]

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attempt to establish fair rules for government procurement policies, the problem of questionable foreign payments applies to government actions affecting investment as well as procurement. Furthermore, the effect of injecting these sensitive issues into the already delicate negotiations relating to international trade and the possible cost to the United States in terms of concessions in other areas argue against use of GATT for this purpose.

Id.

254. Rubin, *supra* note 244, at 317-18.

255. *Id.*

256. The Organization of American States (OAS) is the oldest regional organization in the world, tracing its origins to the Congress of Panama, convened by Simon Bolivar in 1826. In 1890, the International Union of American Republics was established and became the Pan American Union in 1910. The current OAS charter was adopted in 1948, under article 52 of the U.N. charter. The OAS is comprised of thirty-five member nations: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Surinam, Trinidad and Tobago, United States, Uruguay and Venezuela. Cuba is also a member but has been excluded from participation since 1962. *See* U.S. Dep't of State, *Background Notes: Organization of American States* (last modified Mar. 1998)<http://www.state.gov/www/background_notes/oas_0398_bgn.html>; Sutton, *supra* note 240, at 1450-52.

257. NYC BAR REPORT, *supra* note 88, at 39.

258. *Id.*

259. Morgan, *supra* note 249, at 386.

260. *Id.*

3. *The United Nations*

On December 15, 1975, the U.N. General Assembly adopted Resolution 3514 entitled "Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved."[261] The resolution condemned corrupt practices, including bribery, and instructed the Economic and Social Council ("ECOSOC") to direct the U.N. Commission on Transnational Corporations to include international bribery in its program work.[262]

The following March, at the Commission's meeting in Lima, Peru, the United States proposed that ECOSOC formulate and adopt a code outlawing corrupt payments in international trade.[263] However, once again, "deafening silence" met the U.S. proposal.[264]

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261. NYC BAR REPORT, *supra* note 88, at 38.

262. *Id*; *see also* Hartman, *supra* note 241, at 166; Murphy, *supra* note 241, at 393-94.

263. NYC BAR REPORT, *supra* note 88, at 38. According to the Richardson Task Force, the U.S. proposal included the following principles:

(i) It would apply to international trade and investment transactions with governments, i.e., government procurement and other governmental actions affecting the international trade and investment as may be agreed;

(ii) It would apply equally to those who offer to make improper payments and to those who request or accept them;

(iii) Importing governments would agree to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions, and establish appropriate criminal penalties for defined corrupt practices by enterprises and officials in their territory:

(iv) All governments would cooperate and exchange information to help eradicate corrupt practices;

(v) Uniform provisions would be agreed upon for disclosure by enterprises, agents and officials of political contributions, gifts and payments made in connection with covered transactions.

Foreign Payment Disclosure Hearings, *supra* note 9, at 44.

264. As Professor Seymour Rubin, who was then U.S. Representative to the United Nations Commission on Transnational Corporations, explained:

> At Lima ... there was nothing on the Commission's agenda which indicated that the subject of illicit payments would be discussed. Instead, the Commission was focusing on other aspects of the regulation or conduct of transnational corporations. Nonetheless, I received instructions to present the subject at four o'clock on a Friday afternoon, with the understanding that Mr. Ingersoll, who was then Undersecretary of State, would make a presentation before Senator Proxmire's committee at the same time. Surprisingly, I succeeded in introducing the subject at that time.
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> The subject of illicit payments was brought up in that forum, at least partially, because there had been a great deal of noise made in the United Nations about the reprehensible conduct of certain corporations, which were

Subsequently, the ECOSOC established the Ad Hoc Inter-Governmental Working Group on Corrupt Practices, which completed a draft agreement on corrupt payments in 1979.[264] No action was taken on this agreement largely because the United States was unable to garner support from the developed countries of Europe.[265]

4. *The Organization for Economic Cooperation and Development*

In January 1975, the OECD, whose membership is restricted to developed nations,[267] established a Committee on International

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known to be bribing governments of developed and developing countries alike. Iran was one of the chief proponents of this kind of activity. In Iran, under the Shah, there was considerable activity which fell into the category of reprehensible conduct. The Japanese cases were also receiving substantial publicity. I was, therefore, not entirely prepared for the deafening silence which greeted my own suggestion that the Commission on Transnational Corporations take up this particular topic, especially since it was discussing a code of conduct to instruct transnational corporations on the proper mode of conduct in the international arena. Needless to say, I received support from only a few members of the Commission.

Rubin, *supra* note 244, at 319-20.

265. *See* Murphy, *supra* note 241, at 394; NYC BAR REPORT, *supra* note 88, at 38.

266. As Professor Rubin reported:

> Interestingly, America's Western European allies have created the greatest difficulties. Although the Western European countries usually side with the United States in most matters, whether it be Restricted Business Practices or the general conduct of transnational corporations, the United States has not been able to obtain their support for a code of conduct on illicit payments in the U.N. forum. Consequently, it is easy to understand why, in the area of illicit payments, there is great difficulty in arriving at any agreed-upon code.

Rubin, *supra* note 244, at 321. Professor Rubin also noted that an impediment to achieving consensus on international bribery was the disconnect between perceived and actual standards of conduct on the part of the "moral allies" of the United States:

> The problem in the United Nations stems partially from the fact that there exists a difference in perception between what the conduct really is, or what the standards of conduct really are, and what they are said to be. Specifically, this situation occurs when a nation has a law opposed to bribery, as well as a law permitting a tax deduction for a payment that is stated to have been made for the purposes of a bribe and justified as being in the regular course of business. For this reason, the United States has not been able to achieve any degree of consensus with its moral allies in the United Nations.

Id. at 332.

267. The Organization for Economic Cooperation and Development (OECD) was formed as the Organization for European Economic Cooperation (OEEC) following World War II to administer the Marshall Plan to reconstruct Europe. On April 14, 1960, the Convention on the Organization for Economic Cooperation and

Investment and Multinational Enterprises to draft a code of conduct for multinational corporations.[268] On June 21, 1976, the OECD Ministerial Conference adopted a Declaration on International Investment; annexed to it were guidelines for multinational enterprises.[269]

Although OECD policy and guidelines addressed a number of issues pertaining to multinational enterprise activities, the policy specifically prohibited the solicitation and payment of bribes and political contributions unless such contributions were "legally permissible." The policy also provided that multinational enterprises should "abstain from any improper involvement in local political activities."[270] However, like the OAS policy, compliance with the OECD policy and guidelines was voluntary and established no substantive enforcement mechanisms.[271]

B. Non-Governmental Initiatives

1. The International Chamber of Commerce (ICC)

On March 2, 1976, the ICC announced the formation of a Commission on Unethical Practices, under the chairmanship of Lord Shawcross of the United Kingdom, to propose guidelines "for promoting correct conduct" of companies engaged in international transactions.[272] At the ECOSOC meeting in Geneva, the ICC also supported an international convention under which signatories would be obliged to take steps to eradicate corrupt practices of their citizens; including disclosure of all political contributions and a prohibition

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Development was signed in Paris and the OEEC was transformed to the OECD. The OECD currently has twenty-nine members including: Austria, Australia, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, New Zealand, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. The governing body is the Council comprised of representatives of the member States. The OECD headquarters is in Paris, France and is administered by the Secretary General. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ABOUT OECD (1998); *see* Sutton, *supra* note 240, at 1450-52.

268. Morgan, *supra* note 249, at 386.

269. *Id.*

270. *Id.*; *Foreign Payments Disclosure Hearings*, *supra* note 9, at 43.

271. NYC BAR REPORT, *supra* note 88, at 40.

272. *Id.* at 42.

against making foreign political contributions.[273]

On November 29, 1977, the ICC Commission issued its report, which was adopted by the ICC Council.[274] The report revealed that enforcement of existing antibribery laws was inconsistent from country to country.[275] The report endorsed the enactment of strict laws prohibiting and punishing corrupt practices and advocated multinational agreements prohibiting corruption.[276]

The report also stressed self-regulation as the most effective way to eliminate corruption and set forth proposed "Rules of Conduct to Combat Extortion and Bribery."[277] The rules prohibited the request, payment or acceptance of a bribe.[278] They also required fair and accurate recording of all financial transactions and prohibited the maintenance of off-book accounts."[279] The guideline section of the rules encouraged the adoption of corporate codes of conduct and the establishment of rigorous accounting controls.[280]

The ICC report and rules were updated on March 26, 1996.[281] The updated report confirmed "the basic approach" set forth in the ICC's 1977 report, the need for multinational action "to meet the challenging goal of greater transparency in international trade."[282] Noting that "major responsibility" for effecting reform "undoubtedly rests with governments," the report urged the prompt implementation of the May 1994 OECD Recommendation on Bribery in International Business Transactions.[283]

2. *Transparency International*

The first major private organization formed to combat international corruption was established in May 1993. Modeled after the human rights advocacy organization Amnesty International, a

273. *Id.*
274. Morgan, *supra* note 249, at 387.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. International Chamber of Commerce: 1996 Revisions to the ICC Rules of Conduct on Extortion and Bribery in International Business Transactions, 35 I.L.M. 1306 (1996).
282. *Id.* at 1307.
283. *Id.* The 1994 OECD recommendation is discussed *infra*.

former World Bank official, Peter Eigen, founded Transparency International, which is headquartered in Berlin.[284]

According to Transparency International, its mission is to curb corruption through international and national coalitions encouraging governments to establish and implement effective laws, policies and anti-corruption programs; to strengthen public support and understanding for anti-corruption programs and enhance public transparency and accountability in international business transactions and in the administration of public procurement; and to encourage all parties involved in international business transactions to operate at the highest levels of integrity.[285]

Rather than investigate and expose incidents of bribery, Transparency International has practiced "quiet diplomacy" through a network of chapters in fifty-two countries, including the United States.[286] In conjunction with Göttingen University, Transparency International publishes an index of international corruption. This index ranks eighty-five countries based on the perceptions of people engaged in international commerce.[287] Working through its country chapters, Transparency International lobbied governments to enact FCPA-like laws and establish anti-corruption mechanisms.[288] For example, Russian President Boris Yeltsin and the Russian Parliament asked Transparency International to submit proposals for new anti-corruption laws.[289] Transparency International was also strongly influential in gaining support among members for the OECD Anti-Bribery Recommendation.[290]

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284. *See* Beverley Earle, *The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 209 (1996); Hartman, *supra* note 241, at 167-68; Salbu, *supra* note 241, at 235; Raymond Bonner, *The Worldly Business of Bribes: Quiet Is Joined*, N.Y. TIMES, July 8, 1996, at A3; Barbara Crossette, *A Global Gage of Greased Palms*, N.Y. TIMES, Aug. 20, 1995, at sec. 4 P3.

285. *Transparency International Mission Statement* (last modified Apr. 1997) <http://www.transparency.de/mission.html>.

286. Bonner, *supra* note 284.

287. The latest index, ranked Denmark as being perceived as the least corrupt and Cameroon as being perceived as the most corrupt of the eighty-five countries in the survey. The United States ranked seventeenth. *The Transparency International 1998 Corruption Perception Index* (last modified Apr. 21, 1999) <http://www.transparency.de/documents/cpi/index.html>.

288. Klich, *supra* note 241, at 144.

289. *Id.*

290. *Id.*

C. *Recent Developments*

1. *The Organization of American States: The Inter-American Convention Against Corruption*

On December 11, 1994, the leaders of the governments of the Western Hemisphere met in Miami, Florida for the "Summit of the Americas."[291] Finding that "[e]ffective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions,"[292] the summit adopted a plan of action.[293] Under the plan, thirty-four signatories[294] agreed to the following:

- Promote open discussion of the most significant problems facing government and develop priorities for reforms needed to make government operations transparent and accountable;
- Ensure proper oversight of government functions by strengthening internal mechanisms, including investigative and enforcement capacity regarding acts of corruption and facilitating public access to information necessary for meaningful outside review;
- Establish conflict of interest standards for public employees and effective measures against illicit enrichment, including stiff penalties for those who utilize their public position to benefit private interests;
- Call on the governments of the world to adopt and enforce

291. Summit of the Americas: Declaration of Principles and Plan of Action, 34 I.L.M. 808 (1995).

292. *Id.* at 811.

293. *Id.* at 815. In the Declaration of Principles, summit participants reaffirmed their commitment and adherence "to the principles of international law and the purposes and principles enshrined in the United Nations Charter and in the Charter of the Organization of American States (OAS), including the principles of the sovereign equality of States, non-intervention, self-determination, and the peaceful resolution of disputes." *Id.* at 810.

294. The Declaration of Principles and Plan of Action was signed by representatives on behalf of Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela. *Id.* at 808.

measures against bribery in all financial and commercial transactions within the hemisphere; toward this end inviting the OAS to establish liaison with the OECD Working Group on Bribery in International Business Transactions;

- Develop mechanisms of cooperation in the judicial and banking areas to make possible rapid and effective response in the international investigation of corruption cases;
- Give priority to strengthening government regulations and procurement, tax collection, the administration of justice and the electoral and legislative processes, utilizing the support of the [Inter-American Development Bank] and other international financial institutions where appropriate; and
- Develop within the OAS, with due regard to applicable treaties and national legislation, a hemispheric approach to acts of corruption in the public and private sectors that would include extradition and prosecution of individuals so charged, through the negotiation of a new hemispheric agreement or new arrangements within existing frameworks for international cooperation.[295]

Summit participants recognized the OAS's "paramount role" in following up on the decisions made, particularly regarding the anti-corruption directives,[296] and the importance of "public and private sector partnerships."[297]

The anti-corruption measures in the Summit's plan of action served as the basis for the Inter-American Convention Against Corruption, which opened for signature in Caracas, Venezuela on March 29, 1996.[298] The Convention, which at the time was described as "one of the most important developments ever in the international

295. *Id.* at 818-19. In setting out this action plan, it was noted that:

> The problem of corruption is now an issue of serious interest not only in this Hemisphere, but in all regions of the world. Corruption in both the public and private sectors weakens democracy and undermines the legitimacy of governments and institutions. The modernization of the state, including deregulation, privatization and the simplification of government procedures, reduces the opportunities for corruption. All aspects of public administration in a democracy must be transparent and open to public scrutiny.

Id. at 818.

296. *Id.* at 835-36.

297. *Id.* at 838.

298. Organization of American States: Inter-American Convention Against Corruption, 35 I.L.M. 724 (1996) [hereinafter Convention Against Corruption].

ethics area,"[299] called for action at the national and multi-national levels, as well as cooperation among nations to address the problem of corruption.[300] Thus, the Convention stated the following two purposes:

1. To promote and strengthen the development by each of the

299. Michael Skol, *An Ethical Bonanza: The Caldera Convention and the Internationalization of the FCPA*, 3 Fed. Ethics Rep. 1 (1996).

300. Thus, the Preamble to the convention stated that the members of the OAS adopted the convention:

> CONVINCED that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as the comprehensive development of peoples;
>
> CONSIDERING that representative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance;
>
> PERSUADED that fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration and damage to a society's moral fiber;
>
> CONVINCED of the importance of making people in the countries of the region aware of this problem and its gravity, and of the need to strengthen participation by civil society in preventing and fighting corruption;
>
> RECOGNIZING that in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively;
>
> CONVINCED of the need for prompt adoption of an international instrument to promote and facilitate international cooperation in fighting corruption and, especially, in taking appropriate action against persons who commit acts of corruption in the performance of public functions, or acts specifically related to such performance, as well as appropriate measures with respect to the proceeds of such acts;
>
> DEEPLY CONCERNED by the steadily increasing links between corruption and the proceeds generated by illicit narcotics trafficking which undermine and threaten legitimate commercial and financial activities, and society, at all levels;
>
> BEARING IN MIND the responsibility of States to hold corrupt persons accountable in order to combat corruption and to cooperate with one another for their efforts in this area to be effective; and
>
> DETERMINED to make every effort to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

Convention Against Corruption, supra note 298, at 727.

As one commentator noted, "Taken as a whole, the Convention involves both state-level and transnational approaches, attacking individual acts of corruption and the systems which permit such acts to flourish, as well as promoting cooperation among states in a collective effort to eradicate corruption." Sutton, *supra* note 240, at 1457.

States parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and

2. To promote, facilitate and regulate cooperation among the States parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.[301]

a. Offenses

The Convention is intended to apply to the following: a public official's solicitation or acceptance of a corrupt payment; the offer or payment of money or benefit to a public official in exchange for an act or omission in the performance of a public function; an act or omission by a public official for the purpose of illegally obtaining a benefit either for the official or a third party; the fraudulent use or concealment of property obtained through corruption; and the participation as a principal or a third party ("instigator, accomplice or accessory after the fact") in the commission, attempted commission or conspiracy to commit an act of corruption.[302] The Convention made clear that the enumerated acts were not exclusive and that two or more parties could agree the Convention would apply to other acts

301. Convention Against Corruption, supra note 298, at 728, art. 2.

302. The Convention defined the acts of corruption to which it applied as follows:

a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;
c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;
d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and
e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.

Id. at 729, art. VI(1).

of corruption as well.[303] The Convention also provided that States that had not already done so should establish an offense of "illicit enrichment" defined as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earning during the performance of his functions."[304]

Additionally, States were asked to consider establishing other offenses under their laws to promote "the attainment of the purposes of this Convention."[305] These offenses included a government official's use of classified information or government property for personal gain or for the gain of a third party; procuring a decision from a public authority for personal benefit or benefit of a third party; and diverting government property or monies to a third party for the benefit of the government official or a third party.[306] These offenses, if adopted, would be considered "acts of corruption" for

303. *Id.* at art. VI(2).

304. *Id.* at 730, art. IX.

305. *Id.* at art. XI(1).

306. *Id.* at 730-31. Article XI of the Convention provided:

> In order to foster the development and harmonization of their domestic legislation and the attainment of the purposes of this Convention, the States Parties view as desirable, and undertake to consider, establishing as offenses under their laws the following acts:
>
> a. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of classified or confidential information which that official or person who performs public functions has obtained because of, or in the performance of, his functions;
>
> b. The improper use by a government official or a person who performs public functions, for his own benefit or that of a third party, of any kind of property belonging to the State or to any firm or institution in which the State has a proprietary interest, to which that official or person who performs public functions has access because of, or in the performance of, his functions;
>
> c. Any act or omission by any person who, personally or through a third party, or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State property; and
>
> d. The diversion by a government official, for purposes unrelated to those for which they were intended, for his own benefit or that of a third party, of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official has received by virtue of his position for purposes of administration, custody or for other reasons.

Id.

purposes of the Convention.[307]

Finally, States were to criminalize "transnational bribery."[308] Under that provision, signatories were to enact laws prohibiting and punishing the offering or making of a corrupt payment to a government official of another State "in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions."[309]

b. National Actions

In addition to enacting laws criminalizing the "acts of corruption" enumerated in the Convention,[310] signatories agreed to consider taking other actions to strengthen their internal standards of conduct and the transparency of governmental functions. These actions included the establishment of standards of conduct with mechanisms for training and enforcement; establishment of mechanisms for oversight and reporting acts of corruption without fear of retaliation; adoption of requirements for disclosure of public officials' income and assets and recordkeeping and account controls requirements for publicly held corporations; establishment of systems for government hiring and procurement of goods and services; and elimination of favorable tax treatment of expenses in violation of the State's anti-corruption laws.[311]

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307. *Id.* at 731, art. XI(2).

308. *Id.* at 730, art. VIII.

309. *Id.* Article VII of the Convention provided the following regarding transnational bribery:

> Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.

Id.

310. *Id.* at 731, art. VII.

311. *Id.* at 728, art. III. The parties to the Convention were to consider "the applicability of measures . . . to create, maintain and strengthen" the following:

> 1. Standards of conduct for the correct, honorable, and proper fulfillment of public functions. These standards shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions. These standards shall also establish measures and systems requiring government officials to report to appropriate authorities acts

States were also to adopt laws affecting the jurisdiction of their courts.[312] The Convention called on States to invoke territorial jurisdiction,[313] jurisdiction predicated on nationality[314] and jurisdiction based on the universality principle.[315] Once again, the Convention

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of corruption in the performance of public functions. Such measures should help preserve the public's confidence in the integrity of public servants and government process.

2. Mechanisms to enforce these standards of conduct.
3. Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities.
4. Systems for registering the income, assets and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such registrations public.
5. Systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.
6. Government revenue collection and control systems that deter corruption.
7. Laws that deny favorable tax treatment for any individual or corporation for expenditures made in violation of the anticorruption laws of the States Parties.
8. Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.
9. Oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts.
10. Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.
11. Mechanisms to encourage participants by civil society and nongovernmental organizations in efforts to prevent corruption.
12. The study of further preventive measures that take into account the relationship between equitable compensation and probity in public service.

312. *Id.* at 729, art. V.

313. *Id.* Accordingly, "[e]ach State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense in question is committed in its territory." *Id.*

314. *Id.* Accordingly, "[e]ach State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory." *Id.*

315. *Id.* Accordingly:

> [e]ach State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the alleged criminal is present in its territory and

made it clear that the enumeration of these three bases of jurisdiction were not intended to be exclusive of any other basis of jurisdiction adopted by a State.[316]

c. International Actions

The Convention also mandated that the parties cooperate with one another to ensure enforcement of each State's anti-corruption measures. The Convention pledged the parties to cooperate with each other by doing the following:

- including the offenses described in the Convention as extraditable offenses in treaties among the parties and, if no extradition treaty exists, considering the Convention as the legal basis for extradition;[317]

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it does not extradite such person to another country on the ground of the nationality of the alleged criminal.

Id. Jurisdiction based on universality is somewhat unusual since the principle is typically invoked with regard to crimes that are universally condemned, for example, terrorism, and which are often committed in Stateless territories, for example, piracy.

316. *Id.* The Convention stated, "This Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law." *Id.*

317. *Id.* at 731. With respect to extradition, article XIII provides:

1. This article shall apply to the offenses established by the States Parties in accordance with this Convention.
2. Each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition treaty existing between or among the States Parties. The States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between or among them.
3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.
4. State Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offenses between themselves.
5. Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the requested State may refuse extradition.
6. If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offense, the Requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State, and shall report the final outcome to the Requesting State in due course.

- processing requests for evidence and otherwise facilitating investigations and prosecuting acts of corruption;[318]
- sharing information and experiences in preventing, detecting, investigating and prosecuting acts of corruption;[319]
- assisting in the identification and retrieval of property or proceeds derived from or used in the commission of acts of corruption;[320]

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7. Subject to the provisions of its domestic law and its extradition treaties, the Requested State may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure his presence at extradition proceedings.

Id. at 731-32.

318. *Id.* at 732, art. XIV(1). Article XIV(1) provides:
In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in this Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.

Id.

319. *Id.* Article XIV(2) provides:
The States Parties shall also provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption. To that end, they shall foster exchanges of experiences by way of agreements and meetings between competent bodies and institutions, and shall pay special attention to methods and procedures of citizen participation in the fight against corruption.

Id.

320. *Id.* Article XV provides:
1. In accordance with their applicable domestic laws and relevant treaties or other agreements that may be in force between or among them, the States Parties shall provide each other the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this Convention.
2. A State Party that enforces its own or another State Party's forfeiture judgment against property or proceeds described in paragraph 1 of this article shall dispose of the property or proceeds in accordance with its laws. To the extent permitted by a State Party's laws and upon such terms as it deems appropriate, it may transfer all or part of such property or proceeds to another State Party that assisted in the underlying investigation or proceedings.

Id.

- refraining from invoking bank secrecy as a basis for refusing to provide assistance subject to the requesting State's obligation not to use the information in any other proceeding unless authorized by the providing State;[321] and
- establishing a central authority for making and receiving requests for assistance.[322]

Thus far, twenty-five nations, including the United States, have signed the Convention;[323] however, only sixteen nations have ratified it.[324] In transmitting it to the Senate for advice and consent to ratification,[325] the President hailed the Convention as "the first multilateral Convention of its kind in the world to be adopted."[326] Others share the President's appraisal.[327] The President also advised

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321. *Id.* Article XVI provides:

1. The Requested State shall not invoke bank secrecy as a basis for refusal to provide the assistance sought by the Requesting State. The Requested State shall apply this article in accordance with its domestic law, its procedural provisions, or bilateral or multilateral agreements with the Requesting State.
2. The Requesting State shall be obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorized by the Requested State.

Id.

322. *Id.* at 732-33. Article XVIII provides:

1. For the purposes of international assistance and cooperation provided under this Convention, each State Party may designate a central authority or may rely upon such central authorities as are provided for in any relevant treaties or other agreements.
2. The central authorities shall be responsible for making and receiving the requests for assistance and cooperation referred to in this Convention.
3. The central authorities shall communicate with each other directly for the purposes for this Convention.

Id.

323. Organization of American States, *Interamerican System of Legal Information* (visited Oct. 14, 1999) <http://www.oas.org/en/prog/juridico/english/sigs/b-58.html>.

324. The OAS reported that Argentina, Bolivia, Chile, Colombia, Costa Rica, Domincan Republic, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela ratified the Convention. *Id.*

325. The Convention must be ratified in order to become effective. Convention Against Corruption, *supra* note 298, at 733, art. XXII.

326. *Transmittal to Congress on Inter-American Convention*, 34 WEEKLY COMP. PRES. DOC. 554 (Apr. 1, 1998).

327. *See* Nancy Zucker Boswell, *Nurturing the Seeds of Reform*, 4 Fed. Ethics Rep. 1, 4 (1997) ("the Convention is a powerful political statement and its provisions are broad"). Ms. Boswell is the U.S. Executive Director of Transparency International.

the Senate that ratification would not require implementing legislation.[328] Although the OAS Convention represents a significant accomplishment in galvanizing multinational action against corruption, its long-term effectiveness remains to be seen.

2. *The Organization for Economic Cooperation and Development: The 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Officials and the 1997 Convention on Bribery in International Business Transactions*

In 1996 and 1997, the OECD realized two major accomplishments in the effort to eliminate bribery as an accepted means of international business. These two initiatives, the 1996 Recommendation on the Tax Deductibility of Bribes Paid to Foreign Officials and the 1997 Convention on Combating Bribery of Foreign Public Officials, were the culmination of over seven years of study and negotiation by the United States and fellow members of the OECD.

a. *The 1996 Recommendation on the Tax Deductibility of Bribes Paid to Foreign Officials*

In 1990, the Council of the OECD, comprised of the ministers or permanent representatives of member countries,[329] requested that the Committee on International Investment and Multinational Enterprise ("CIME") study the feasibility of cooperative action by member governments to combat illicit payments.[330] The CIME study, issued in 1992, included a section on the tax treatment of bribes paid to foreign

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Deputy Secretary of State Strobe Talbott also described the convention as "a powerful statement by the governments of the hemisphere that corruption will no longer be considered business as usual" and serves "as an outstanding, indeed, unique role model for similar efforts around the world." Deputy Secretary of State Talbott, *U.S. Signs Inter-American Convention Against Corruption* (June 2, 1996) (press release) (visited October 14, 1999) <http://pdq2.usia.gov>; *see also* Sutton, *supra* note 240, at 1470-78. The success in obtaining criminalization of international bribery was attributed primarily to the efforts of the United States. *See a Defeat for Business Bribery Abroad*, N.Y. TIMES, Apr. 16, 1996, at A20; *Against Latin Corruption*, WASH. POST, Apr. 12, 1996, at A24.

328. *Transmittal to Congress on Inter-American Convention*, *supra* note 326, at 554.

329. Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, art. 7 (visited May 29, 1999) <http://www.oecd.org/about/origins/ convention/conventn.htm>.

330. *Implementing the OECD Recommendation*, *supra* note 6.

government officials.[331]

At the urging of then Secretary of State Warren Christopher, the OECD Council took up the question of international bribery at their May 1994 meeting.[332] Acting on the CIME study, the OECD Council adopted what has been described as the first multilateral agreement to combat foreign bribery.[333] The Recommendation on Bribery in International Business Transactions[334] was premised on the recognition that "bribery is a widespread phenomenon in international business," and "all countries share responsibility to combat bribery."[335] The OECD Council also recognized that all member countries had laws prohibiting domestic bribery "while only a few Member countries have specific laws making the bribery of foreign officials a punishable offense . . . ."[336] For those reasons the Council was "[c]onvinced that further action is needed on both the national and international level to dissuade both enterprises and public officials from resorting to bribery when negotiating international business transactions and that an OECD initiative in this area could act as a catalyst for global action."[337]

Accordingly, the OECD Council recommended "that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions."[338] To that end the Council called on member nations to take domestic action regarding their own laws and international action regarding cooperation among member and non-member countries.

Domestically, the Council called on OECD members to "take

331. *Id.*

332. *See* Secretary of State Madeleine K. Albright, Remarks at the Organization for Economic Cooperation and Development Signing Ceremony for the Anti-Bribery and Corruption Convention (Dec. 17, 1997); *see also Summary of OECD Anti-Bribery Convention*, INT'L LAW NEWS, Winter 1998, at 10 (prepared by U.S. Commerce, Justice and State Departments).

333. American Bar Ass'n Section of Int'l Law and Practice, *Report to the House of Delegates Concerning Corrupt Practices in the Conduct of International Business*, 30 Int'l Law. 193, 196 (1996).

334. *Organization for Economic Cooperation and Development: Council Recommendation on Bribery in International Business Transactions*, OECD Doc. C(94)75/Final (May 27, 1994) [hereinafter *1994 Bribery Recommendation*].

335. *Id.* at 1390.

336. *Id.*

337. *Id.*

338. *Id.*

concrete and meaningful steps" to deter, prevent and combat bribery. These steps included examination of the country's laws regarding bribery of foreign officials and regarding tax laws, regulations and practices that may favor bribery.[339]

Internationally, the Council recommended that member nations take steps to foster cooperation with each other and with non-member countries to confront international bribery. Member countries were encouraged to cooperate with authorities in other countries in the investigation and prosecution of bribery, including the sharing of information, the provision of evidence and extradition.[340] Member countries were also encouraged to "make full use of existing agreements and arrangements for mutual international legal assistance" and, if necessary, enter into new agreements to that end.[341] They were further encouraged to "ensure that their national laws afford an adequate basis for this cooperation."[342] Both member countries and the OECD Secretariat were urged to consult with non-member countries and international organizations to promote anti-corruption policies and "encourage them to join in the effort to combat such bribery in accordance with this recommendation."[343]

As part of the 1994 Bribery Recommendation, the Council

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339. *Id.* at 1391. Thus, the Council recommended that:

> [E]ach member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. These steps may include:
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> i) criminal laws, or their application, in respect of the bribery of foreign public officials;
>
> ii) civil, commercial, administrative laws and regulations so that bribery would be illegal;
>
> iii) tax legislation, regulations and practices, insofar as they may indirectly favor bribery;
>
> iv) company and business accounting requirements and practices in order to secure adequate recording of relevant payments;
>
> v) banking, financial and other relevant provisions so that adequate records would be kept and made available for inspection or investigation; and
>
> vi) laws and regulations relating to public subsidies, licences (*sic*), government procurement contracts, or other public advantages so that advantages could be denied as a sanction for bribery in appropriate cases.

Id.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 1392.

directed CIME to monitor its implementation.[344] CIME was invited to form a working group to assist in that effort,[345] directed to report to the Council after its first review of implementation and review the Recommendation within three years.[346]

Thereafter, acting on a proposal from the OECD Committee on Fiscal Affairs ("CFA"), on April 11, 1996, the OECD Council adopted a further recommendation addressing the tax deductibility of bribes to foreign officials.[347] The Council recommended "that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility."[348] The Council noted in this connection that "[s]uch action may be facilitated by the trend to treat bribes to foreign public officials as illegal."[349] Once again, the CIME, in cooperation with the CFA, was directed to monitor implementation and promote the Recommendation in contacts with non-member governments.[350]

On May 26, 1997, the CFA made its report on implementation of the Recommendation on Tax Deductibility.[351] The CFA reported that, while most OECD member countries treated bribes as taxable income to the recipient, the tax treatment of the person or firm paying the bribe was determined, in most instances, according to whether the recipient was a domestic or foreign official.[352] The report noted that bribes paid to foreign officials were "in principle" deductible as business expenses in twelve member countries.[353]

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344. *Id.*

345. *Id.*

346. *Id.*

347. *OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*, OECD Doc. C(96)27/Final, 35 I.L.M. 1311 (Apr. 11, 1996) [hereinafter *1996 Recommendation on Tax Deductibility*]. This action was taken at the urging of the United States. *See* Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10 ("Under intense pressure from the United States, the world's richest nations today took an important step to fight corruption in international business dealings by agreeing that bribes paid to foreign officials, often listed as commissions or fees, should no longer be tax deductible").

348. *1996 Recommendation on Tax Deductibility, supra* note 347, at 1312.

349. *Id.*

350. *Id.*

351. *See Implementing the OECD Recommendation, supra* note 6.

352. *Id.* § V(2).

353. *Id.* These countries included: Australia, Austria, Belgium, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Portugal, New Zealand and Switzerland.

However, Norway and the Netherlands enacted new legislation at least limiting the deductibility of bribes, and deductibility was under reexamination in Australia, Belgium, Denmark, Luxembourg and Switzerland.[354]

b. *The 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

Meanwhile, the CIME and the Working Group on Bribery continued their work with member and non-member countries to implement the 1994 Recommendation on Bribery and develop a revised recommendation.[355] The CIME reported that the criminalization of bribery of foreign officials received priority "since it has ramifications for actions in other fields."[356] In May 1996, the OECD Council endorsed the conclusion that it was necessary to criminalize bribery of foreign government officials in a coordinated manner.[357] As the CIME noted, "[a]n important concern was to ensure that companies face substantially similar rules and penalties for international bribery, no matter what their own country of origin, and that the network of laws forged by the combined effort will permit effective enforcement and mutual legal assistance."[358] The CIME submitted a Revised Recommendation on Combating Bribery in International Business Transactions, which the OECD Council adopted on May 23, 1997.[359]

The Council's revised Recommendation on Combating Bribery replaced the broad statements of principle in its earlier

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Id. In addition, bribes were deductible in Denmark and Sweden "if they [were] the customary practice in the country of the recipient." *Id.*

354. *Id.* § VI(2).

355. *See Review of the 1994 Recommendation on Bribery in International Business Transactions, Including Proposals to Facilitate the Criminalization of Bribery of Foreign Officials*, OECD Doc. C/MIN(97)17/ADD1/CORR1 (May 26, 1997) [hereinafter *Review of the 1994 Recommendation*].

356. *Id.* § III. For example, the CFA reported that, under Dutch law, expenses for illicit activities could not be deducted if a Dutch criminal court ruled that an illegal act was committed. The CFA noted, however, that "there is at present no jurisprudence with regard to the question whether the bribery of a foreign public official constitutes a criminal offense according to Dutch criminal law." *Implementing the OECD Recommendation*, *supra* note 6, ¶ 32.

357. *Review of the 1994 Recommendation*, *supra* note 355, §III(A).

358. *Id.*

359. *Revised Recommendation on Combating Bribery in International Business Transactions*, OECD Doc. C(97)123/Final, 36 I.L.M. 1016 (May 29, 1997) [hereinafter *1997 Revised Recommendation on Combating Bribery*].

recommendation with specific proposals for legislative action by member governments. The Recommendation included "concrete and meaningful steps" to be taken regarding the revisions of criminal laws, tax laws, accounting requirements and practices, banking laws, public contracting, civil laws and administrative regulations and international cooperation.[360] With certain technical amendments, the Council adopted the Recommendation as a convention on December 18, 1997.[361]

The parties to the Convention recognized that bribery of public officials was a widespread problem that all countries shared responsibility for and required a multilateral response.[362] The

360. *Id.* at 1019, § II.

361. *Convention on Combating Bribery of Foreign Officials in International Business Transactions*, DAFFE/IME/BR(97)20 (Apr. 8, 1998) [hereinafter *1997 Convention*].

362. Thus, the Convention states in its preamble that the Convention was adopted by the parties:

> Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;
>
> Considering that all countries share a responsibility to combat bribery in international business transactions;
>
> Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Cooperation and Development (OECD) on May 23, 1997, C(97)123/Final, which, inter alia, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and coordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;
>
> Welcoming other recent developments which further advance international understanding and cooperation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;
>
> Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery; Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;
>
> Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral cooperation, monitoring and follow-up;
>
> Recognising that achieving equivalence among the measures to be taken

Convention solemnized the principal reforms set forth in the earlier Recommendation regarding criminalization of foreign bribery, establishment of accounting and controls requirements, clarification of jurisdiction and the rendering of mutual legal assistance in matters of foreign bribery, including extradition.

i. Offenses

Under the Convention, bribery of a foreign public official,[363] either directly or through an intermediary, is a criminal offense.[364]

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by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence.

Id. at 4.

363. *Id.* "foreign public official" was defined in the Convention to mean, "[A]ny person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation." *Id.*

In addition, the Convention defined "foreign country" to include "all levels and subdivisions of government, from national to local." *Id.* In this connection, the Commentaries accompanying the Convention provide further guidance concerning the meaning and scope of "foreign public official." As explained in the Commentaries, the exercise of a public function includes "any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement." *Id.* at 9. Similarly, a "public agency" includes any "entity constituted under public law to carry out specific tasks in the public interest." *Id.* "Public enterprise" is broadly defined to include private entities owned or controlled by the government:

> A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

Id. An officer or manager of a government owned or controlled enterprise will be considered a public official unless the enterprise is in actuality a commercial venture. "An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." *Id.* A foreign public official within the contemplation of the Convention may also be an official of an international organization that may include, "any international organization formed by States, governments, or other public international organizations, whatever the form of organization and scope of competence, including, for example, a regional economic integration organization such as the European Communities." *Id.*

364. *Id.* at 4. Article 1 of the Convention provides:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer,

However, under the Convention, liability only extends to the person or entity that offers or pays the bribe and not to the foreign official who demands or accepts it.[365] The Recommendation recognizing

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promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of the international business.

Id. With respect to liability for a bribe paid through an intermediary, the Commentaries noted that "the conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity." *Id.* at 9. Liability extends to natural persons and legal persons. Under article 2 of the Convention, parties were to take the necessary measures "to establish the liability of legal persons for the bribery of a foreign public official." *Id.* at 4. However, as the Commentaries explain, the Convention is not to be applied strictly. Instead, the Convention establishes a standard which is to be integrated into the parties' laws:

> This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.
>
> Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfill its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgment or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

Id. at 8. The Convention does not require the parties to extend criminal liability to "legal persons" if the country's laws do not otherwise provide for such liability. Instead, under article 3 of the Convention, "legal persons" must be subject to "effective, proportionate and dissuasive *non-criminal* sanctions." *Id.* at 5 (emphasis added). Thus, article 3(2) of the Convention provides, "In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials." *Id.* The failure of the Convention to require legal liability for corporations and other entities has been criticized as not "leveling the playing field" for countries, like the United States, which impose criminal liability on corporations. *See* Geoffrey R. Watson, *The OECD Convention on Bribery*, INSIGHT, Mar. 1998, at 1.

365. *1997 Convention*, *supra* note 361, at 8. This is made clear in the Commentaries to the Convention that state:

> This Convention deals with what, in the law of some countries, is called

accomplice and conspirator liability, as well as liability for attempts.[366]

The purpose of the bribe must be to induce the public official to "act or refrain from acting in relation to the performance of official duties" for the purpose of obtaining or retaining business or to secure some "other improper advantage in the conduct of international business."[367] The Convention broadly construes the acting or refraining to act by a foreign official to include "any use of the public official's position, whether or not within the official's authorised competence."[368] The Commentaries to the Convention make it clear that it is no defense that the company offering the bribe was the best qualified bidder or the award of the business otherwise would have been proper.[369]

'active corruption' or 'active bribery,' meaning the offence committed by the person who promises or gives the bribe, as contrasted with 'passive bribery,' the offence committed by the official who receives the bribe. The Convention does not utilise the term 'active bribery' simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

Id.

366. *Id.* at 4. Article 1 further provides in this regard that:

Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Id. However, as pointed out in the Commentaries, if such accessory liability is not otherwise prohibited under the country's laws and if the specified acts do not result in further action in violation of the Convention, the country would not be required to make the acts punishable solely by virtue of the Convention:

The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Id. at 9.

367. *Id.* at 4.

368. *Id.* This was highlighted in the Commentaries which noted that:

One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office—though acting outside his competence—to make another official award a contract to that company.

Id. at 9.

369. *Id.* The Commentaries explained, "It is an offence within the meaning of

Further, the Convention criminalizes payments made to secure an "advantage" other than obtaining or retaining business. According to the commentaries, such an advantage may include anything "to which the company concerned was not clearly entitled." As an example, they cite "an operating permit for a factory which fails to meet the statutory requirements."[370] It is no defense in this regard that payments were customary in the country or necessary to obtain the official benefit.[371] However, "facilitating payments" are not bribes within the meaning of the Convention,[372] and it is also not an offense if the payment was for an "advantage" required or permitted under the country's laws.[373] Additionally, countries charging money laundering as an offense in regard to domestic bribery are to make the same offense applicable to bribery of a foreign official.[374]

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paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business." *Id.*

370. *Id.*

371. *Id.* Additionally, the amount of the bribe has no effect on culpability. As the Commentaries explained, "It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local customer, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage." *Id.* Thus, the Commentaries also suggested that culpability is unaffected by whether the bribe resulted in obtaining or retaining the business or advantage. With regard to the tax deductibility of bribes, however, unlike the 1997 Recommendation, which urged "prompt implementation" of the OECD's 1996 Recommendation on Tax Deductibility, the Convention is silent concerning the elimination of tax deductibility. *See 1997 Revised Recommendation on Combating Bribery, supra* note 359, at 1020.

372. *Id.* Although the Commentaries clearly state that the practice of facilitating payments is not condoned:

> Small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

373. *1997 Convention, supra* note 361, at 9. The Commentaries note in this regard that "it is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law." *Id.*

374. *Id.* Article 7 of the Convention provides, with respect to the offense of money laundering, that "each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official,

ii. Jurisdiction

The Convention adopted, with some modification, the Recommendation's provisions regarding assertions of territorial and nationality-based jurisdiction.[375] However, rather than call for the extradition of citizens if the party did not assert nationality-based jurisdiction, as the Recommendation did,[376] the Convention requires countries having jurisdiction (either territorial or national) to consult "with a view to determining the most appropriate jurisdiction for prosecution."[377] The Convention includes additional procedural

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without regard to the place where the bribery occurred." *Id.* at 5. The Commentaries explain that reference to the predicate offense of "bribery of its own public official" is intended broadly so that the laundering of funds used for bribery will be prohibited whether the country makes "active bribery" or "passive bribery" the predicate for money laundering:

> '[B]ribery of its own public official' is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Id. at 10.

375. With respect to territorial jurisdiction, the Commentaries reiterate the sentiment in the Recommendation that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." *Id.* With respect to nationality-based jurisdiction, the Commentaries noted that:

> [n]ationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to 'principles' includes the principles upon which such selection is based.

Id.

376. *See 1997 Revised Recommendation on Combating Bribery*, *supra* note 359, at 1023 ("States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials").

377. *1997 Convention*, *supra* note 361, at 5. Article 4 of the Convention provides with respect to jurisdiction:

> 1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.
> 2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

provisions as well.[378]

iii. Accounting and Controls

The Convention expanded the Recommendation's accounting and control provisions.[379] While continuing the prohibition against

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Id. The Recommendation provisions concerning extradition in the event a country declined to exercise nationality-based jurisdiction were incorporated into Article 10 of the Convention, which dealt specifically with extradition and is discussed *infra*.

378. *Id.* The Convention included other procedural provisions as well. Article 5 emphasized the necessity of independent judgment in conducting investigations and prosecutions of internal bribery:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Id. Article 6 requires that an adequate period for investigation and prosecution be allowed when establishing the applicable statute of limitations: "Any statute of limitations applicable to the offense of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offense." *Id.*

Article 11 requires the designation of a responsible authority to consult on jurisdictional issues and to make or receive requests for legal assistance and extradition:

> For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify the Secretary-General of the OECD of an authority or authorities responsible for making and receiving requests, which shall serve as a channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Id. at 6.

The Commentaries further underscore the importance of article 5 (enforcement) in assuring that prosecutorial discretion with respect to bribery of foreign officials would be based on professional, rather than political considerations:

> Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/Final . . . which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Id. at 10.

379. The 1997 Recommendation enumerated standards for accounting and controls requirements to be adopted by member countries. These standards included: maintenance of adequate books and records identifying "the matters in respect of which the receipt and expenditure takes place"; prohibition of "off-book"

"off-book" transactions and the maintenance of "off-book" accounts, the Convention enlarged the requirements of accuracy of books, records and financial statement disclosures.[380] Under the Convention, companies are prohibited from misidentifying the purpose of liabilities and using false documents to camouflage corrupt payments.[381]

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transactions or the maintenance of "off-book" accounts; disclosure in financial statements of the "full range of material contingent liabilities"; sanctions for omissions, falsifications or fraud in accounting records; independent audit of financial statements; standards for the independence of auditors; reporting requirements for auditors who discover indications of possible bribery; standards for internal controls including standards of conduct; statements by management in the annual report concerning internal control mechanisms, particularly mechanisms that prevent bribery; establishment of independent monitors, such as audit committees or supervisory boards; and establishment of mechanisms that prevent bribery; establishment of mechanisms for receiving communications from "persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical supervisors." *1997 Revised Recommendation on Combating Bribery*, *supra* note 359, at 1020-21.

380. The expanded accounting and controls requirements will be the subject of continuing discussions in the Working Group. However, as the Commentaries point out, the Convention's disclosure requirements will have an immediate effect:

> Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

1997 Convention, *supra* note 361, at 10.

381. *Id.* at 5. Under Article 8 of the Convention:

> In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those

iv. Sanctions

The punishment for violation of the Convention's anti-bribery provisions is to consist of "effective, proportionate and dissuasive civil, administrative or criminal penalties" comparable to the punishment imposed for domestic bribery.[382] In addition, the bribe and any proceeds of the bribery, or property of corresponding value, are to be subject to seizure, confiscation and forfeiture.[383] Monetary

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laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

Id.

382. *Id.* Article 3 of the Convention provides, with respect to penalties for bribery of a foreign official, that:

> [t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

Id. Liability for bribery of a foreign official is to extend to "legal persons" as well as "natural persons." As stated in article 2 of the Convention, "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." *Id.* at 4. However, if the laws of the country do not provide for the criminal liability of legal person generally, the Convention will not require establishment of criminal liability solely in cases of bribery of foreign officials. As explained in the Commentaries, "In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility." *Id.* at 9. Nevertheless, parties to the Convention must establish "effective, proportionate and dissuasive" non-criminal penalties for legal persons if the country's laws do not provide for criminal liability. Thus, the Convention stated that, "[i]n the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, for bribery of foreign public officials." *Id.* at 5.

383. Article 3 of the Convention provides that the bribe and the "proceeds of the bribery" of property of equivalent value will be subject to seizure and confiscation:

> Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property, the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanction of comparable effect are applicable.

Id. at 5. The "proceeds of bribery" referred to in article 3 "are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery." *Id.* at 9. Article 3 also provides for the seizure and confiscation of property corresponding in value to the bribe or the proceeds of bribery. The confiscation of property contemplated in the Convention includes forfeiture and means "the permanent deprivation of property by order of a court or other competent authority" and is to be exercised "without prejudice to the rights of victims." *Id.*

sanctions of "comparable effect" may also apply.[384] Parties to the Convention are to consider further civil or administrative penalties, including denial of public benefits, debarment from contracting and dissolution.[385] "Effective, proportionate dissuasive civil, administrative or criminal penalties" are also to be imposed for omissions and falsifications in books, records and financial statements of companies.[386]

v. Mutual Assistance and Extradition

The Convention expanded upon the Recommendation regarding mutual assistance and extradition. Parties to the Convention are to provide prompt and effective legal assistance, to the fullest extent possible, in both criminal and civil proceedings. This includes promptly informing the requesting party of any additional

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384. *Id.* at 5 (art. 3).

385. Under article 3, parties are to consider the imposition of additional civil or administrative sanctions. *Id.* These sanctions include: denial of public benefits, debarment from contracting, placement under judicial supervision and dissolution. As the Commentaries explain:

> Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Id. at 9. The OECD Council included in the 1997 Recommendation that suspension from public contracting be adopted as a sanction when it was determined "on substantial evidence" that an enterprise had engaged in foreign bribery. Member countries were also urged to require anti-corruption provisions in bilateral aid funded procurements; to promote implementation of anti-corruption provisions in international development institutions; and to cooperate with development partners in combating corruption, all in accordance with the earlier recommendation of the OECD Development Assistance Committee (DAC). *1997 Revised Recommendation on Combating Bribery*, *supra* note 359, at 1021. On May 6 and 7, 1996, DAC members endorsed a recommendation on anti-corruption proposals for aid-funded procurement. DAC recommended that "[m]embers work to ensure the proper implementation of their anti-corruption provisions and that they draw to the attention of the international development institutions to which they belong, the importance of proper implementation of the anti-corruption provisions envisaged in their rules of operation." *The DAC Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement*, OECD Doc. C/MIN(97)17/ADD2 Annex 1 (May 1997).

386. *Id.* at 5. Article 8 of the Convention provides, with regard to penalties for omissions and falsifications in accounting records and financial statements, that "Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications, in respect of the books, records, accounts, and financial statements of such companies." *Id.*

information needed to render assistance and informing the requesting party of the status and outcome of a request.[387] Additionally, the requirement of dual criminality or bank secrecy should not impede mutual legal assistance.[388]

The Convention established bribery of a foreign official as an

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387. *Id.* at 6. Article 9 of the Convention provides, with respect to mutual assistance, that:

> Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

Id. at 10. The legal assistance contemplated under article 9 of the Convention includes the transportation of persons, including those in custody, to the requesting country for purposes of assisting in an investigation or testifying at trial. Such transportation apparently would require the person's consent, however. As stated in the Commentaries:

> Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Id.

388. *Id.* at 5. Article 9 of the Convention provides with respect to dual criminality and bank secrecy requirements:

> Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
>
> A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Id. With regard to the requirement of dual criminality as a predicate to extradition, the Commentaries explain that the Convention:

> [A]ddresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Id. at 10.

extraditable offense.[389] If a Party's laws make extradition conditional upon the existence of a treaty, the Convention is to be considered such a treaty.[390] If a Party declines extradition on the grounds that the person is a national, the Party must refer the person to "competent authorities" for prosecution.[391] If extradition is made conditional upon a requirement of dual criminality, by operation of the Convention, the condition is deemed to have been fulfilled in cases of bribery of foreign public officials.[392]

vi. Monitoring and Implementation

Under the OECD Recommendation on Bribery, the deadline for member countries to submit proposed implementing legislation to their legislative bodies was April 1, 1998. They were supposed to

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389. *Id.* at 5. Article 10 of the Convention provides: "Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them." *Id.*

390. *Id.* Article 10 further provides:

> If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offense of bribery of a foreign public official.

Id. As the Commentaries explain:

> A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Id. at 10.

391. *Id.* at 5. In this regard, article 10 of the Convention provides:

> Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

Id.

392. *Id.* Article 10 provides in regard to the requirement of dual-criminality:

> Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention [defining the offense of bribery of a foreign public official].

Id. The Commentaries also note in this regard that "the requirement of dual criminality should be deeded to be met if the act is unlawful where it occurred, even if under a different criminal statute." *Id.* at 10.

seek enactment of the legislation by the end of 1998.[393] Parties to the Convention are to "co-operate in carrying out a program of systematic follow-up to monitor and promote the full implementation of this Convention."[394] The apparatus for carrying out this monitoring function is the Working Group on Bribery in International Business Transactions, which will continue its efforts under the charter adopted in the recommendation.[395] The OECD Council was expected to further consider the Convention at the Spring 1999 meeting.[396]

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393. *1997 Revised Recommendation on Combating Bribery*, *supra* note 359, at 1019.

394. Article 12 of the Convention provides:

> The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in the International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

1997 Convention, *supra* note 361, at 6.

395. *Id.* Thus, the Commentaries note that:

> The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:
>
> i) receipt of notifications and other information submitted to it by the [participating] countries;
>
> ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:
>
> — a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
>
> — a system for mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.
>
> iii) examination of specific issues relation to bribery in international business transactions;
>
> iv) ....
>
> v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

Id. at 11.

396. The OECD Working Group on Bribery in International Business transactions was scheduled to discuss this issue during a seminar from February 10 through February 12, 1999. *See generally*,http://www.oecd.org (visited October 15,

The United States hailed the Convention as "a bold and historic step in the fight against international commercial bribery."[397] Secretary of State Madeline K. Albright described the Convention as a "victory for good government, fair competition and open trade."[398] Transparency International characterized the Convention as having "global impact" because the criminalization of bribery would reduce the "supply-side" of bribery and because the stronger internal anti-bribery procedures would reduce the "demand-side" in developing and transitional economies.[399]

The twenty-nine OECD members signed the Convention on December 17, 1997.[400] In addition to the member country signatories, five non-member countries that participated in the OECD discussions signed the Convention.[401]

Under the framework of the Convention, five of the ten countries having the largest share of exports, representing at least sixty percent of the combined total exports of those ten countries, must deposit instruments of acceptance, approval or ratification on or before December 31, 1998, for the Convention to enter into force.[402]

1999).

397. U.S. Dep't of State, *OECD, Anti-Bribery Convention* (Nov. 21, 1997) (press statement) (visited October 13, 1999) <http://secretary.state.gov/www/briefings/statements/971121.html>.

398. At the signing ceremony in Paris on December 17, 1997, Secretary Albright stated, "Four years ago, my predecessor Secretary of State Christopher proposed that the OECD take the lead in making international bribery a crime. Today, with our signatures, that goal has been realized. It is a victory for good government, fair competition and open trade." Albright, *supra* note 332.

399. Thus, Transparency International stated:

> The Convention will have a global impact. It will reduce the supply-side of corruption as the OECD countries are the home states of most international companies. It will be important on the demand-side, strengthening domestic anti-corruption efforts in developing countries and in those countries in transition in Central and Eastern Europe.

Transparency International, *OECD Anti-Corruption Convention Leaves Critical Questions Still Open* (Nov. 5, 1997) (press statement) (last modified Dec. 8, 1997) <http://www.transparency.de/documents/press-releases/1997/1997.11.3.oecd-convention.html>.

400. *Summary of OECD Anti-Bribery Convention*, *supra* note 332.

401. These countries were Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. OECD, *Press Release on Agreement Criminalizing Bribery* (Nov. 21, 1997); *see also* Lawrence Speer, *OECD Approves Pact to Combat Bribery; Bribe's Tax Deductibility Not Eliminated*, 14 INT'L TRADE REP. (BNA) 2031 (Nov. 26, 1997).

402. *1997 Convention*, *supra* note 361, at 7 (art. 15). The Annex to the Convention identifies the following ten countries and the relative percentage of their aggregate imports as follows:

If the Convention has not entered into force by December 31, 1998, any signatory that deposited instruments of acceptance, approval or ratification may declare its readiness to accept the Convention, which will then enter into effect after two signatories deposit declarations.[403]

During its discussions, the Working Group could not agree about the treatment of payments to political parties and candidates in anticipation of their becoming public officials. At times these discussions were quite contentious,[404] and the Convention recognized that additional work would be necessary in this area.[405] However, in certain circumstances the Convention includes political party officials within the meaning of foreign public officials,[406] and thus a bribe to a

United States	19.7%
Germany	17.5%
Japan	14.6%
France	9.5%
United Kingdom	8.3%
Italy	7.7%
Canada	6.3%
Korea	5.6%
Netherlands	5.6%
Belgium-Luxembourg	5.4%

Id.

403. *Id.* The Convention was sent to the Senate on May 1, 1998 for advice and consent to ratification. THE WHITE HOUSE, LETTER TO CONGRESS ON BRIBERY OF FOREIGN PUBLIC OFFICIALS (May 1, 1998) (press release) (visited Oct. 13, 1999) <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/5/4/11.text.1>. In his message to the Senate urging favorable consideration, the President noted, "While the Convention is largely consistent with existing U.S. law, my administration will propose certain amendments to the FCPA to bring it into conformity with and to implement the Convention." *Id.*

404. *See* Speer, *supra* note 401, at 2031 ("Prior to the final round of negotiations Nov. 18-21, U.S. and European Union negotiators were deadlocked over whether the treaty would apply to sitting parliamentarians, officials of state-owned, or para-statal enterprises, and political parties. The United States had threatened not to sign the agreement if those categories were excluded."); *see also* Gary G. Yerkey, *International Agreements: U.S., EU Still Differ in OECD Talks on Curbing Foreign Bribery, Official Says*, 14 INT'L TRADE REP. (BNA) 511 (March 19, 1997).

405. *1997 Convention*, *supra* note 361, at 9. The Commentaries to the Convention note in this regard that:

> under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Id.

406. *Id.* As explained in the Commentaries:

political party official could contravene the Convention. Additionally, although not explicit in the Convention, there apparently was agreement, at least among the Working Group, that corrupt payments to foreign officials made through political parties would be prohibited, as would payments directed by a foreign official to be made to a political party.[407] It was anticipated that the OECD Council would revisit this issue in Spring 1999.[408]

D. Other Recent International Initiatives Against Bribery and Corruption

Other governmental organizations also recently addressed the problem of international corruption. Among the most significant of these initiatives are the U.N. Declaration on Corruption and Bribery, the Protocols of the European Union and the Anti-Corruption Guidelines of the World Bank/International Monetary Fund.

1. The United Nations

Noting the efforts of the OAS and the OECD, on December 16,

[I]n special circumstances, public authority may in fact be held by persons (*e.g.*, political party officials in single party states) not formally designated as public officials. Such persons, through their de facto performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

Id.

407. *See* Summary of OECD Anti-Bribery Convention, *supra* note 332, at 10-11:

Although the text does not specifically cover political parties, the negotiators agreed that the convention will cover business-related bribes to foreign public officials made through political parties and party officials, as well as those bribes, which corrupt foreign public officials direct to political parties. Some persons who are not formally designated as public officials but who may in fact perform a public function (*e.g.*, political party officials in single party states) may, under the legal principles of some countries, be considered to be foreign public officials. In addition, under the legal systems of some countries, an advantage promised or given to a person in anticipation of that person's becoming a foreign public official may fall within the scope of the convention. Negotiators agreed to an accelerated work plan to address several outstanding issues related to the convention, including acts of bribery relating to foreign political parties and relating to persons in anticipation of their becoming foreign public officials. The results of this review will be reported to Ministers by the 1999 OECD Council meeting.

Id.

408. *Id.*; *see also* Albright, *supra* note 332 ("we have also agreed to address outstanding issues by the Spring of 1999. We will have an opportunity to expand the Convention to cover bribes to political parties and their officials").

1996, the U.N. General Assembly adopted a Declaration Against Corruption and Bribery in International Commercial Transactions.[409] In its Declaration, the General Assembly stated, "A stable and transparent environment for international commercial transactions in all countries is essential for the mobilization of investment, finance, technology, skills and other important resources across national borders in order, inter alia, to promote economic and social development and environmental protection."[410] The Declaration defined bribery to include the solicitation and making of a corrupt payment.[411]

The Declaration called on member countries to "commit themselves" to a variety of measures to combat bribery and corruption. Member countries were to take "effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions,"[412] including the

409. *Declaration Against Corruption and Bribery in International Commercial Transactions*, U.N. GAOR, 51st Sess., Agenda Item 12, U.N. Doc. A/RES/51/91 (1996); *reproduced in* 1 FOREIGN CORRUPT PRACS. ACT REP. 150.013 (1997).

410. *Id.* at 150.013.

411. *Id.* Thus, the Declaration provided that bribery included the following elements:

> (a) The offer, promise or giving of any payment, gift or other advantage, directly or indirectly, by any private or public corporation, including a transnational corporation, or individual from a State to any public official or elected representative of another country as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction;
>
> (b) The soliciting, demanding, accepting or receiving, directly or indirectly, by any public official or elected representative of a State from any private or public corporation, including a transnational corporation, or individual from another country of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction . . . .

Id.

412. *Id.* The Declaration states:

> Member States, individually and through international and regional organizations, taking actions subject to each State's own constitution and fundamental legal principles and adopted pursuant to national laws and procedures, commit themselves:
>
> To take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions, in particular to pursue effective enforcement of existing laws prohibiting bribery in international commercial transactions, to encourage the adoption of laws for those purposes where they do not exist, and to call upon private and public corporations, including

criminalization of bribery of foreign officials[413] and the denial of the tax deductibility of bribes paid to public officials.[414] Member countries were also to consider establishing "illicit enrichment" as an offense.[415]

The Declaration also called on member States to adopt corporate governance requirements prohibiting bribery. States were encouraged to develop accounting standards and practices that encouraged transparency and codes of conduct for corporations that prohibited bribery.[416]

The Declaration committed member States to mutual cooperation in investigating and prosecuting acts of bribery and corruption.[417] In particular, States were to facilitate access to

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transnational corporations, and individuals within their jurisdiction engaged in international commercial transactions to promote the objectives of the present Declaration ....

Id.

413. Member States are to "criminalize such bribery of foreign public officials in an effective and coordinated manner, but without in any way precluding, impeding or delaying international, regional or national actions to further the implementation of the present Declaration ...." *Id.*

414. Member States further agreed:

To deny, in countries that do not already do so, the tax deductibility of bribes paid by any private or public corporation or individual of a State to any public official or elected representative of another country and, to that end, to examine their respective modalities for doing so ....

Id.

415. Thus, States are to "examine establishing illicit enrichment by public officials or elected representatives as an offence." *Id.*

416. Member States are to:

[D]evelop or maintain accounting standards and practices that improve the transparency of international commercial transactions, and that encourage private and public corporations, including transnational corporations, and individuals engaged in international commercial transactions to avoid and combat corruption, bribery and related illicit practices.

Id.

417. Member States are to:

[C]ooperate and afford one another the greatest possible assistance in connection with criminal investigations and other legal proceedings brought in respect to corruption and bribery in international commercial transactions. Mutual assistance shall include, as far as permitted under national laws or as provided for in bilateral treaties or other applicable arrangements of the affected countries, and taking into account the need for confidentiality as appropriate:

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

(b) Notice of the initiation and outcome of criminal proceedings

documents and records[418] and ensure that bank secrecy laws did not impede investigations and legal proceedings concerning corruption.[419]

2. The European Union

Following the effective date of the Maastricht Treaty on November 1, 1993, the former European Community formally became the European Union ("EU").[420] The European Union currently has fifteen members[421] and is comprised of the European Commission (formerly the Commission of European Communities), the European Parliament, the Council of Ministers and the Court of Justice.[422]

On December 3, 1995, at the U.S.-European Summit in Madrid, Spain, President Clinton, Spanish Prime Minister Felipe Gonzales and European Commission President Jacques Santer announced a "New Transatlantic Agenda" for U.S.-European cooperation.[423] Among the agenda items addressed to strengthening the multilateral trading system was the agreement to "combat corruption and bribery by implementing the 1994 OECD Recommendation on Bribery in International Transactions."[424] The agenda also called for the strengthening of international judicial assistance and cooperation in

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concerning bribery in international commercial transactions to other States that may have jurisdiction over the same offence;

(c) Extradition proceedings where and as appropriate.

Id. at 150.015-150.016.

418. The Declaration commits States to "take appropriate action to enhance cooperation to facilitate access to documents and records about transactions and about identities of persons engaged in bribery in international commercial transactions." *Id.* at 150.016.

419. States are also committed to "ensure that bank secrecy provisions do not impede or hinder criminal investigations or other legal proceedings relating to corruption, bribery or related illicit practices in international commercial transactions, and that full cooperation is extended to governments that seek information on such transactions." *Id.*

420. Dep't of State, *Fact Sheet: European Union* (May 12, 1997).

421. *Id.* The current membership of the European Union is Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Turkey have applied for membership. *Id.*

422. *Id.*

423. Dep't of State, *Joint U.S./EU Action Plan* (Dec. 3, 1995). <http://dosfan.lib.uic.edu/ERC/bureaus/eur/releases/951203EUAction.html>

424. *Id.* at 2.

obtaining evidence.[425]

In a communication to the Council of Ministers and European Parliament on May 21, 1997, the European Commission underscored the need for a stronger EU policy against corruption inside and outside the European Union.[426] To that end, the Commission proposed the criminalization of bribery of foreign officials, the disallowance of the deductions for illegal payments, improved roles for public procurement, standards for effective auditing of company accounts, blacklisting of firms convicted of corruption, criminalization of the laundering of corruption proceeds and civil causes of action against competitors who obtain contracts through corruption.[427]

On May 26, 1997, the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union was signed.[428] The Convention called for the criminalization of "passive corruption"[429] and "active corruption."[430] Member States were to take the measures necessary "to allow heads of businesses or any persons having power to make decisions or exercise control within a business to be declared criminally liable" for the acts of persons "under their authority acting on behalf of the business."[431]

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425. *Id.* at 8.

426. EU Bulletin EU5-1997 (Mar. 9, 1997).

427. *Id.*; *see also* Boswell, *supra* note 327, at 4.

428. *1997 Convention*, *supra* note 361, at 12.

429. *Id.* at 16. Article 2 of the Convention defines "passive corruption" as:

> The deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties....

Id.

430. *Id.* Article 3 of the Convention defines "active corruption" as:

> The deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties....

Id.

431. *Id.* Article 6 provides:

> Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of corruption, as referred to in Article 3, by a person under their authority acting on behalf of the business.

Id.

Member States were to establish jurisdiction based on territoriality, nationality, where the offense was committed against an official of the European Union or member State official or where the offender was an EU official.[432] When extradition was denied on the basis of nationality, the State denying extradition was to establish jurisdiction over the offense, and documents and evidence were to be transmitted to that State in aid of prosecution.[433] Member States were also to cooperate with each other in investigating cases of bribery

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432. *Id.* at 16-17. Convention Article 7 provides:

1. Each Member State shall take the measures necessary to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4 where:
   (a) the offence is committed in whole or in part within its territory;
   (b) the offender is one of its nationals or one of its officials.
   (c) the offence is committed against one of the persons referred to in Article 1 or a member of one of the European Community Institutions referred to in Article 4(1) who is at the same time one of its nationals;
   (d) the offender is a Community official working for a European Community Institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State in question.
2. Each Member State may declare, when giving the notification provided for in Article 13(2), that it will not apply or will apply only in specific cases or conditions one or more of the jurisdiction rules laid down in paragraph 1(b), (c) and (d).

Id.

433. *Id.* at 17. Convention Article 8 provides:

1. Any Member State which, under its law, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with the obligations arising out of Articles 2, 3 and 4, when committed by its own nationals outside its territory.
2. Each Member State shall, when one of its nationals is alleged to have committed in another Member State an offense established in accordance with the obligations arising out of Articles 2, 3 and 4 and it does not extradite that person to that other Member State solely on the found of his nationality, submit the case to its competent authorities for the purpose of prosecution if appropriate. In order to enable prosecution to take place, the files, information and exhibits relating to the offence shall be transmitted in accordance with the procedures laid down in Article 6 of the European Convention on Extradition of 13 December 1957. The requesting Member State shall be informed of the prosecution initiated and of its outcome.
3. For the purposes of this Article, the term 'national' of a Member State shall be construed in accordance with any declaration made by that State under Article 6(1)(b) of the European Convention on Extradition and with paragraph 1(c) of that Article.

Id.

and, in instances when more than one State had jurisdiction over the offense, in determining which State would prosecute.[434] Disputes among member States arising from interpretation or application of the Convention were to be submitted to the Court of Justice for resolution.[435]

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434. *Id.* Convention Article 9 provides:

1. If any procedure in connection with an offence established in accordance with the obligations arising out of Articles 2, 3 and 4 concerns at least two Member States, those States shall cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.
2. Where more than one Member State has jurisdiction and has the possibility of viable prosecution of an offence based on the same facts, the Member States involved shall cooperate in deciding which shall prosecute the offender or offenders with a view to centralizing the prosecution in a single Member State where possible.

Id.

435. *Id.* at 18. Convention Article 12 provides:

1. Any dispute between Member States on the interpretation or application of this Convention which it has proved impossible to resolve bilaterally must in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution. If no solution has been found within six months, the matter may be referred to the Court of Justice of the European Communities by one of the parties to the dispute.
2. Any dispute between one or more Member States and the Commission of the European Communities concerning Article 1, with the exception of point (c), or Articles 2, 3 and 4, insofar as it concerns a question of Community law or the Communities' financial interests, or involves members or officials of Community institutions or bodies set up in accordance with the Treaties establishing the European Communities, which it has proved impossible to settle through negotiation, may be submitted to the Court of Justice by one of the parties to the dispute.
3. Any court in a Member State may ask the Court of Justice to give a preliminary ruling on a matter concerning the interpretation of Articles 1 to 4 and 12 to 16 raised in a case pending before it and involving members or officials of Community institutions or bodies set up in accordance with the Treaties establishing the European Communities, acting in the exercise of their functions, if it considers that a decision on that matter is necessary to enable it to give judgment.
4. The competence of the Court of Justice provided for in paragraph 3 shall be subject to its acceptance by the Member State concerned in a declaration to that effect made at the time of the notification referred to in Article 13(2) or at any subsequent time.
5. A Member State making a declaration under paragraph 4 may restrict the possibility of asking the Court of Justice to give a preliminary ruling to those of its courts against the decisions of which there is no judicial

Furthermore, on October 6, 1997, the Council of Ministers adopted a common position supporting the creation of international instruments to make bribery of foreign officials and officials of international organizations a crime.[436] The common position emphasized that it was in accordance with the program of action against corruption that the Council of Europe adopted in November 1996 and the May 1997 OECD Recommendation on Bribery.[437]

3. The World Bank and the International Monetary Fund

The World Bank defined corruption as "the abuse of public office for private gain."[438] According to World Bank President James D. Wolfensohn, "The international community simply must deal with the cancer of corruption, because it is a major barrier to sustainable and equitable development . . . . The World Bank Group stands ready to do all we can to help our member countries and partners to increase their efforts in the fight against corruption."[439]

To that end, in August 1996, the Bank's Board of Executive Directors revised the guidelines for loans and credits.[440] The guidelines state that the bank's policy requires borrowers and "bidders/suppliers/contractors" of contracts financed by the bank to "observe the highest standard of ethics during the procurement and execution of such contracts."[441] In accordance with that policy, the Bank will reject a proposal for financing if it determines that the recommended bidder for the contract engaged in a corrupt[442] or

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remedy under national law.

6. The Statute of the Court of Justice of the European Community and its Rules of procedure shall apply. In accordance with those Statutes, any Member State, or the Commission, whether or not it has made a declaration pursuant to paragraph 4, shall be entitled to submit statements of case or written observations to the Court of Justice in cases which arise under paragraph 3.

Id.

436. EU Bulletin EU10-1997 (Jan. 13, 1998).

437. *Id.*

438. THE WORLD BANK, *supra* note 240, at ch. 2.

439. *Id.* at Foreword.

440. *See* THE WORLD BANK, GUIDELINES FOR PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS (1996) (IBRD is the International Bank for Reconstruction and Development, and IDA is the International Development Association).

441. *Id.* at 7.

442. The Guidelines define "corrupt practice" as the "offering, giving, receiving, or soliciting of anything of value to influence the action of a public official in the

fraudulent practice[443] in competing for the contract.[444] The Bank will also cancel the portion of a loan allocated to a contract if the Bank determines "corrupt or fraudulent practices were engaged in by representatives of the borrower or of a beneficiary of the loan during the procurement or the execution of that contract, unless the borrower takes timely and appropriate remedial action satisfactory to the Bank."[445]

Furthermore, the Bank may bar a firm from receiving a Bank financed contract, either indefinitely or for a fixed period, if the firm engaged in corrupt or fraudulent practices.[446] Additionally, the Bank may require that a contract provide the Bank with the right to inspect and audit the accounts and records of suppliers and contractors.[447]

E. Summary

Beginning contemporaneously with Congress' consideration of

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procurement process or in contract execution." *Id.*

443. The Guidelines define "fraudulent practice" as:

> A misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the borrower, and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the borrower of the benefits of free and open competition.

Id.

444. *Id.* Section 1.15(b) of the Guidelines provides that the Bank "will reject a proposal for award if it determines that the bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question ...." *Id.*

445. *Id.* at 7-8. Section 1.15(c) of the Guidelines provides that the Bank:

> will cancel the portion of the loan allocated to a contract for goods or works if it at any time determines that corrupt or fraudulent practices were engaged in by representatives of the Borrower or of a beneficiary of the loan during the procurement or the execution of that contract, without the Borrower having taken timely and appropriate action satisfactory to the Bank to remedy the situation ....

Id.

446. *Id.* at 8. Section 1.15(d) of the Guidelines provides that the Bank, "will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract if it at any time determines that the firm had engaged in corrupt or fraudulent practices in competing for, or executing, a Bank-financed contract." *Id.*

447. *Id.* Section 1.5(e) of the Guidelines provides that the Bank:

> will have the right to require that, in a contract financed by a bank loan, a provision be included requiring Suppliers and Contractors to permit the Bank to inspect their accounts and records relating to the performance of the contract and to have them audited by auditors appointed by the Bank.

Id.

the FCPA and during the ensuing twenty-one years, the United States has worked through international organizations to build an international consensus for the prohibition of bribery in international transactions. The United States has, by no means, acted alone in this regard. Anti-bribery measures at the national and multinational level have been advocated by Transparency International, the International Chamber of Commerce and the World Trade Organization, among others. As a result of these efforts, the United Nations, the EU, the OAS and the OECD condemned the bribery of foreign officials. These organizations called for the criminalization of international bribery and elimination of the tax deductibility of bribes.

Additionally, the OAS and OECD adopted multinational conventions that, if ratified and implemented by their signatories, will have far reaching effects in the apprehension, investigation and prosecution of transnational corruption. These conventions not only seek to assure uniform treatment of persons and entities engaging in international bribery, but they also resolve difficult issues of extraterritorial jurisdiction by establishing the basis of a State's prescriptive and adjudicative jurisdiction and by facilitating mutual assistance in securing evidence and in instances of extradition.

Implementation of the conventions, however, will require significant changes in the laws of countries that presently do not regard the bribery of foreign officials as a crime. Indeed, the continuing debate and disagreement among members of the OECD Working Group concerning payments to foreign political parties and candidates reveal that despite the growing consensus on foreign bribery, there remain sharp cultural and political differences as to what constitutes international corruption.

IV. Conclusion

In 1977, Congress concluded that the overseas "questionable payments" U.S. corporations made in the early 1970s harmed the strategic and diplomatic interests of the United States. It also found that these interests would continue to be threatened unless Congress asserted prescriptive jurisdiction extraterritorially to prohibit foreign corrupt payments by U.S. entities and individuals. The resulting FCPA was an aggressive, though not unique, exercise of Congress' nationality-based and passive territorial and effects-based jurisdiction to regulate the conduct of U.S. nationals overseas.

Congress recognized that this exercise of extraterritorial jurisdiction risked offending the sovereignty of other nations and the concomitant harm to U.S. international relations. To accommodate these concerns, Congress restricted the reach of the Act to those persons and entities over which U.S. jurisdiction existed by virtue of nationality or some other basis. In so doing, Congress eschewed the problematic assertion of extraterritorial jurisdiction over foreign nationals (i.e., foreign officials and foreign corporations, including foreign subsidiaries of U.S. companies) for offenses committed outside the United States.

Enforcement of the FCPA is shared by the U.S. Department of Justice and the SEC and has been consistently restrained as reflected in the recent enforcement actions against Montedison, S.p.A. and Triton Energy Corporation. However, because the United States is virtually alone in prohibiting foreign bribery, U.S. companies are subject to constraints in conducting international business to which their foreign competitors are not subject. Thus, regardless of whether the FCPA caused U.S. companies to lose business, the international commerce playing field is not level.

For that reason, U.S. authorities, with Congress' endorsement, pursued international initiatives to proscribe the corrupt practices of those not subject to U.S. jurisdiction. These efforts, which began contemporaneously with Congress' earliest consideration of the FCPA, have enjoyed remarkable success. At the urging of the United States, and with the support of organizations such as Transparency International and the ICC, a consensus against international bribery has developed in a multinational setting. Indeed, the United Nations, the World Trade Organization and the European Union all publicly condemned foreign bribery and proposed measures to combat international corruption.

The conventions that the OAS and the OECD recently adopted hold the greatest promise for multinational reform. Although their approaches and provisions differ, both conventions mandate uniformity among their respective signatories in the prohibition and punishment of foreign bribery. Of equal significance is the fact that both conventions establish and clarify the basis of jurisdiction over the offenses prescribed therein and mandate mutual legal assistance in investigation and prosecution of bribery, including extradition and the elimination of bank secrecy as a barrier to assistance.

The conventions are powerful statements of principle. More importantly, however, if the conventions are ratified and

implemented, the U.S. government's twenty-year campaign against international bribery largely will have been realized.