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CONTROL OF ACCOMMODATION PAYMENTS
MADE BY
TRANSNATIONAL CORPORATIONS

*Dissertation Submitted to
the School of Graduate Studies and Research
in Partial Fulfilment of the Requirements*

For the Degree of

Master in Laws

By

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Abhimanyu Jalan, Ottawa, Canada, 1993



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Abstract

This dissertation attempts to shed light on illegal and questionable payments made by the transnational corporations. It commences with a definition of the kinds of payments to be considered, discusses the various elements involved in the making of such payments, and identifies the various parties involved in such transactions. It then goes on to analyze the effects of such payments in detail, highlighting their economic and socio-political impact, in an effort to provide a justification for controlling such payments. Thereafter, the dissertation discusses the benefits of an international code as a means to control such payments and provides a detailed discussion of the international efforts made to date by various international organisations like the United Nations and the Organisation for Economic Cooperation and Development (OECD). The dissertation then outlines the problems which hamper the successful implementation of these international efforts. This section contains a discussion as to the impediment created by the conflicting stance taken by the developed and the developing countries on the matter. After taking all this into consideration, the dissertation focuses on the problems encountered by nations which unilaterally attempt to curb the practice of making illegal and questionable payments, and the experience of the United States of America is discussed in detail. Finally, the dissertation suggests means which might help in controlling and more effectively restraining the transnational corporations and all the parties involved from resorting to illegal or questionable payments in international commercial transactions in the near future.

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TO MY PARENTS

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1. Introduction

Since the end of World War I, there has been an awareness that transnational enterprises need international guidelines for their conduct.¹ However, mere awareness of a need for control was not enough to stir action; the real precipitating factor was the discovery of Watergate.² Impropropriety, beginning in the office of the President of the United States of America and filtering through the political, economic and business sectors of our society, shocked the consciences of people throughout the world. A sense of moral indignation over the abuse of power, use of money, and corporate form of business to achieve that end, encouraged demands for control, investigation and disclosure of information concerning the practices of corporations involved in making questionable payments at home and abroad.³

Further research into the problem reveals that this problem of questionable and illegal corporate payments is a universal phenomenon with deep roots and a long history.⁴

¹ M. Joelson & J. Griffen, "International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis" (1977) 11 Int'l L. 5.

² L. Cutler, "Watergate International Style" (1976) 24 For. Pol'y 160.

³ M. E. Fabre, "Bribery and the Multinationals in Latin America: Only the Tip of the Iceberg" (1978) 10 Law. Am. 371.

⁴ According to N. H. Jacoby, in *Bribery & Extortion in World Business* (New York: Macmillan, 1977), at 6-7 [hereinafter cited as Jacoby] such payments have become so much a part of nearly every culture that most languages provide a word for them. Some of these are:

Brazil	jeitinho	India	speed money	Nigeria	dash
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It poses serious political, economic, social, legal and moral challenges. The effects of such payments are not only deleterious when they take place within a national context, but are strongly exacerbated and their ramifications even more dangerous when they are made in the context of international commercial transactions by Transnational Corporations (herein after cited as TNCs) with substantial resources and the ability to avoid regulation by the states in which they operate. They distort the process of economic development, undermine national sovereignty and thwart normal international relations.

One way in which such payments distort the process of development is by inducing countries to make inappropriate expenditures and to waste needed resources. Whenever such a payment is made, in one way or another, resources and wealth are misallocated. For example, where market access depends on such payments, an inefficient firm could sell relatively low-quality and high-priced products at the expense of a more efficient enterprise. Buyers are constantly exposed to the risk of placing their limited resources in an inferior and perhaps unnecessary product.

Egypt	baksheesh	Indonesia	uong sogok	Pakistan	rishvat
France	pot de vin	Iran	roshveh	Peru	coima
Germany	trink gelt	Italy	bustarella	U.S.	payoff
Greece	baksissi	Japan	wairo	Zaire	tarif
Honduras	pajada	Malaysia	makan siap		de
Hongkong	hatchien	Mexico	mordida		verre

In a world of scarce resources and great developmental needs such activities cannot be tolerated. This dissertation attempts to shed light on illegal and questionable payments made by the transnational corporations. It commences with a definition of the kinds of payments to be considered, discusses the various elements involved in the making of such payments, and identifies the various parties involved in such transactions. It then goes on to analyze the effects of such payments in detail, highlighting their economic and socio-political impact, in an effort to provide a justification for controlling such payments. Thereafter, the dissertation discusses the benefits of an international code as a means to control such payments and provides a detailed discussion of the international efforts made to date by various international organisations like the United Nations and the Organisation for Economic Cooperation and Development (OECD). The dissertation then outlines the problems which hamper the successful implementation of these international efforts. This section contains a discussion as to the impediment created by the conflicting stance taken by the developed and the developing countries on the matter. After taking all this into consideration, the dissertation focuses on the problems encountered by nations which unilaterally attempt to curb the practice of making illegal and questionable payments, and the experience of the United States of America is discussed in detail. Finally, the dissertation suggests means which might help in controlling and more effectively restraining the transnational corporations and all the parties involved from resorting to illegal or questionable payments in international commercial transactions in the near future.

2. Major Concepts

In an international commercial transaction a broad range of morally questionable and sometimes illegal activities may occur. The scope of such activities varies from one country to another and from one society to another. However, not all questionable or illegal activities result in or have a connection with illegal or questionable payments. For the purposes of this dissertation, I shall be referring only to those activities of transnational corporations which involve illegal or questionable payments. This chapter provides a description of the major concepts which help in describing the questionable and illegal payments made by transnational corporations. However, it should be noted that the following descriptions are not, in any way, an attempt to formulate precise legal definitions.

Illicit Payments and Bribery

The term "illicit payments" was first used by the Centre for Transnational Corporations⁵ in its report entitled "Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concepts and Issues Related to the Formulation of an International Agreement", which it had prepared for the Ad Hoc Intergovernmental

⁵ See *infra*, note 81 and accompanying text.

Working Group on Corrupt Practices formulated under the auspices of the United Nations Economic and Social Council⁶. The report described the term as

"the generic term for all payments that were made with the intention to improperly influence a decision, and may be directed to officials in public service as well as to officials of private institutions. They cover financial and non-financial payments, and may include the payment of a bribe or illegal political contributions, gifts and favours (sometimes sexual) to officials; excessive or unduly lavish entertainment; payments to close relatives or friends of officials; granting employment to close relatives or friends of officials; arranging for transactions that enable officials to violate local currency laws; payments made clandestinely to political figures and journalists to influence; and so on."⁷

As far as "bribery" is concerned, the term has been used in most penal legislation to describe the payment of anything of value made to a decision maker (or his/her agent) in order to influence his/her official decision-making. *Black's Law Dictionary* defines the term as "any money, goods, right in action, property, thing of value, or any preferment, advantage, privilege or emolument, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to induce or influence action, vote, or opinion of person in any public or official capacity."⁸ Another author has described the concept as "a payment voluntarily offered for the purpose of inducing a public official to do or omit to do something in violation of his lawful duty or to exercise his official discretion in

⁶ See *infra*, note 87 and accompanying text.

⁷ UN ECOSOC 2nd Sess., para. 21, UN Doc. E/AC.64/3 (1977).

⁸ *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West, 1991) at 173.

favour of the payor's request for a contract, concession or privilege or some basis other than the merits."⁹ In short, a bribe is a payment, initiated by the payor, to induce the payee to do something for the payor that is improper.

Another term which is very similar to bribery is "extortion". However, the two are not the same. The term "extortion" is used to refer to the situation in which the payment is made as a result of threats or other methods of coercion employed by an official. Black's Law Dictionary defines this as "the corrupt demanding or receiving by a person in office of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justified, or of a fee not due."¹⁰ Thus, in extortion, the initiator is the recipient, the object is a thing of value, and the motivating force is a threat of harm to the payor.

Illicit payments include "bribery" and "extortion" but are broader in scope and include payments which are not *per se* illegal. For example, in some countries, political contributions are not illegal *per se*; they become illegal when their size or manner is larger than those legally permitted. Another example of an illicit payment is a payment which is otherwise legal, but which becomes illicit by virtue of the character of the recipient, for example, the payment of royalties or taxes to illegal régimes in contravention of United

⁹ T. Sorenson, "Improper Payments Abroad: Perspectives and Proposals" (1976) 54 For. Aff. 719 at 722.

¹⁰ *Supra*, note 8, at 731.

Nations resolutions. For instance, in its Advisory Opinion on the Legal Consequence for States of the Continued Presence of South Africa in Namibia [i.e. South West Africa] notwithstanding Security Council resolution 276 (1970), the International Court of Justice noted the illegality of the South African régime in Namibia and stated that all "Member States (of the United Nations) are under an obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia" and that the illegality of the South African presence in Namibia also "impose(d) upon Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory".¹¹ Another example of payments which could be regarded as illicit are payments made in violation of the exchange control regulations of a State.

The abovementioned distinctions are necessary for several reasons. First, no illegal or questionable payment is a pure breed comprising of elements of either bribe or extortion. Most of them are *hybrids* of the two types. A demand for an accommodation payment by a foreign government official from a TNC could soon lead to the TNC viewing this as the easiest and fastest way of getting things done and resorting to the same in future without waiting for the official to make the demand. On the other hand, the

¹¹ [1971] I.C.J. Rep. 16 at 76.

offer by the TNC to make such a payment, could lead to the situation where the official would take the earlier willingness of the TNC as an opportunity for private gains and start selling his/her discretions or services by demanding accommodation payments in situations where the official would have earlier acted without such a payment. Further, though the classification might not appear to be important, it would be useful to identify the nature of the payments in order to ascertain what remedy might be effective so as to stop such payments from being made. Thirdly, until the intention for making the payments is known, it would be difficult to ascertain whether there is indeed a problem worthy of the time and energies of lawmakers.

It is for these reasons that I have preferred to use the term "accommodation payments", which includes bribery, extortion, and all other payments which may or may not be technically illegal, throughout the course of this work for the sake of consistency. It is used to denote the act of offering, promising, or giving of any payment, gift or other advantage by any natural person, on his/her own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as consideration for performing or refraining from the performance of his/her duties in connection with an international commercial transaction. It includes the soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift, or other advantage, as consideration for performing or refraining from the

performance of his/her duties in connection with such a transaction.¹²

a. Types of accommodation payments

For the purposes of our study, accommodation payments may be classified into three major types: expediting decision making, altering decision-making, and maintaining a favourable climate. Political contributions, which may be made for all the above purposes, are most often connected with securing a favourable climate.¹³

Expediting payments

Expediting payments are those payments which are made to speed up the decision making process. They are most common where a civil service is under-staffed and thus limited in its capacity to handle the demand for the service it performs. Expediting payments are used to buy preferential access to the head of the line. These payments generally vary between the range of \$25 to \$5,000, and are typically offered to low and middle level public employees.¹⁴ A typical example is a payment to a harbour master

¹² This definition is very much on the same lines as the one included in the "Draft International Agreement on Illicit Payments" as formulated by the Committee on an International Agreement on Illicit Payments, UN Doc. E/1979/104 (1979).

¹³ *Ibid.* at 8.

¹⁴ Business International Corporation Public Policy Study, Executive Summary, Questionable Corporate Payments Abroad: Patterns, Policies, Solutions 10 at 11 (1976) [hereinafter cited as BIC Study].

to avoid waiting to off-load a ship. Sometimes such a payment is a result of extortion by the official who controls the service or function. The official lets it be known that preferential treatment can be purchased and suggests that if payment is not forthcoming problems will ensue.

Decision altering payments

Decision altering payments are those accommodation payments which are made to induce an official to buy a product that a person would not normally have bought, or to act in a way in which no official would otherwise have acted.

"These payments normally vary from \$5,000 to \$100,000. Instances that have been brought to light include payments to airline and government officials to favour one manufacturer's aeroplane even without regard to whether the plane may be inferior or inappropriate; payments to military officials to persuade them to purchase more aircraft than they need; payments by company executives to officials in charge of resources for a concession on favourable terms; and payments to change official rulings on taxation, licensing or permits."¹⁵

The impact of payments which fall in this category is more deleterious than that of expediting payments. Not only is the order in which people are served is affected: the actual use and distribution of resources is also changed. This aspect makes these

¹⁵ Cutler & Drory, "Towards an International Code on Illicit Payments", in S. Rubin & G. Clyde Hafbauer eds. *Emerging Standards of International Trade & Investment, Multinational Codes & Corporate Conduct* (Toronto: Rowman & Allanheld, 1984) at 34-35.

payments a matter of particular concern. Moreover, when such payments come from foreign sources the distortions they create risk the chances of being viewed as an external interference with internal decision making process.

Political contributions

Political contributions are accommodation payments made either to a party in power that is seeking to maintain its status or to opposition parties that are seeking to accede to power. In many cases, the objective behind the payments is to maintain or to secure a government policy favourable to the payor. It is invariably difficult to determine whether such payments are in fact legitimate political contributions or simply accommodation payments. Payments in this category typically vary anywhere from \$100,000 to millions of dollars.¹⁶

A more complex type of a "political payment" is a payment that is made with the intent to alter the system. Such payments can be directed towards any level of a government, institution, or company. For example, by securing the removal of, or conversely the appointment or election of particular officials, the way in which decisions are generally made and the general orientation of the decision makers may change -

¹⁶ BIC Study, *supra*, note 14, at 9.

although payment is not linked to any specific decision.¹⁷

b. Parties to accommodation payments

Accommodation payments involve two or more parties. For the purposes of our study the reference is confined to commercial participants and does not include non-commercial participants. Instances of accommodation payments to foreign officials made by individuals for causes totally unrelated to business and commerce are beyond the scope of this study. The definition of a commercial participant covers all domestic and transnational corporations, including manufacturers, traders, and those in service industries whether privately owned, or publicly owned. A commercial participant may also be government or other public officials including consultants and advisors who hold quasi governmental positions through part-time involvement in governmental boards and commissions or through contractual relationships with governments. Members of royal

¹⁷ For example: In the Case of International Telephone and Telegraph (hereinafter referred to as ITT) in Chile, fearing a socialist takeover of Chile, ITT offered the US Central Intelligence Agency \$ 1 million to help prevent the election of the Marxist leader, Dr. Salvador Allende Gossens, as President of Chile. Though the offer was not accepted by the CIA, and Allende did get elected, the revelation of ITT's offer by a Washington columnist during 1972 led to investigation by a quickly formed sub-committee on Multinational Corporations under the Chairmanship of Senator Frank. Further on January 9, 1977 former US Ambassador Edwar M. Korry charged in CBS's "60 Minutes" that US multinational corporations operating in Chile during his ambassadorship had made political payments directly to the late Salvador Allende to stay his seizure of their properties, and that the former president of Chile had demanded \$ 1 million as "protection money" to desist from the expropriation of US owned assets. Commenting on Ambassador Korry's testimony before the Senate subcommittee on intelligence activities, presided over by Senator Church, the Wall Street Journal said in an editorial on January 12, 1977: "Allende and his government were corrupt in the most ordinary, garden-variety sense. They took bribes, and from the same multinational corporations for which they expressed such hatred and contempt."

families¹⁸ and leading figures of political parties would also be covered. A participant may also be a person who can influence decisions in his/her private role, for example, an official of a company or of a non-governmental institution.

Besides the payor and the recipients, such transactions may also have intermediaries and agents. An intermediary is a person or organisation that serves as the vehicle through which an accommodation payment is made. Usually the purpose of using an intermediary is to conceal the fact or the nature of the payment or the identity of the maker of the payment. For example, a foreign intermediary may represent a manufacturer's overseas sales efforts. In addition, corporations that engage in corrupt practices often use intermediaries as a screen for their activities by carefully avoiding a discussion of accommodation payments with the intermediary so that the corporation can in times of need deny its involvement.¹⁹ Sometimes intermediaries are used to facilitate extortion, for instance, when a government official suggests to a firm that in order to facilitate the commercial transaction it should use a particular intermediary. The intermediary then delivers all or part of the commission back to the government officials.

¹⁸ For example: newspaper headlines trumpeted the charges that Prince Bernhard of The Netherlands or former Prime Minister Kakuei Tanaka of Japan requested payments from Lockheed for promoting the purchase by their government of that company's military or civilian aircraft. Tanaka was indicted, on August 16, 1976, of accepting a bribe from Lockheed and of violating Japan's foreign exchange control laws by receiving the money directly rather than through approved channels. Bernhard denied the charges, but, an investigating commission of the Dutch Parliament reported on August 26, 1976, that although it had failed to prove or disprove the allegations, Bernhard had shown himself "open to dishonourable favours and offers" and had "harmed the interests of the state".

¹⁹ "Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concepts and issues Related to the Formulation of an International Agreement", see *supra*, note 7.

Transnational Corporations

The term "transnational corporation" (TNC) is often used interchangeably with multinational corporations (MNCs). Whichever it may be, the United Nations defines these as "corporations that possess or control the means of production or services outside the country where they are established."²⁰ A more complete definition is given by Gilles Pacquet. According to him, it is a "chain of companies operating simultaneously in different countries and under different national jurisdictions, but under the corporate control of the parent company."²¹ Gerardo Sicat, however, puts it more succinctly. For him, a TNC "owns or controls production facilities in more than one country."²²

From an analysis of these definitions, some of the basic characteristics which appear are:

1. TNCs are corporations having a legal personality.
2. They operate through a network of subsidiary corporations in different countries but under the corporate control of one parent company.

²⁰ "The Irresistible Rise of Big Business", Third World Guide (1988) 41.

²¹ W. C. Bacungan & F. Laxa, *Multinational Corporations in the Philippines*, (Manila: Technology Resource Centre, 1979) at 6.

²² Gerardo Sicat, *Foreign Investments and Multinational Companies*, (National Bookstore, 1983) c. 34, at 802.

3. Through their subsidiaries or directly they own or control production facilities and possess or control the means of production or service in more than one country.

Aside from being corporations which control assets in two or more countries, there are other aspects which characterize TNCs. They are large corporations which usually originate in developed countries, and their influence over nations is enormous. They have a broad range of products and activities with diverse technical and strategic requirements, and these products are either made or traded in the countries where the TNC has established its business. They have great geographical reach and are usually in industries which are monopolistic or oligopolistic in nature. One or a few of them have exclusive control over certain services or commodities in a given market. They also have immense commercial flexibility which enables them to enter a host country when conditions are favourable, or exit when these conditions are no longer conducive to their operations.²³

²³ Bacungan & Laxa, *supra*, note 21, at 7.

3. Reasons to Control Accommodation Payments

Accommodation payments by TNC's have significant economic, and socio-political impact in the developing countries in which TNC's operate. One may get a sense of the magnitude of this impact by comparing the relative economic power of TNCs and developing states. While sales of about 130 Third World countries in 1980 had amounted to \$1.9 billion, the combined sales of the 200 largest TNCs netted more than \$3 billion in 1982.²⁴ Furthermore, TNCs account for about one-fifth of total global economic output. Their total production is growing at ten percent per annum,²⁵ and it is estimated that by the start of the 21st century, TNC production will account for 60 percent of the non-socialist world GNP.²⁶ With a view to demonstrate the need to control accommodation payments this chapter analyses the economic and socio-political impact of accommodation payments made by TNCs, as well as the impact of accommodation payments on the responsibility of TNCs to their shareholders.

²⁴ "The Irresistible Rise of Big Business," *supra*, note 20, at 41.

²⁵ Bacungan & Laxa, *supra*, note 21, at 2.

²⁶ B. Chattopadhyay, "Multinational Corporations and the Sovereignty of Developing Countries," in *Imperialism and Transnational Corporations*, (Manila: Philippine Press Council, 1980) at 4. With the recent democratization of Eastern Europe and the U.S.S.R. it is only reasonable to suppose that this share of the TNCs will significantly increase.

a. Economic Impact of Accommodation Payments

TNCs affect the states in which they operate in many different ways. They have more money than domestic businesses in most states in which they operate and can use accommodation payments more effectively than domestic business. They also have the capability to operate beyond national boundaries. This ability to shift their operations from one state to another enables them to avoid national policies they do not like and thereby undermine the effectiveness of such policies. TNCs, as significant non-governmental political actors with concentrated economic and political powers, operate with corporate business power somewhat freed from local market control. Within a developing host country, in which the political climate is often unstable, they represent a political power responsive to external forces and not entirely under the control of the host.²⁷ In these circumstances, the use of accommodation payments by TNCs results in an imbalance of political, economic and social forces operative within the host country, thereby disrupting self-determined national and social development.

Developing countries in which TNCs operate often face political, social and economic instability. Competing movements playing upon their new nationalism cause a continuous undercurrent of political instability. The presence of TNCs tends to exacerbate this instability by undermining the effectiveness of local governments.

²⁷ S. Kobrin, "Morality, Political Power and Illegal Payments" (1976) Colum. J. World Bus. 108.

Anxious to develop industry and to stabilize their monetary systems, these host countries chafe from their dependence on imported technology and goods, and are unsatisfied with the TNC market criteria for decision-making and use of their resources. Host countries' social concerns with development and equitable participation in economic growth often severely conflict with the limits and social costs of TNC marketing strategies. For example, TNCs often concentrate on higher technology industries which may contribute to the eventual modernization of the industrial structure of the host country, but may not serve one of the immediate prime objectives of development, namely an increase in employment opportunities. Furthermore, many of the products which TNCs specialize in cater to the demands of high income countries and a small number of high income earners in the host country. When they are marketed in developing countries, they may introduce patterns of consumption which are not conducive to sustained development and confer very limited benefits to the vast majority of the population. A host country's drive for development coupled with the sheer presence of TNCs, necessarily also has an impact on changing consumer orientations, traditional forms of family and village life by contributing to urbanization, and new systems of values and aspirations within the culture,²⁸ which all lead to instability in the host country.

Also, TNCs often exploit natural resources in developing countries for export to

²⁸ J. P. Gunneman ed., *The Nation-State and Transnational Corporation in Conflict - With Special Reference to Latin America* (New York: Praeger 1975).

world markets. A major objective of host countries would be to secure fair prices for the commodities sold and as much processing as possible in their own countries. The TNC, guided by its own world-wide marketing strategy, might not pursue the same objective. The transnational political relationship between TNCs and national governments must be viewed in light of the interactions between the host society and its institutions, and between the parent corporation and its subsidiary. For the TNC, a subsidiary in any country is generally important only in relation to the corporation as a whole, thus engendering a situation in which the interests of the TNC and the host country are very likely to be in conflict. Host countries often find that TNCs are responsive to the demands of head-quarters in another country and indirectly responsive to the demands of another government. Thus, the TNCs' interests are less likely to be in line with the national interests of the host country. Bearing in mind all these considerations, it becomes necessary for host developing countries to formulate their development strategies clearly in order to direct the investments of TNCs in a way that is consistent with their national goals and policies, including income distribution, labour conditions, industrialization or balance of payments.

This setting of conflict of interests coupled with inadequate institutions and regulatory structure, leaves the developing host country vulnerable to certain TNC abuses in a trade-off for the technology and industrial development contributed by the presence of the TNCs. Therefore, in the absence of sufficient restraints, the TNCs exacerbate the

problems of these developing host countries, particularly in the critical areas of technology and finance.²⁹ While industrialization and goals of economic growth require that technology be available from the developed countries, the problem remains that concentrated control of technology remains in foreign hands. As to finance, rather than bringing in finance capital from abroad, TNCs seek funds from local host sources. Due to the established credit of TNCs, the lending pattern of local institutions is to prefer TNCs over local entrepreneurs, following the business logic of risk minimization. There are even greater problems for the host country when local lenders are branch TNC lenders like Bank of America, Grindlays Bank, Citi Bank, etc. Opportunities for market entry by local businessmen are thus severely curtailed.³⁰ While these effects on technology and finance are attributable to the presence of the TNCs, they are also a result of a lack of, or inadequate governmental controls over, capital flow, local borrowing limitations, utilization of foreign supplies, as well as capital, and realistic regulation of imports and exports.

Though no specific study has been conducted in the recent past to verify such conclusions on the structural impact of 'TNCs' concentration and power on the developing

²⁹ R. E. Muller, *The Multinational Corporation and the Exercise of Power: Latin America - The New Sovereigns Multinational Corporations as World Powers* (New York: Simmons & Schuster, 1975) at 56.

³⁰ *Ibid.* at 58.

host countries, a pre-1970 study of Chile³¹ showed that in one developing country, at least, TNC presence was pervasive. For the period from 1967 to 1969, participation by TNCs in the industrial sector increased from 16.6 percent to 20.3 percent, while domestic participation diminished from 76.1 to 63.0 percent. Of the hundred largest industrial firms, forty were TNC controlled. When the sample was increased to the one hundred and sixty largest industrial firms, over fifty-one percent were TNC controlled. Among seven firms involved in the most important industries in Chile, at least fifty-one percent of total production was controlled by one to three foreign firms in each industrial sector. A behavioral analysis of the twenty-two largest TNCs in Chile revealed that five were monopolies, six were duopolies and eight were oligopolies, with each of the eight being the largest supplier in its market. According to this study, these figures reflected not only reality in Chile, but were representative of most developing host countries where TNCs were operating. Further, the study indicated that the ability of TNCs operating in these countries increased their power over time by using accommodation payments to purchase the trust and loyalty of the local officials in different sectors.

The technology contributed to the countries by the TNCs is a further basic cause of unemployment because as total output increases, less and less labour is required to produce that output. As a result, the rate of unemployment in the host country, in that

³¹ *Ibid.* at 59.

particular industry, increases and adds to further concentration of already extreme disparities in income distribution.³²

Even if the host governments want to effectively control the TNCs, accommodation payments severely affect their will to do so. The governmental structure of countries places trust in its executives to implement the policies of national interest. This trust is based on the personal integrity of the office bearers. Some of these executives realize the importance and financial value of this trust placed upon them and, more so in developing countries than developed countries, are vulnerable to the allure of personal enrichment at the cost of betraying the trust placed upon them. They view TNCs as buyers capable of making the highest bids for their betrayal of trust. On the other hand, the TNCs view this opportunity as the easiest way to achieve their own interest by getting around the bureaucratic controls. Thus, in the absence of effective regulation to control accommodation payments, the financial contributions of the TNCs to the developing host countries are, in reality, a drain on local savings and ultimately on consumption by the people.

How an economy may suffer because of accommodation payments by a TNC is

³² *Ibid.* at 66.

illustrated by the case of *Securities and Exchange Commission v. United Brands Company*.³³ United Brands, formerly the United Fruit Company, is one of the world's largest producers of bananas. The company's earnings are substantially dependent upon the cultivation and sale of bananas. At the beginning of 1974, approximately 25 percent of its total banana production was concentrated in Honduras.³⁴ In April 1974, Honduras imposed a new tax on banana exports. To win a tax reduction in 1974, the company paid an unidentified official of the Republic of Honduras \$1.25 million.³⁵ Later, it was estimated that had the accommodation payment not been made to the unidentified official, and had the tax remained in effect, it would have increased the revenues of the Republic of Honduras by approximately \$20 million.³⁶

From an economic perspective, accommodation payments distort the competitive marketplace since quality and price are not permitted to determine which goods and

³³ *Securities and Exchange Commission v. United Brands Company*, Civil No. 75-0509 (D.D.C. settled Jan. 27, 1976), SEC Lit. Rel. No. 7251. Civil No. 75-0509 (D.D.C. filed April 9, 1975). In this case, the court ordered the corporation to adopt, implement, and maintain a policy statement regarding unlawful payments to government officials in the United States of America and elsewhere. Also see, *infra*, note 226 and accompanying text.

³⁴ Tracy, "How United Brands Survived the Banana War" *Fortune* (July 1976) 145. Although United Brands is engaged in other operations, banana sales provide a significant percentage of the company's earnings. In 1975, banana sales accounted for only 30 percent of the company's sales of \$2.2 billion, but provided 75 percent of the operating profits.

³⁵ The money was paid through a foreign subsidiary of the company, improperly characterized as "commissions" on the corporation's books and deposited in a Swiss bank account for the recipient. See R. P. Kane & S. Butler, "Improper Corporate Payments: The Second Half of Watergate" (1976-77) 8 Loy. U. Chi. L.J. 1 at 19.

³⁶ *Ibid.* See also: "United Brands Paid Bribe of \$1.25 Million to Honduran Official" *Wall Street Journal* (April 9, 1975) 1.

services will be made available to the public, nor can they determine the profitability of an enterprise. Instead, in a market place controlled by accommodation payments, producers who are most willing and financially able to force their product or service into the heart of the market succeed.³⁷ Businesses who cannot or will not pay are in danger of perishing irrespective of the price and quality of their goods and services. In poorer countries, accommodation payments may also reduce the availability of essential commodities as a result of shortages deliberately created by officials in an effort to line their pockets. One observer suggests that:

"a local business person persuades a friendly government minister to slap import duties on a particular commodity. Supplies dry up, the price sky rockets, and the well-connected business person unloads personal stock at a large profit. The friendly minister then gets his percentage."³⁸

b. Social-Political Impact of Accommodation Payments

Irrespective of whether accommodation payments are initiated by TNCs or government officials, such payments cause immense damage to the reputation of international business. Each time such a payment is discovered and becomes public knowledge, the people's confidence in the ability of international business to contribute

³⁷ A. E. Roth, "International Codes of Conduct on Accommodation Payments : Promoting Ethical Practices or Imposing Alien Standards " (1987) 19 N.Y.U.J. Int'l L. and Pol. 670.

³⁸ J. Spivak, "In Nigeria, Payoffs Are a Way of Life" *Wall Street Journal* (July 12, 1982) 23.

to the quality of life is shattered, and protectionism and isolationism is encouraged.³⁹

Accommodation payments also create a major problem involving questions of equity and power in society. Equality, including equality before the law, is an almost universally accepted value and few would agree that influence in society should be proportional to wealth. But, in fact, influence does tend to be associated with wealth. The notion of small domestic actors who do not and cannot affect prices through their individual actions is a basic assumption of a competitive economic system. The argument is easily extended into the political and social sphere. If pursuit of individual interests is to result in an optimal outcome for society as a whole, the individual actors must be characterized by the political analog of a price taker. A given actor must not have the political power to influence the outcome of the political process. The power of individual actors must be circumscribed by the market. The world of TNCs is far removed from that of perfect competition. The vast accumulation of market power with TNCs results in a considerable degree of non-market power and control over non-market activities of various sorts. In an economy characterized by large firms with considerable market and non-market power, one can no longer expect a socially optimal solution from the pursuit of individual interests. Individuals commanding large resources gain an unequal influence over the course of events; they can often impose their interests on society at large. In this

³⁹ *Supra*, note 37, at 671.

way, accommodation payments affect the equity in a society.

It is beyond debate that officials of governments are relied upon to act for the public interest and not for their own enrichment. But, attracted by the magnitude of personal enrichment, officials of both rich and poorer nations find the urge to accept accommodation payments irresistible. The making of accommodation payments to officials divides their loyalty. It shifts their priority from service to their country to personal enrichment. Having once accepted such a payment, whether or not they consciously act against the public interest, they adopt a second criterion of action. The resultant conflict of interest is always a dilution of loyalty, always a betrayal of trust. Putting morality to one side, the social injury inflicted by such breaches of trust goes beyond any material measurement. By benefiting individuals rather than the people of a country as a whole, accommodation payments ultimately prove to be burdens imposed on international trade and investment for private instead of public benefit.

A classic example of the damage and socio-political injury inflicted by accommodation payments is the recent arms scandal in India which indirectly led to the fall of one of the country's most popular leaders. In 1986, Bofors A.B, a subsidiary of the Sweden's Nobel Industries and makers of large guns and ammunition, won a contract

for \$1.3 billion for the supply of FH-77B 155mm howitzer guns to India⁴⁰. Almost a year later, the Swiss radio alleged that to secure the contract accommodation payments to the tune of \$60 million were paid to Indian Government officials. As a response, the then prime minister of India, Rajiv Gandhi and the president of Nobel Industries, Ingvar Carlsson categorically denied the allegation⁴¹. But, on persistent and energetic digging by Swedish journalists, including Bjarne Stenqvist and Bo G. Andersson of Stockholm's *Dagens Nyheter*, Bofors conceded that it had paid the amount, but adamantly refused to disclose the identity of the person(s) to whom the amount was paid.⁴² However, in late April 1988, Radio Sweden and one of India's most prestigious national daily newspapers, *The Hindu*, disclosed that a substantial part of the payments went to a Geneva registered company called Moineau S.A. Moineau which was owned by the Hinduja brothers, an Indian family fast rising as arms dealers and close associates of Rajiv Gandhi.⁴³

Though, the matter could not be pursued, it did raise furore in the Indian Parliament and severely tarnished the image of Rajiv Gandhi⁴⁴. The Indian electorate lost

⁴⁰ P. Gupte, "Who Got the \$ 60 Million?" *Forbes* (June 27, 1988) 51.

⁴¹ S. R. Weisman, "Gandhi in Dispute Over Hiring US Detectives" *New York Times* (April 5, 1987), Sec. I, at 8:1.

⁴² S. Lohr, "The Swedish Quandry: Arms Deal or Pacifism?" *New York Times*, (May 17, 1987), Sec. I, at 3:1; S. Hazarika, "India Striving to Check Secret Accounts" *New York Times* (June 12, 1987), Sec. I, at 5:1.

⁴³ S. R. Weisman, "Mystery Deepens on New Delhi Arms Scandal" *New York Times* (1 May 1988), Sec. I at 14:1.

⁴⁴ B. Crossette, "Gandhi Draws Fire in Parliament" *New York Times* (12 Oct. 1988), Sec. I at 8:3.

confidence in him, and the political party led by him, the Congress (I), lost the upcoming elections in 1989. The scandal cost the Indian government dearly. During the whole affair, attention was diverted from major current issues like terrorism, poverty, unemployment, etc. and, indirectly, the progress of the economy was stalled for almost a year and a half. A qualitative evaluation of the competition for the deal also revealed that Bofors had been given the contract even though the gun offered by the competing French firm had showed better performance, was lower in price and was recommended by most of the Indian army officials who had witnessed the test performance of both the guns.

Even officials who seemingly have no economic need to solicit under the table payments appear to engage in the practice: Prince Bernhard of the Netherlands surrendered his public functions in 1976 in the wake of charges of accepting \$1.1 million in payoffs from Lockheed Aircraft Corporation⁴⁵. There have been similar disclosures about leaders in Japan⁴⁶, Italy⁴⁷, Iran⁴⁸, and the Philippines⁴⁹.

⁴⁵ *Wall Street Journal*, (Aug. 27, 1976) 4.

⁴⁶ K. Landauer, "Lockheed Aid to Militarist Japan Faction Blasted in Senate Study of Multinationals" *Wall Street Journal* (Aug. 27, 1976) at 5.

⁴⁷ *Ibid.*

⁴⁸ W. M. Carley, "Documents in SEC Case Indicate Payoffs Were a Big Part of Business in Shah's Iran" *Wall Street Journal* (Nov. 14, 1980) 54.

⁴⁹ *Wall Street Journal* (March 13, 1986) 3; *Wall Street Journal* (March 19, 1986) 35.

c. Impact of Accommodation Payments on Corporate Accountability
to Shareholders

The making of accommodation payments also brings the integrity of top management of TNCs into question. In most cases of accommodation payments the clandestine book-keeping practices resorted for creating funds from which such payments are made, are never disclosed to the shareholders. In most instances, accommodation payments are deliberately made a closely guarded secret. This is done to avoid turmoil over it and in order not to make such payments a subject of shareholder scrutiny. The Watergate Special Prosecution Force⁵⁰ had also discovered that the existence of these funds was possible only through the deliberate falsification of the corporations' financial records and statements, and the intentional deception of outside directors and independent auditors.⁵¹ Such activity bears directly on the financial integrity of the TNCs and the stewardship of management.

The revelation of each accommodation payment creates an environment of insecurity in the minds of investors. The first thought which crosses their minds is that

⁵⁰ The Watergate Special Prosecution Force was established on May 25, 1973, as an independent investigation and prosecution force within the United States Department of Justice. Its primary jurisdiction included all offenses connected with the unauthorized entry into the Democratic National Committee headquarters at the Watergate as well as all offenses rising out of the 1972 presidential election. *Watergate Special Prosecution Force Report* 5-6 (1975).

⁵¹ D. P. Doherty, "The SEC's Management Fraud Program" (1976) 31 Bus. Law 1279.

if such payments are necessary to secure or maintain significant business overseas, the business is peculiarly unstable or less predictable than a business which depends upon superior salesmanship or management.

The discovery of each accommodation payment also affects the investing patterns of investors. On such a discovery, they may not want to invest money in the TNC(s) participating in such activities. They would not want to see their money involved in a process which produces unaccounted-for cash and the falsification of accounts. In the case of *Securities and Exchange Commission v. United Brands Company*⁵², the defendants acknowledged that the disclosure of the payments could result in "a material reduction in future earnings and a loss of substantial corporate assets by significant loss in goodwill and unwillingness on the part of shareholders to further invest in the corporation, which, in turn, could affect the continuity and future expansion of the operations of the company."⁵³

Accommodation payments also affect the voting decision of the shareholders and it has been held by the Corporate Finance Division of the United States Securities Exchange Commission that:

"the conviction of a corporation and/or its officers or directors for having made

⁵² See *supra*, note 33.

⁵³ *Wall Street Journal* (April 9, 1975) 1.

accommodation payments is a material fact that should be disclosed to the public and specifically to shareholders, particularly in the context of a proxy statement where shareholders are being asked to vote for management. Such a conviction is material to an evaluation of the management of the corporation as it relates to the operation of the corporation and the use of corporate funds."⁵⁴

In sum, the rationale for the need for control of accommodation payments can be explained by the following statement made by the Securities and Exchange Commission (SEC):

*"Investors have a right under the securities laws to be fully advised of facts concerning character and integrity of the officials relevant to their management of the corporation. This is particularly true when management administers significant assets in foreign states, where investors may not have the same protection as existed in their countries. Accordingly, all transactions of such transnational corporations should be closely monitored."*⁵⁵

⁵⁴ SEC Securities Act Rel. No. 5466 (March 8, 1974).

⁵⁵ L. D. Solomon & D. C. Gustman, "Questionable and Illegal Payments by American Corporations" (March 1980) J. Bus. L. 67 at 69; See also SEC report on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Committee on Banking, Housing and Urban Affairs, May 12, 1976; It is also to be noted that the US Congress, in enacting both the Securities Act and the Securities Exchange Act, gave the Commission broad discretion in determining the matters which would come within the scope of "full and fair disclosure" concept. In this regard, the Senate Report accompanying the Exchange Act commented that: "The Commission is given complete discretion ... to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors." S. Rep. No. 792, 73rd Cong., 2d Sess. 10 (1963). This congressional intent is embodied in section 10(c) of the Securities Act, 15 U.S.C. § 77j (c) which provides: "Any prospectus shall contain such other information as the Commission may by rules or regulation require as being necessary or appropriate in the public interest or for the protection of investors. See also section 12(b) of the Exchange Act, 15 U.S.C. § 781(b) (1982); The concept of integrity disclosure has been specifically upheld in the decision of *SEC v. Schlitz Brewing Co.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96, 464 (E.D. Wisc. June 7, 1978), wherein the court held that the failure of the corporate and individual defendants to disclose illegal marketing practices and transactions with foreign affiliates was thus held to have a potentially direct effect on the integrity of management and thus was material for purposes of disclosure under the federal securities law.

Furthermore, basic to the idea of controlling accommodation payments is the concept that all funds belonging to the corporation, which in turns belongs to the shareholders, must be accounted for within the corporation's system of financial accountability. It becomes a matter of great concern when it is found that significant amounts of money floats around outside this system of corporate accountability and are used by a very small coterie of officers, without any necessity to account for that use through normal channels.

In view of the above effects of accommodation payments, the TNC capability of creating economic units to pursue objectives that are impossible to attain in a national framework, and the tremendous growth of many TNC's combined with the sharp increase in world trade in the past three decades,⁵⁶ make it a necessity that the TNCs' practice of obtaining business by making accommodation payments be prevented and controlled.

⁵⁶ E.S.C. Res. 1721, 53 U.N. ESCOR Supp. (No. 1) at 3, U.N. Doc. E/5209 (1972), requested the Secretary General of the United Nations to appoint a Group of Eminent Persons to study the role of transnational corporations in world society. For the report by that Group, see *Multinational Corporations in World Development*, U.N. Doc. ST/ECA/190 (1973), at 1. For a discussion of post-1945 growth and development of TNCs, see J. Kuusi, *The Host State and the Transnational Corporations: An Analysis of Legal Relationships* (1979) at 18-24. By the end of the 1960's, two thirds of overall direct investment asset value and income flows, and about three-quarters of the receipts of new capital inflows were accounted for by the developed countries. *Ibid.* at 20. The remaining one-third of overall direct investment went to the developing countries, representing nearly 50 percent of all private capital movements to these areas. *Ibid.*

4. Control of Accommodation Payments

a. The Need for International Action

As argued above, the problem of accommodation payments has serious economic and socio-political costs; threatens the integrity of capital markets; and is by any measure a cause for deep concern. The varied and multifaceted methods of effecting and concealing such payments, combined with the speed and ability of TNCs to simultaneously operate in many different countries and deep rooted business traditions makes controlling accommodation payments a complex problem.

What then is the solution? Neither governments nor business can alone deal effectively with this problem. Complementary and mutually reinforcing united action by governments and the business community would appear to be the only answer. Also, any attempt to control accommodation payments cannot be successful until there is co-operation on a national and international scale. The sections following demonstrate (1) the reasons why international action is needed, (2) provide a survey of international efforts to control accommodation payments, and (3) elucidate the barriers to reaching a consensual international solution.

The Centre on Transnational Corporations [hereinafter the Centre],⁵⁷ in its report⁵⁸ rationalised the need for international action by analyzing the problems inherent in unilateral attempts by nation states to control accommodation payments. It observed that due to the nature of TNCs and the "across-the-frontier" element involved in the making of accommodation payments, the impediments to effective national action, from the standpoint of host states who allow TNCs originating in some other country to do business in their country, were many and varied. Effective enforcement at the national level may be impeded by factors such as conflicts of jurisdiction, the inadequacy of information available in any one State and conflicting governmental policy towards TNCs and their activities.⁵⁹

In some states laws exist regarding accommodation payments, but they are often not comprehensive enough to cover all accommodation payments or are not enforced or both. Therefore, effective action is possible only by means of a multilateral or international action which harmonizes standards and provides for effective enforcement.⁶⁰

The report put forth the view that since accommodation payments involved

⁵⁷ See *infra*, note 79 and accompanying text.

⁵⁸ See *infra*, note 81 and accompanying text.

⁵⁹ *Supra*, note 7, at 12.

⁶⁰ *Ibid.*

activities in several states, including the home country (i.e. the country from where the parent TNC originates) of the TNC making the payment, the country in which the official resides, and possibly third countries through which the payments pass to avoid discovery, the effective control of accommodation payments was not possible without concurrent action in almost all countries including, especially, home and host countries.⁶¹

The Centre, noting the standpoint of home countries, observed that because accommodation payments are used to gain competitive advantage, some countries may perceive that unilateral action to change national law to prohibit such payments by their nationals in host states would place their firms at a serious competitive disadvantage internationally.⁶² Even if this disincentive was overcome, the practical effectiveness of such an action was seriously doubted unless similar actions were taken by other home countries. Hence, though national action by both home and host states constitutes an essential part of the remedy to the problem, international action is not only desirable but also indispensable to prohibit accommodation payments.⁶³

⁶¹ *Ibid.* para 49.

⁶² *Ibid.* See also the discussion relating to the Commons Problem, *infra*, note 144 and accompanying text.

⁶³ *Ibid.* para. 51. Also note that in response to the note-verbale transmitted by the Secretary-General of the United Nations on 2 March 1976, the Governments of Columbia, Norway, and Denmark stated that only within the context of a international code of conduct, legally binding on transnational corporations, could incidents of accommodation payments involving transnational corporations be regulated. Several other countries including Japan had expressed their support for an international agreement to regulate accommodation payments because of the difficulties encountered by them in obtaining information and conducting investigations relating to such payments. UN Doc. E/5838 (1976).

International action, specifically to control and regulate accommodation payments, also forms a pre-requisite to effective national action because successful national action on transactions involving accommodation payments cannot take place without international co-operation for enforcement related to issues such as information exchange, judicial assistance and extradition.⁶⁴ The scope of the existing international agreements is limited to well-defined crimes about which there is little disagreement. Even the Centre, in justifying the need for an international action to control accommodation payments, took note of the fact that where accommodation payments have taken place, international co-operation has been difficult because the national laws, which were violated, were not fully covered by existing mutual judicial assistance agreements.⁶⁵

The Centre, in its report, was of the opinion that in controlling and prohibiting accommodation payments, action at the international level was necessary in order to achieve a uniform understanding on issues such as: (a) the concepts and terms used to describe or proscribe certain activities involving accommodation payments; (b) criteria and procedures for the recognition and enforcement of judgements or findings of national tribunals or authorities; (c) arrangements for obtaining evidence abroad; (d) procedures for subpoena of records available in another country; (e) extradition in cases of individuals

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* para. 52.

seeking to escape responsibility; and (f) appropriate punishment.⁶⁶

In addition, the Centre expressed the view that since the fundamental characteristic of any accommodation payment is secrecy, co-operation in making public information on such payments would have an important deterrent function. Indeed, an agreement on the exchange of information seems complementary to an agreement on international standards and criteria for disclosure. With this in mind, the Centre stated that international action would also facilitate and accomplish the task of establishing uniform disclosure procedures for TNCs.⁶⁷ This, in its view, would not only help to achieve uniformity in the reporting procedures, which all TNCs would then be required to follow, but would also help to establish co-operative procedures for the exchange of information in order to track down accommodation payments and the parties involved in making them.⁶⁸ The Centre took note of the fact that under the present situation, even if a third country, i.e. a country which is neither host or the home to the TNC, agreed to shut off accommodation payments without another haven country taking similar steps, the activities could simply be transferred to the latter. Hence, in its opinion, an international action was required to encourage all countries, whose tax and bank secrecy laws favour their use as third

⁶⁶ *Ibid.* at 13, para. 53.

⁶⁷ *Ibid.* para 54.

⁶⁸ *Ibid.*

countries, to co-operate in eliminating or limiting accommodation payments.⁶⁹

Thus, an effective measure to regulate accommodation payments would require absolute synchronisation of both international and national efforts. It would have to address the possible situations which might lead to conflicts of jurisdiction and ensure that all information pertaining to TNC activity is through some measure available to all states and that the sanctions against the use of such payments are effectively enforced throughout the world. It would have to address situations which might require extradition to ensure that evidence regarding the use of such payments is in no way suppressed.

b. Forms of International Regulation

Accommodation payments can be regulated on an international scale using either or both of two basic approaches: (1) multilateral conventions; or (2) universal code of conduct. In either of the approaches, attempts to control such payments can either be directed towards the home state from where the TNCs originate or towards the host state in which the TNCs are allowed to do business and where the receiving officials reside or both. This section describes the means through which either of the two approaches can be taken at the international level.

⁶⁹ *Ibid.*

A multilateral convention is an agreement, binding and enforceable under international law, among more than two sovereign states. Such conventions have been a favoured instrument for requiring uniform behaviour of public and private actors in the international arena.⁷⁰ Such conventions ordinarily require the contracting parties to establish specified conduct as an offense under their domestic law and to exercise jurisdiction over offenses committed on their territory.⁷¹

International action in the form of a multilateral convention regulating accommodation payments and requiring states to prosecute or extradite offenders is potentially the most effective international means of preventing accommodation payments. The principal advantages of a multilateral convention as a means of addressing the issue of accommodation payments are three-fold: (1) it would be legally binding on the contracting parties; (2) assuming no significant reservations, it would impose uniform obligations on the contracting parties; and (3) it may provide for effective enforcement mechanisms, including criminal sanctions, under the domestic law of the contracting

⁷⁰ Multilateral conventions requiring states to criminalize particular forms of transnational activity have become more common in recent years. These so-called "criminalization conventions" have principally focused on combating international terrorism and drug trafficking. Anti-terrorism conventions include the 1971 Montreal Convention on Unlawful Acts Against Civil Aviation ((1971) 10 I.L.M. 1151); the related 1988 Montreal Protocol on Unlawful Acts of Violence at Airports ((1988) 27 I.L.M. 627); and the 1988 Rome Convention on Maritime Terrorism ((1988) 27 I.L.M. 668). Anti-drug trafficking conventions include the 1988 Vienna Convention on Narcotic Drugs ((1989) 28 I.L.M. 493); and a series of earlier U.N. sponsored conventions on the subject. The 1990 Council of Europe Convention on Money Laundering ((1991) 30 I.L.M. 148) addresses a closely related issue.

⁷¹ Some conventions also require or permit assertion of jurisdiction based solely on the nationality principle. For example, see 1988 Rome Convention on Maritime Terrorism, art. 6(1)(c) ((1988) 27 I.L.M. at 675-676); 1988 Vienna Convention on Narcotic Drugs, art. 4(1)(b) ((1989) 28 I.L.M. at 503-504).

states. If accepted and implemented by all states, it may substantially deter accommodation payments in international transactions, help level the playing field of international competition, facilitate sharing of information concerning accommodation payments, provide for easier and faster extradition of suspects, and eliminate unnecessary costs of doing business in the international arena.

The disadvantages of controlling accommodation payments through a multilateral convention are both intrinsic and extrinsic. A multilateral convention is intrinsically inflexible. All parties must agree to any change in its terms. For example, if the definition of "accommodation payments" or a particular enforcement mechanism created unforeseen problems for one or more parties, they would have to persuade the other parties to agree to a change. The extrinsic problems with a multilateral convention regulating accommodation payments are even more significant. There may not be consensus among the home countries on important elements of the convention. At worst, no significant group of host or home member states might be able to agree on any text to recommend for signature. Alternatively, it is possible that there might be agreement only among a sub-set of home states, which might ultimately refuse to proceed on their own for fear of putting their enterprises at a competitive disadvantage. Another possibility is that broad agreement would be purchased at a price of permitting Member States to accede to the agreement with significant reservations, thereby effectively undermining the goal of uniformity on the issue. Hence, it is likely that negotiation, ratification, and

implementation of a multilateral agreement on control of accommodation payments might take many years. For successful agreement to be reached, a broad political consensus must exist among Member States, especially home states, and the consensus must extend beyond agreement that accommodation payments are reprehensible. It must reach (1) the appropriateness of exercising jurisdiction over what some regard as extraterritorial conduct, and (2) the proper and pragmatic remedies for dealing with such conduct.

On the other hand, codes of conduct are rules issued by an authoritative or self-regulatory body, or adopted by an informal industry group, to govern business, professional, or other behaviour. Unlike a multilateral convention, they do not constitute or contemplate legally binding commitments and are addressed to private enterprises and natural persons rather than to states. Recent years have seen the increasing use of international codes and guidelines. Because international law traditionally addresses the conduct of nations, not enterprises or natural persons, guidelines have developed as part of international "soft law" to fill the gap.⁷² The United Nations and several of its instrumentalities have issued guidelines on a variety of subjects. These include a set of Equitable Principles and Rules of Control of Restrictive Business Practices⁷³ (adopted by the U.N. General Assembly), and a Tripartite Declaration of Principles on

⁷² See Seidl-Hoenveldern, *International Economic "Soft Law"* Recueil des Cours (1979-II).

⁷³ (1980) 19 I.L.M. 813.

Multinational Enterprises and Social Policy,⁷⁴ issued by the International Labour Organization.

A principal advantage of international guidelines as an instrument for addressing the problem of accommodation payments is that they would require less of a consensus than multilateral conventions. An international code would also help in establishing a balanced set of standards of good corporate conduct to be observed by transnational corporations in their operations and of standards to be observed by governments in their treatment of transnational corporations. This would have certain benefits which, although perhaps less concrete than those associated with a multilateral convention may nevertheless be significant. It would: (a) encourage that the activities of transnational corporations are integrated in the development objectives of the developing countries; (b) establish the confidence, predictability, transparency and stability required for an expanded growth of foreign direct investment in a mutually beneficial manner; (c) contribute to a reduction of frictions, conflict and painful disruptions between transnational corporations and countries; (d) enable the flow of foreign direct investment to use its potential in the development process; and as a consequence encourage positive adjustment through the growth of productive capacities.⁷⁵

⁷⁴ (1978) 17 I.L.M. 422.

⁷⁵ "High-Level Roundtable on the United Nations Code of Conduct on Transnational Corporations" (1986) 13 Syracuse J. Int'l L. & Comm. 124 at 127. See also: I. Walter & T. Murray, *Handbook of International Business* (New York: John Wiley & Sons, 1988) c. 9, at 8 where the authors observe that a benefit that business might expect

The principal disadvantage of a code of conduct is its limited potential effectiveness. The fact that they primarily address enterprises and natural persons, not sovereign states, and are not legally binding and lack enforceability altogether, severely limits their scope: they cannot seek to accomplish a number of potential goals like that of criminalizing accommodation payments, affecting tax treatment, introducing administrative remedies, or promoting intergovernmental information exchange and judicial and administrative assistance on matters relating to accommodation payments.

The section following shall discuss the international attempts made to regulate and control accommodation payments through both the forms as discussed above.

to have from a uniform Code of Conduct is the reduction of uncertainty or a larger degree of stability in relations with governments. The Code will also help transnational corporations to extricate themselves from conflicting requirements imposed on them by two or more countries. In brief, the Code would entail a set of acceptable standards of behaviour by transnational corporations and governments.

5. Survey of International Efforts to Control Accommodation Payments

a. United Nations Efforts to Control Accommodation Payments

An historical review⁷⁶ reveals that the control of accommodation payments has long been on the international agenda. After World War I, the League of Nations did study the possibility of international controls for cartels and industrial agreements. However, no action was taken due to diverse national policies, objections as to loss of sovereignty, and the fact that cartels were deemed efficient and beneficial. Before the end of World War II, the United States planned for an International Trade Organisation to regulate many areas of international trade. The Havana Charter of 1948 prohibited business practices affecting international trade which restrained competition, limited access to markets, or fostered monopolistic control.⁷⁷ The Charter failed when United States' support was withdrawn.

Since then, a similar United Nations draft code was drawn-up in 1953, the

⁷⁶ Joelson & Griffin, *supra*, note 1, at 10.

⁷⁷ This Charter dealt with foreign investment and restrictive business practices (Articles 12 and 46-54; UN Conference on Trade and Employment, UN Sales No. 1948.II.D.4). It upheld the right of capital importing countries to screen foreign investments, place restriction on ownership, and take other reasonable actions. However, this Charter was never adopted.

European Economic Community was formulated, and various other economic and regulatory movements involving co-operation among nations for controlling the activities of TNCs have occurred.⁷⁸

Recent efforts began in December 1974 after the United Nations Economic and Social Council established the United Nations Commission on Transnational Corporations and the U.N. Centre on Transnational Corporations (which serves as secretariat to the Commission).⁷⁹ The General Assembly on 15 December 1975 adopted resolution 3514

⁷⁸ At the United Nations, resolutions on permanent sovereignty over natural resources have been adopted since 1952; a draft convention on restrictive business practices was discussed in 1953, and 1954; and the International Development Strategy for the First and Second Development Decade (1960s and 1970s) touched upon issues related to foreign direct investment (UNCTC, E/C.10/9 and Add. 1). Outside the United Nations, the developed countries dealt with the issue in the forum of the OECD. Developing countries, particularly the nonaligned countries (those countries which do not maintain formal alliance with major powers), raised the issue of foreign private investment at some of their early meetings and conferences. In 1972, the Conference of Foreign Ministers of Non-Aligned Countries called in their Georgetown Declaration for a study of criteria, techniques, and procedures for making private foreign investment "subserve national development objectives" in order to facilitate the adoption of a common approach to private foreign investment (The Georgetown Declaration, Action Program on Economic Co-operation of Foreign Ministers of Non-Aligned Countries, August 1972). Paralleling these governmental attempts and intentions have been proposals by a number of private groups. A draft convention, for instance, providing for protection of foreign investment was prepared in 1958 by a group chaired by Lord Shawcross (A.A. Fatouros, "An International Code to Protect Private Investment; Proposals and Perspectives," (1961) 14 U. Toronto L.J. at 77-102). Similar drafts were presented by a British Parliamentary group for world government, by the German Society to Advance the Protection of Foreign Investment, and by other groups, conferences and institutions. Obviously, these efforts reflected the objectives of their initiators. While initiatives by private groups and developed countries aimed at protecting foreign investment and ensuring a favourable investment climate, those stemming from developing and nonaligned countries were intended to protect the interests of host countries and affirm their right to regulate foreign investment and a desire to attract it in order to serve the development efforts of nonindustrial countries.

⁷⁹ See Economic and Social Council resolution 1908 (LVII) of 2 August 1974 and 1913 (LVII) of 5 December 1974; The Commission on Transnational Corporations is an intergovernmental body, composed of 48 governments and assisted by 16 expert advisors. The members of the Commission are elected for 3-year terms by ECOSOC. The 16 advisors who participate in their individual capacities from business, labour, university, and other interest group backgrounds, are selected by the Commission from a list prepared by the Secretary-General. The following are the members of the Commission on Transnational Corporations: Algeria, Argentina, Brazil, Canada, China, Congo, Costa Rica, Cuba, Egypt, France, Federal Republic of Germany, Ghana, Guatemala, Guinea, India, Iran, Italy, Jamaica, Japan, Kenya, Libyan Arab Jamahiriya, Mexico, Netherlands, Pakistan, Panama, Peru, Philippines, Republic of Korea, Rumania, Sierra Leone, Somalia, Swaziland, Sweden, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Ireland, U.S.A., Venezuela, Yugoslavia, Zaire. The Centre on Transnational Corporations, on the

(XXX) entitled "Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved", in which it condemned all corrupt practices, including accommodation payments, by transnational and other corporations, their intermediaries and others involved, and requested the Economic and Social Council to direct the Commission on Transnational Corporations to include in its programme of work the question of accommodation payments and to make recommendations on ways and means whereby such payments could be effectively prevented.⁸⁰

Pursuant to this resolution, the Secretary-General on 2 March 1976 transmitted a *note verbale* to Governments of member states requesting relevant information on the subject of accommodation payments. In response, the Government of the United States of America referred to its endeavours to eliminate accommodation payments as evidenced by investigations into the corporate practice of accommodation payments that had been and were still being made by the United States Congress, and proposed the formation of an international agreement to deal with such payments.⁸¹ In its proposal, the US

other hand, is an autonomous part of the Secretariat of the United Nations that became operational in November 1975 as the central unit at the secretariat level of the United Nations system to deal with all aspects related to transnational corporations. The Centre receives its work program primarily from the Commission to which it submits reports and provides all services needed to achieve the objectives set by the Commission. See also: J.Kline, "International Codes and Multinational Business", 90 (1985) *ICC Guidelines for International Investment* (International Chamber of Commerce: pub. no. 272, 1972) pp. 59-62.

⁸⁰ UN ESC 61st sess., para 1, UN Doc. E/5838 (1976).

⁸¹ *Ibid.* para 52-53. This report covered the measures and regulations that the responding Governments stated they had taken at the national and international levels in order to deal with the issue of corrupt practices, including accommodation payments. It contained a brief survey of the penal legislation of selected countries regarding the concept of corruption, persons capable of committing it, elements of offence and sanctions. It also described certain

Government put forth the view that co-ordinated action by exporting and importing host countries was the only effective way to prevent accommodation payments.⁸²

The Commission on Transnational Corporations discussed the subject at its second session, held at Lima from 1-12 March 1976. It discussed the proposal submitted by the United States and decided to forward it for further discussion to the United Nations Economic and Social Council.⁸³

At its sixty-first session the Economic and Social Council considered the US proposal as forwarded by the Commission on Transnational Corporations, and adopted resolution 2041 (LXI) of 5 August 1976 in which it decided

"to establish an *Ad Hoc* Intergovernmental Working Group [hereinafter Working Group] to conduct an examination of the problem of corrupt practices, in particular bribery, in international commercial transactions by transnational and other corporations, their intermediaries and others involved, to elaborate in detail the scope and contents of an international agreement to prevent and eliminate illicit payments, in whatever form, in connexion with international commercial

investigations of accommodation payments that had been conducted by Governments, and summarized the proposals for further dealing with the issue. In conclusion, the report stated that the issue of accommodation payments is a complex one that merited serious international concern and pointed out that the "various aspects of the issue would require more detailed consideration" than was possible within its scope.

⁸² *Ibid.*

⁸³ *Supra*, note 7, at 3.

transactions as defined by the Working Group".⁸⁴

The Ad Hoc Intergovernmental Working Group on Corrupt Practices

The Working Group held its first session from 15 to 19 November 1976, and requested the Centre on Transnational Corporations to prepare, for its second session, a working document on corrupt practices which would identify the issues involved in an analysis of the question of corrupt practices and indicate the options available to the Working Group.⁸⁵

At its second session held from 31 January to 11 February 1977, the Working Group adopted a list of major issues to be considered in the examination of the problem of accommodation payments. The issues included defining various concepts related to accommodation payments, actions at the national and international level, settlement of disputes and proposals and options to control accommodation payments other than an

⁸⁴ *Official Records of the Economic and Social Council, Sixty-first Session, Supplement No. 5 (E/5782), para 37. Also see, Supra, note 7, at 3.*

⁸⁵ See United Nations document E/AC.64/3, entitled "Corrupt Practices, Particularly Illicit Payments in International Commercial Transactions: Concepts and Issues Related to the Formulation of an International Agreement", *Ibid.* This report examined the concepts and issues related to the formulation of an international agreement on corrupt practices, particularly accommodation payments in international commercial transactions. Chapter 1 of this report elaborated on the major concepts involved, such as "corrupt practices", "bribery", "illicit payments" and "international commercial transactions", and identified the various possible classifications of such corrupt practices, as well as the parties involved. Chapter II underscored the need for international action and discussed the type of actions, both national and international, that might be embodied in a relevant international agreement. It also discussed the type of machinery that could be created in the agreement in order to enforce its provisions and to ensure the settlement of any disputes relating to its interpretation or application.

international agreement. It also requested the Centre on Transnational Corporations to prepare for its third session an annotation of the approved outline.⁸⁶

The Centre, accordingly, prepared a document entitled "Major Issues to be Considered in the Examination of the Problem of Corrupt Practices, in particular Bribery, in International Commercial Transactions by Transnational and Other Corporations, Their Intermediaries and Others Involved".⁸⁷ This document suggested various means by which the Working Group could deal with the issues it had identified in its last session, provided analysis of the penal laws of twenty-five countries on the problem of accommodation payments, and elaborated on the various conceptual issues identified by the Working Group.

In its third session⁸⁸, the Working Group agreed to use the document prepared by the Centre⁸⁹, as a basis for its discussions. After a general exchange of views on the issues contained in that document, the Working Group decided to request the Centre on

⁸⁶ In this session, the Group also decided to change its name from "*Ad Hoc* Intergovernmental Working Group on Corrupt Practices" to "*Ad Hoc* Intergovernmental Working Group on the Problem of Corrupt Practices", see UN Doc. E/AC.64/L.2 (1977), UN Doc. E/AC.64/5 (1977). Also note that in this session, the representative for the U.S.A. presented a working paper, entitled "Ideas on the Scope and Content of an International Agreement on Illicit Payments in Connexion with International Commercial Agreement" (UN Doc. E/AC.64/L.1 (1977)), before the Group. The paper provided guidelines on which any treaty for the regulation of accommodation payments should be drafted.

⁸⁷ UN Doc. E/AC.64/7 (1977).

⁸⁸ This session took place from 28 March - 8 April 1977, and, from 27 June - 1 July 1977.

⁸⁹ *Supra*, note 87.

Transnational Corporations to draft a text in the form of legal provisions to reflect the suggestions which the Centre had provided in sections II, III, IV, V and VI of the document it had prepared earlier.⁹⁰ These sections dealt respectively with definitions, actions at the national level, action at the international level, settlement of disputes, and ways in which an international agreement on accommodation payments may be put into force.

In conformity with that request, the Centre prepared a working paper.⁹¹ The paper provided options regarding ways in which the Working Group might define terms like "Bribery", "Illicit payments", "Public Official" and "International Commercial Transactions". It suggested alternatives through which action against accommodation payments could be taken at the national and international level; provisions for settlement of disputes, and other related matters.⁹²

The Working Group discussed this paper in the latter part of the third session and submitted its report in compliance with Economic and Social Council's resolution 2041 (LXI).⁹³ The report, in part A, provided "provisions relevant to the elaboration of an

⁹⁰ *Ibid.*

⁹¹ Annex 1 of UN Doc. E/AC.64/L.3 (1977).

⁹² *Ibid.*

⁹³ *Supra*, note 84.

international agreement to eliminate and prevent illicit payments, in whatever form, in connexion with international commercial transactions by transnational and other corporations, their intermediaries and others involved", and, in part B, discussed "other relevant proposals and options".⁹⁴ In its report, the Working Group also recommended to the Economic and Social Council that it continue the Working Group so that it may complete its work; expand the membership of the Working Group, and request the expanded Working Group to draft an international agreement to prevent and eliminate accommodation payments in whatever form in connexion with international commercial transactions, and to consider other actions to combat accommodation payments.⁹⁵

The Economic and Social Council, allowing the request of the Working Group, expanded the membership to include all interested nations, including non-member States, with a proviso that "the Working Group shall meet only if a quorum of four States from each interested geographical group is represented", and mandated it to draft an international agreement to prevent and eliminate accommodation payments.⁹⁶

⁹⁴ See UN Doc. E/6006 (1977) entitled "Report of the Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices on its First, Second, Third and Resumed Third Sessions". See also: UN Doc. Nos. E/AC.64/L.3/Annex II/Rev.1 (1977); and E/AC.64/L.3/Annex II/Rev.1/Add.4 (1977).

⁹⁵ *Ibid.* para 1 at 1.

⁹⁶ Economic and Social Council Resolution 2122 (LXIII), dated 4 August 1977.

The Working Group met again in its fourth, fifth, and resumed fifth sessions⁹⁷. During the fourth session the delegates concentrated mainly on the precise wording of the articles dealing with criminalization and national jurisdiction. At the fifth and resumed fifth session, the Working Group discussed the legal texts on these and other issues, including mutual judicial assistance, extradition with the definition of terms such as "public official", and "international commercial transactions".

During these sessions, various proposals on various aspects were presented by delegates.⁹⁸ These proposals and the report of the Working Group on its first, second and third sessions⁹⁹ were discussed extensively during both the sessions. There emerged a general consensus that both the offense of making and receiving accommodation payments should be criminalized in the national law of each state and that appropriate penalties should be instituted by national legislation. In this context, an accommodation payment was understood to be any payment, gift or other benefit made or promised to a public official with the intention that the public official be induced to perform or refrain

⁹⁷ The fourth session was held from 6-10 March 1978, the fifth from 3-14 April 1978, and the resumed fifth from 26 to 30 June 1978. These sessions were attended by the following States: Algeria, Argentina, Australia, Belgium, Canada, Colombia, Cuba, Denmark, Equatorial Guinea, France, Federal Republic of Germany, Ghana, Greece, the Holy See, India, Iran, Iraq, Ireland, Italy, Japan, Kenya, Mali, Mexico, the Netherlands, Niger, Nigeria, Norway, Pakistan, Philippines, Republic of Korea, Rwanda, Spain, Sudan, Sweden, Switzerland, Thailand, Turkey, Uganda, United Kingdom, United Republic of Cameroon, United States of America, Venezuela, Zaire and Zambia.

⁹⁸ There was a proposal by Denmark and Japan for an article on record keeping, and a proposal by France for a convention on the elimination of bribery in international commercial transactions. See UN Doc. E/1978/115, Annexes I, II, & IV, (1978).

⁹⁹ UN Doc. E/6006 (1977).

from the performance of his/her duties. However, considerable discussion arose about the exact wording regarding whether the act had to be simply in connexion with an international commercial transaction or whether it had to be for the specific purpose of obtaining or retaining such a transaction. Besides the criminalization through penal law, the Group also considered the use of administrative measures, with or without consequences through civil law, to further deter accommodation payments.

The discussion on the topic "jurisdiction", determining the competence of national law over accommodation payments, primarily emphasized the differences in existing legal systems with respect to the principles of nationality and territoriality.¹⁰⁰ Proposals were advanced favouring extra-territorial jurisdiction over nationals for legal systems under the territorial principle.¹⁰¹ However, no definitive agreement was reached on this matter.

Differences in legal systems among countries also prevented the Working Group from agreeing on whether corporations could be prosecuted as "legal persons". Several delegations were of the view that the term "a national"¹⁰² was ambiguous. In their

¹⁰⁰ Under the former, a State has the right to prosecute a national wherever the offense is committed; under the latter, the State can prosecute only in cases where the act was committed within its own territory.

¹⁰¹ This might be done by introducing a so-called "territorial link" between the offense and the territory of the State of which the offender is a national. Such a solution was chosen by the USA in its Foreign Corrupt Practices Act of 1977 (Public Law 95-123 of 19 December 1977).

¹⁰² Article 4(1)(c) of the Draft Agreement (see Annex 1) provided that "Each Contracting State shall take measures as may be necessary to establish jurisdiction over the offence referred to in Article(a) relating to any payment, gift or other benefit in connexion with the negotiation, conclusion, retention, revision or termination of an international commercial transaction when the offence is committed by a national of that State, provided that any

opinion, it could be interpreted so as to include a juridical as well as a natural person; or to exclude juridical persons; or to exclude juridical persons, as well as natural persons of other States in which case a large loophole would be created for the agreement could by no means prohibit a corporation from using a foreigner as an agent for the purpose of making accommodation payments.

Other differences which became evident during the sessions of the Working Group related to definitions of terms like "public official", and "international commercial transaction".¹⁰³ The opinion was also expressed by several delegates that an international agreement to combat accommodation payments should focus on the major areas of abuse. In the opinion of these delegates, the Working Group should have concentrated on the larger accommodation payments which were directly related with obtaining or retaining an international commercial transaction.

With these unresolved differences, the Working Group, in compliance with the mandate given to it by the Economic and Social Council in resolution 2122 (LXIII), concluded with the formulation of the Draft International Agreement To Prevent and

element of that offence, or any act aiding or abetting that offence, is connected with the territory of that State.

¹⁰³ The representatives from the Federal Republic of Germany made reservations regarding the inclusion of the words "other business transaction" in the definition of the term "international commercial transactions". UN Doc. E/1978/115 (1978).

Eliminate Illicit Payments in International Commercial Transactions".¹⁰⁴

This Draft Agreement consisted of two parts - parts A & B.¹⁰⁵ Part A contained 14 articles. Articles 1 and 2 defined the act of making or demanding accommodation payments, a public official, and terms like "international commercial transactions" and "intermediaries". Articles 3-10 provided the duties and rights of States who would become parties to such an agreement. They imposed upon all contracting states, whether home or host, a duty to include a clause in all contracts related to international commercial transactions, that accommodation payments would not be used by either of the parties; that they will take all practical measures to prevent their occurrence; and in cases of breach will establish jurisdiction to ensure prosecution of offenders. Under these articles, the contracting home states were further imposed upon with the obligation to ensure that all payments made to intermediaries were accurately recorded. Host states were similarly obligated to ensure proper and accurate recording of all payments made to intermediaries within their jurisdiction and record all relevant information pertaining to them and their connections with people associated with the transaction. Contracting home states, under these articles, were further required to submit an annual report on the activities of their TNCs to the Secretary-General of United Nations. Further, a contracting state, whether, home or host, was given the right to seek information relating to measures

¹⁰⁴ *Ibid.* at 5-13.

¹⁰⁵ For a complete text of the draft agreement prepared by the Working Group, see Annex 1.

taken by other contracting states in relation to the above, and seek assistance in connexion with investigation and proceedings relating to any breach of the agreement. Article 11 made the act of making or demanding accommodation payments an extraditable offence, and Articles 12-14 contained provisions as to the bringing into force of such an agreement. Part-B, entitled "Other Relevant Proposals and Options", contained suggestions with regard to the harmonization of tax treatment and disclosure under national laws. In this Part, the Working Group emphasised the need for all States to enter into appropriate bilateral and multilateral arrangements to prevent and eliminate accommodation payments, and noted that a Code of Conduct on Transnational Corporations was being prepared by the Commission on Transnational Corporations and a part of this also dealt, to a certain extent, with corrupt practices.¹⁰⁶

This report of the Working Group, together with the Draft Agreement, were submitted to the Economic and Social Council. In August 1978, the Economic and Social Council decided to establish a Committee on an International Agreement on Illicit Payments and to convene a conference to conclude an international agreement on illicit payments.¹⁰⁷

¹⁰⁶ UN Doc. E/1978/115, at 13, para 9-10, (1978).

¹⁰⁷ See Official Records of the Economic and Social Council, 1978 Supplement No. 1 (E/1978/78), resolution 1978/71.

Committee on an International Agreement on Illicit Payments

This Committee held its first and second sessions from 7 to 18 May 1979, during which it discussed and formulated the draft of an international agreement on illicit payments. This draft was submitted to the Economic and Social Council in 1979.¹⁰⁸

The draft agreement prepared by the Committee¹⁰⁹ clarified most of the differences on which the Working Group was unable to form a consensus. It retained the first eleven articles of the draft provided by the Working Group with minor amendments, and discarded the others.

The Draft Agreement is aimed at resolving the problems of accommodation payments primarily through creating obligations on home and host countries. Through the interplay of articles 1.1(a), 1.2, 2(a) and (b), 3, 4.1(a) and (c), and 5. Article 1.1(a) requires contracting states to make

"punishable by appropriate criminal penalties under [their] national law...the offering, promising or giving of any payment, gift or other advantage by any *natural* person...to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction".

¹⁰⁸ See "Report of the Committee on an International Agreement on Illicit Payments on its First and Second Sessions", UN Doc. E/1979/104 (1979).

¹⁰⁹ For a complete draft of the Agreement prepared by the Committee, see Annex II.

The Committee added the words "to or for the benefit of" in this article to ensure that the proscriptions enacted into national law by contracting states pursuant to the article embraced both indirect accommodation payments passed on through third parties, as well as favours granted to relatives of foreign officials for the purpose of influencing the latter. It also added the word "undue" before consideration in both articles 1.1(a) and (b) to ensure that the proscriptions enacted by contracting states pursuant to the article included *ex post facto* payments, i.e., payments intended as rewards for past favours. Article 1.2 requires contracting states to make the same acts punishable by appropriate criminal penalties when committed by a *juridical* person, or "in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate measures, according to its national law, with the objective of comparable deterrent effects." Article 2(a) ensures that the provisions of national law enacting the above proscription embrace payments to foreign as well as domestic officials, by defining "public official" as "*any person ... who ... performs a public function.*" Article 2(b) defines "international commercial transaction" very broadly: the term embraces

"any sale, contract, or other business transaction either with a government or a governmental authority or agency, or involving an application for governmental approval, which relates to the supply or purchase of goods, services, capital or technology emanating from a state or states other than that in which they are to be delivered or rendered."

It is odd to note that the Committee did not select the term "international *business*

transaction" instead of "international commercial transaction" when the definition includes transactions involving capital as well as those involving goods, services and technology. It is also to be noted that the definition, as now worded, does not cover a transaction in which a domestic subsidiary wholly owned by foreigners sells locally manufactured goods to a government, nor seems to cover a case in which a subsidiary imports all the parts for a product which it assembles domestically and then sells to the local government. In my opinion, both transactions could be brought under the definition's coverage by substituting after the words "emanating from" the phrase "a person or persons whose nationality is other than that of the State" for the phrase "a State or States other than that.....", and adding to article 2 a definition for the term "national" that includes foreign subsidiaries ultimately controlled by individual nationals of a contracting state. Alternatively, the last transaction could be brought within the definition's coverage by inserting the words "wholly or substantially" or "or originating" immediately after the word "emanating".

Thus, standing alone, articles 1 and 2 obligate all contracting states to make their national anticorruption laws simultaneously applicable to any corrupt payment made in connection with an international commercial transaction, regardless of the nationality of the maker or receiver of the payment, or where the payment is made. Article 4 prevents this radical departure from current international law by restricting the jurisdictional reach which each contracting host state must give to legislation enacted pursuant to article 1. Article 4.1(a) requires a contracting state to establish its jurisdiction over any offense

referred to in article 1 which occurs within its territory. Article 4.1(c) further requires a contracting home state to exercise extraterritorial jurisdiction in certain circumstances provided an offense described in article 1.1(a) is committed overseas by a national. This extension of jurisdiction is circumscribed in two respects. First, the offense must occur in connection with "the negotiation, conclusion, revision, or termination" of an international commercial transaction. Although the notes accompanying the draft agreement provide no clear indication of the purpose of this condition, it seems to be apparently designed to relieve home states of any obligation to exercise extraterritorial jurisdiction over those accommodation payments which might be made to speed up the performance of an international contract already executed. The apparent rationale for inserting this condition into article 4.1(c) instead of 1.1(a) or 2(a) is to differentiate between the responsibilities of home and host states to prosecute such payments. However, this language of article 4.1(c) is bracketed indicating lack of agreement among the delegates of the Committee, or a problem due to differences among national legal systems. Second, some act either aiding or constituting an element of the offense must occur within the territory of the state.

The jurisdiction mandated by article 4.1(a) is broader than that mandated by article 4.1(c) in that it requires contracting states to exercise jurisdiction over accommodation payments made in connection with international commercial transactions (1) by foreigners to foreign officials, (2) by juridical nationals, and (3) regardless of whether they are paid

also in connection with the "negotiation, conclusion, retention, revision, or termination of" such transactions. Article 4.1(c) does not require a contracting state to exercise jurisdiction over accommodation payments paid by juridical nationals. First, the term "national" as used in the agreement does not appear to include juridical persons. Second, article 4.1(c) only covers offenses referred to in art. 1.1(a) which proscribes certain acts on the part of *natural*, but not juridical persons.

Articles 3 and 5 ensure that the responsibilities of contracting states relating to foreign accommodation payments do not end with the simple enactment of laws in accordance with article 1, 2 and 4. Article 5 obligates a contracting state which finds within its territory an alleged offender over whom it has jurisdiction under article 4 "without exception whatsoever" to submit the case to competent national authorities for the purpose of prosecution, unless the state extradites the alleged offender (e.g., to the host state whose official was allegedly paid an accommodation payment). Furthermore, article 3 requires a state to "take all (other) practicable measures for the purpose of preventing the offenses mentioned in article 1." Presumably, this article obliges a contracting state to enforce any other national laws or regulations (such as attempt, aiding and abetting, conspiracy, disclosure, or tax provision) where such enforcement might deter accommodation payments, even though these legal provisions are not referred to elsewhere in the draft agreement.

Besides obligating contracting states to enact and enforce legislation aimed directly against foreign corrupt payments, the draft agreement requires contracting states to measures aimed at indirectly deterring such payments as well. The first sentence of article 6 requires each contracting state to ensure that "enterprises or other juridical persons established in its territory maintain, under penalty of law, accurate records of payments made by them to an intermediary, or received by them as an intermediary, in connexion with an international commercial transaction". In effect, this provision imposes an affirmative duty on a juridical person of contracting home state to keep detailed records of any amount paid to any sales agent, subsidiary, lawyer or other party dealing with a foreign official in connection with an international commercial transaction. An enterprise which otherwise might use such a transaction as an indirect means of executing a foreign accommodation payment is thus forced to choose between accurately recording the transaction with the intermediary, which could provide law enforcement agencies with important evidence of the accommodation payment, or falsifying its books and records, thus risking additional liability for violation of the record-keeping law. As a consequence, article 6 is designed to deter the use of intermediaries as a means of executing accommodation payments to foreign officials. Also, the fact that a payment made to or received by an intermediary need only be recorded by a person who is juridical should in no event be confused with the fact that a payment made by juridical person to an intermediary must be recorded by the payer regardless of whether the intermediary is juridical. This result is established by the definition of "intermediary" as provided by

article 2(c) of the draft agreement.

The enforcement mechanism in the draft agreement to ensure that above provisions are adhered to by the contracting states is contained in article 9.

Article 9 requires contracting states to provide the Secretary-General of the United Nations every second year with information concerning the legislative, administrative and judicial measures which they have taken to implement the agreement. It in turn instructs the Secretary-General to summarize and distribute this information to all contracting states. The enforcement strategy underlying article 9 is the same as that underlying any disclosure scheme - to threaten with adverse publicity those who fail to comply with their legal obligations. A contracting state which fails to enact legislation pursuant to article 1, 2, 4 and 6 or to enforce legislation pursuant to article 3 or 5 would have no positive information to report to the Secretary-General, and upon distribution of the Secretary's progress report other contracting states would then put diplomatic pressure on the offending state to meet its obligation.

In my opinion, the approach taken by article 9 should be quite effective in encouraging contracting states to fulfil their obligation to enact (as opposed to enforce) domestic legislation against accommodation payments. The most reasonable conclusion to draw from a contracting state's persistent failure to enact such legislation is that the

state is conducting its affairs in bad faith. Thus, the sanction of adverse publicity should effectively operate against a state failing to enact legislation. Moreover, a state can avoid the risk of competitive losses to its nationals during the period when other contracting states have not complied with their obligation to enact accommodation payments legislation by providing its own statute will not become effective until all other contracting states have enacted similar legislation. Since by enacting implementing legislation contracting states can avoid adverse publicity with very little risk to their balance of payments, article 9 should effectively encourage multilateral compliance with this aspect of the agreement.

However, with respect to the obligation of contracting states to enforce their laws relating to accommodation payments made to foreign officials, article 9 offers a poor foundation for enforcing the agreement. A contracting states's record of no prosecutions is ambiguous: it could mean during the reporting period either that the state's nationals obeyed the law or that the state decided not to enforce its law. Therefore, a contracting state unable to report news of accommodation payments to the Secretary-General is not at all certain to face adverse publicity, even though this inability is the consequence of a conscious policy not to enforce its law. Accordingly, the sanction of article 9 cannot be expected to effectively deter contracting from following a policy of non-enforcement of their anti-accommodation payment laws.

It should also be noted that the Committee could not reach a consensus on several aspects either due to lack of agreement or differences among national legal systems of the delegates. These included provisions as to record-keeping pertaining to accommodation payments, accommodation payments made in the form of royalty or tax payments, filing of information relating to the implementation of the agreement, and inter-state co-operation in proceedings initiated to investigate accommodation payments.¹¹⁰ However, the most important difference concerned provisions that would have required contracting parties to assert extraterritorial jurisdiction based solely on the "nationality" or controversial "effects" principles of prescriptive jurisdiction. A number of delegations took the position that the proposed provisions were inconsistent with their national law and might be domestically unenforceable.¹¹¹

In the opinion of the Committee, such disagreement was not merely attributable to a lack of agreement, but was to some extent, the result of differences in national legal systems and domestic constitutional norms.¹¹² It left these differences to be resolved at the suggested plenipotentiary conference.

¹¹⁰ The Committee, in the draft agreement, used square brackets to indicate such lack of agreement.

¹¹¹ UN ECOSOC, Report of the Committee on an International Agreement on Illicit Payments, *supra*, note 108, at 10-11, paras. 28, 30-31, 33.

¹¹² *Ibid.* at 2.

The Economic and Social Council, on receipt of the report and text of the draft agreement prepared by the Committee, formulated two draft resolutions on the subject and decided to transmit them to the General Assembly, together with the report of the Committee.¹¹³ The resolutions concerned the convening of a conference of plenipotentiaries by the General Assembly to conclude an international agreement on illicit payments. The two draft resolutions were considered by the General Assembly which agreed to take no decision on them at that time.¹¹⁴ Since then, the matter has never been raised and all efforts to come to a resolution seem to have fallen apart. The failure of the United Nations effort to reach fruition may be attributed to the lack of consensus both between the developed and developing countries, and among the developed countries themselves.

¹¹³ See Official Records of the Economic and Social Council, Second Regular Session of 1979, Supplement No. 1A (E/1979/79/Add.1), decision 1979/73.

¹¹⁴ A/34/635/Add. 3, para. 9.

Code of Conduct on Transnational Corporations

During the time the Working Group and the Committee were working towards the drafting of the agreement on illicit payments in international commercial transactions, the Commission on Transnational Corporations was working towards the preparation of a comprehensive Code of Conduct, to regulate the conduct of TNCs generally with a view to maximize the contributions of TNCs to economic development and growth and to minimize the negative effects of the activities of these corporations, and to specifically deal with accommodation payments.

The Commission completed the preparation of the draft code on 1 February 1988.¹¹⁵ The draft Code of Conduct provides that

"transnational corporations shall refrain, in their transactions, from the offering, promising or giving of any payment, gift or other advantage to or for the benefit of a public official as consideration for performing or refraining from the performance of his duties in connection with those transactions".¹¹⁶

It also directs the TNCs "to maintain accurate records of any payments made by them to any public official or intermediary, and binds them to make available these records to the

¹¹⁵ U.N. Doc. E/1988/39/Add.1. (1988).

¹¹⁶ See documents E/1988/39/Add.1, (1988), Article 21.

competent authorities of the countries in which they operate, upon request, for investigations and proceedings concerning those payments."¹¹⁷

However, the Code of Conduct is yet to be adopted by the General Assembly, and no other action has been taken.

b. Organisation for Economic Co-operation and Development (OECD)

Another major effort to control and regulate accommodation payments was made by the Organization for Economic Co-operation and Development (OECD). The OECD is a Paris based organization with a membership of twenty-four industrialized nations which act as home and host to most of the world's transnational corporations. The OECD has three main purposes in relation to TNCs: to encourage TNCs to contribute to economic and social development; to encourage "national treatment" of TNCs by host countries; and to promulgate standards of business conduct to be observed by TNCs.

In 1976, the OECD, in pursuit of its objective of promulgating standards of business conduct to be observed by the TNCs, developed specific guidelines on

¹¹⁷ *Ibid.*

accommodation payments.¹¹⁸ These guidelines were adopted by the United States along with the other members. The guidelines expressly prohibit the making of "any bribe or other benefit, direct or indirect, to any public servant or holder of public office".¹¹⁹ They also direct the TNCs to, "unless legally permissible, not make contributions to candidates for public office or to political parties or other political organisations"¹²⁰, and "abstain from any improper involvement in local political activities".¹²¹ They also encourage information disclosure and prohibit anti-competitive practices.

Unfortunately, the guidelines have had little impact and did not prove to be very effective for the following reasons: they are merely advisory in nature, they lack implementation procedures, and, finally, they are too broad and would be difficult to enforce even if implementation procedures were in place.¹²²

¹¹⁸ OECD, *Guidelines for Multinational Enterprises* printed as annex to the Declaration of 21st June, 1976 by Governments of OECD Countries in International Investment and Multinational Enterprises, rev. ed. (Paris: OECD, 1984) at 15.

¹¹⁹ *Ibid.* General Policy no. 7.

¹²⁰ *Ibid.* General Policy no. 8.

¹²¹ *Ibid.* General Policy no. 9.

¹²² Roth, *supra*, note 37, at 668.

c. International Chamber of Commerce (ICC)

The ICC consists largely of the chambers of commerce of industrialised states and is a reasonably homogeneous group, much like the OECD.

The ICC, in 1975, under the chairmanship of Lord Shawcross of Britain, formed a commission composed of persons from both developed and developing countries, who had held or currently were in high positions in business or in government. This commission began to develop a set of principles which would lead to the establishment of a code of conduct for all businesses. The code was to deal specifically with accommodation payments. The commission investigated the extent to which individual countries have enacted legislation to prohibit extortion and bribery. The result of this survey clearly showed that while such laws existed in most countries, the effectiveness of their enforcement varied considerably.¹²³

The ICC recommended that an international treaty be drawn up as a matter of urgency under the aegis of the United Nations so as to induce the various governments to take the necessary measures and to promote co-operation between governments which would facilitate the elimination of accommodation payments. It suggested that such a

¹²³ S. Rubin, "International Aspects of the Control of Illicit Payments" (1982) 9 *Syr. J. Int'l L. & Com.* 315 at 317.

treaty should provide for implementation of the governmental measures suggested by the ICC¹²⁴, international cooperation and judicial assistance in dealing with extortion and bribery, and cooperation by all states in the investigation and prosecution of offenders. The ICC recommended that appropriate provisions should be included in all existing or future extradition treaties to this effect. This effort by the ICC progressed until it reached the stage where people began taking a serious look at the standards which had been drafted and the procedures which were going to implement those standards. At that point the whole effort fell apart, and nothing really has been heard of it since.¹²⁵

d. United States Initiative in the GATT

Another effort to regulate accommodation payments which deserves mention is the United States' Senate Resolution 265.¹²⁶ This resolution was adopted in 1975 through the initiative of Senator Abraham Ribicoff, who suggested that the United States raise the question of the control of accommodation payments with the other GATT¹²⁷ countries. Senator Ribicoff argued that such payments represent distortions of proper trade practices,

¹²⁴ For details see, "International Chamber of Commerce: Commission on Ethical Practices - Recommendations to Combat Extortion and Bribery in Business Transaction" Report adopted by the 131st Session of the Council of the ICC, 29th Nov.1977. (1978) 17 ILM 417.

¹²⁵ Rubin, *supra*, note 123, at 317.

¹²⁶ S. Res. No. 265, 94th Cong, 1st Session (1975).

¹²⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S No. 1700, 55 U.N.T.S. 194 (effective Jan. 1, 1948).

and under this premise, the members of the GATT would be the appropriate group to consider the question of accommodation payments. However, when a special trade representative for the United States presented Senator Ribicoff's proposal before the GATT conference, he was greeted only with polite silence.¹²⁸

Conclusion

From an analysis of the above survey, it can be concluded that for an effective control of accommodation payments through international efforts, the following areas of concern specifically need to be resolved: definition; jurisdiction; extradition; record-keeping; disclosure; investigation and enforcement. Legal concerns about exercise of extraterritorial jurisdiction can be much reduced if the exercise rests on a generally accepted jurisdictional principle such as nationality of the persons involved or the territoriality of significant elements of a transaction. Where a recognised basis for jurisdiction concerning an international transaction exists, the acute concerns which may nevertheless arise concerning unilateral extraterritorial investigation or enforcement are avoidable through cooperative arrangements with other concerned states. As far as extradition is concerned, in order to have member states treat the making of accommodation payments an extraditable offense included within the scope of existing

¹²⁸ Rubin, *supra*, note 123, at 319.

extradition treaties, it is essential that all states classify the making of accommodation payments as a crime. For example, the European Convention on Extradition defines extraditable offenses, as those offenses which are punishable under the laws of the requesting and requested states by deprivation of liberty under a detention order for a maximum period of at least one year or by a more severe penalty.¹²⁹ Thus the applicability of existing extradition treaties to accommodation payments will require international agreement to that effect. Existing extradition treaties as a general rule exclude political and related offenses. Cases of accommodation payments generally tend to involve political figures and have extensive political ramifications. Hence, the issue as to what extent the usual exclusion of political offenses from extradition treaties should be allowed to stand needs to be addressed. On the issue of record-keeping, to have an effective control on the means through which accommodation payments are facilitated, it becomes desirable that record-keeping requirements for TNCs are standardised specifically on the issues of who should disclose what, to whom, when and how. Lastly, the issue of mutual assistance between home, host and third countries in order to facilitate all aspects of investigations pertaining to accommodation payments forms an essential element in the control of accommodation payments at the international level.

¹²⁹ Article 2:1, done at Paris on 13 December 1957, European Treaty Series, No. 24.

6. Obstacles to an International Solution

International solutions to control and regulate accommodation payments have mostly been impeded due to the lack of consensus between the developed and developing countries; exclusion of TNCs from the process; a lack of effective implementation of measures even where consensus on standards were reached; and the cumbersome and complex nature of the process of reaching international consensus. This chapter focuses on these issues which have hindered the development of an international solution to the problem of accommodation payments.

Much of the difficulty encountered in the United Nations forum and elsewhere in reaching a consensus on how to deal with accommodation payments stems from the extensive split between the developed and the developing countries of the world. In general, there is a strong feeling on the part of developing countries that there must be some kind of massive transfer of resources from north to south, and that justice and equity demand such redistribution of resources. Many developing countries maintain that they have been exploited by the ex-colonial powers and that they are entitled to some kind of compensation as a result.¹³⁰ This is not a basis upon which one easily arrives at the overall standards that will regulate a new international economic order. This antipathy

¹³⁰ Rubin, *supra*, note 123, at 321.

makes agreement on any issue difficult and has impeded the multilateral adoption of effective measures to deal with accommodation payments.

Furthermore, accommodation payments constitute a way of doing business, indeed, a way of life in many developing countries. Any attempt at interfering with such a fundamental component of their economies and cultures is considered an unwelcome and unwise intrusion.

In some developing countries, "grease" constitutes an essential supplement to income which is factored into wage structures. "When a cabinet minister is paid only \$100 to \$200 a month but he drives around in a Mercedes, that's how the system works", explains the regional president of a major U.S. manufacturer.¹³¹ In Nigeria, where payoffs are commonplace, a major cause of the practice is "the demands of the extended family, which often includes dozens of relatives. Nigerians say the need to care for so many people almost forces the family head to raise money however he can, and graft is one of the easiest ways."¹³² Any attempt to close off this form of income is considered to be a disparaged intrusion.

¹³¹ F. Butterfield, "U.S. Law Against Bribes Blamed for Millions in Lost Sales in Asia" *N.Y. Times* (June 26, 1978) at D10.

¹³² J. Spivak, "In Nigeria, Payoffs Are a Way of Life" *Wall Street Journal*, (July 12, 1982) at 23.

In some cultures, accommodation payments are a way of distributing wealth. When an official receives an accommodation payment he does not get to keep it all. He is obligated to share it with all the people who work with him, either in the same office or in the same department. Often the distribution is done according to the seniority of the official and in many cases the person actually negotiating the money might be doing so only at the command of some higher official or minister. In Saudi Arabia, for example, an American observed: "If someone gets a \$100 million payment, he doesn't keep it allHe has to pay many people who work with him."¹³³

Political rulers and business people in many countries have such a vested interest in international commercial bribery that they would necessarily view any attempts to eliminate or control the practice as a threat to their personal well-being.¹³⁴ The possibility of promulgating a uniform international standard governing accommodation payments promises positive results, in theory, but the reality of imposing standards alien to many cultures and threatening the personal interests of those responsible for implementing such standards make the prospects of such a standard and its effective enforcement very bleak.

¹³³ D. Ignatius, "Royal Payoffs" *Wall Street Journal* (May 1, 1981), at 23.

¹³⁴ Roth, *supra*, note 37, at 674.

Another factor which has significantly impeded the efforts to formulate a multilateral agreement to control accommodation payments is the lack of consensus among developed countries themselves. On a review of United Nations' efforts, one commentator concluded that "the bulk of the important struggle over the proposed agreement has been between the United States on one hand and the other OECD nations on the other."¹³⁵ "Much more so than in the United States, Europe runs on a complex, ancient and 'honourable' system of tips, favours, exceptions to rules, chummy in-groups, string-pulling, and canny dissimulation of anything having to do with money."¹³⁶ This attitude has resulted in a lack of uniformity in the pressure to get rid of accommodation payments among these two blocks of developed countries. The only reason which seems probable for such an attitude is that perhaps the European nations view the unified pressure to get rid of accommodation payments as a threat to their already established order in the European Economic Community. In the result, these differing attitudes have only undercut the global multilateral efforts to control and regulate accommodation payments.

Taking advantage of this and to preserve their own vested interests, the officials in the developing countries, where such payments are viewed to be embedded in culture,

¹³⁵ B. Seymour, "Illicit Payments in International Business: Legislation, International Codes of Conduct, and the Proposed United Nations Convention", in Norbert Horn ed., *Legal Problems of Codes of Conduct for Multinational Enterprises* (Dordrecht, The Netherlands: Kluwer B.V., 1980) at 231-234.

¹³⁶ R. Chelminski, "Pots of Wine" *Saturday Review* (July 9, 1977) at 14.

sarcastically remark that perhaps promoters of international anti-bribery provisions are so quick to condemn accommodation payments because they have neither the opportunity nor the skill to play the game, and make the argument that unfamiliarity, discomfort, or even economic uncertainty created by a custom or business practice should not serve as a justification for attempting to change it.

Another factor contributing to the north-south conflict in control of accommodation payments is that since the developing countries are primarily importers of capital, they are motivated by a desire to ensure the compatibility of TNC activities with their developmental plans and economic objectives.¹³⁷ They take a pragmatic rather than an ideological approach to host state treatment of TNCs. Their primary concern remains concentrated on increased development, not with underlying political or economic philosophy.¹³⁸ Since the developing countries generally do not have the technology and resources possessed by the TNCs,¹³⁹ they do not wish to impose any limitation on TNC activities by adopting strict measures to control accommodation payments. They tend to remain satisfied as long as they entertain the impression (which in some cases might just

¹³⁷ See "Transnational Corporations in World Development" U.N. Doc. ST/CTC/46, (1983) at 118 para. 377, [hereinafter cited as Third Survey]. The Third Survey was an in-depth study on all major aspects of TNC activity and impact in world society, issued by the UN Centre on Transnational Corporations. See also: Fatouros, "International Law and the Third World" (1964) 50 Va. L. Rev. 783, 807-08.

¹³⁸ *Ibid.*

¹³⁹ C.F. Bergsten, T. Horst & T. Morgan, *American Multinationals and American Interests* (Washington: Brookings Institution, 1978) at 370.

be farce) of retaining power and control. They do not wish to take steps which might displease or scare TNCs so as to cause them to withdraw their operations from their country and jeopardize their long-term developmental objectives.¹⁴⁰

Joint action by all nations, as well as all other involved and interested parties, is necessary in formulating regulatory schemes to effectively resolve the problems and misconduct caused by the TNCs. However, because of the existing differences in the needs and policies of the various countries, lack of common interests between developed and developing countries, and diverse perceptions of the economic, political and social impact of transnational corporations, uniform interests in the control of accommodation payments are very difficult to articulate. In addition, inconsistencies due to different policies of implementation deepen the problem even where the interests of the nations are the same.

One result of the widespread publicity given to accommodation payments was a movement among TNCs to adopt, or tighten up, policies regulating the making of accommodation payments by their employees. These instruments often included condemnations of acquisition of business through the use of accommodation payments and urged their employees to abstain from any other use of such payments. Examples of such

¹⁴⁰ Third Survey, *supra*, note 137, at 118 para. 377. The developing countries assert that such "a principle would conflict with efforts being made to strengthen their own enterprises in order to promote autonomous and self-reliant development.

internal guidelines are "The International Responsibilities of a Multinational Corporation" of Union Carbide Corporation; "A Code of Worldwide Business Conduct" of the Caterpillar Tractor Company; and John Deere Corporation's "Guide in the Everyday Conduct of Our Business for Employees at all Levels in the Company". However, the international agencies, instead of recognising the enactment of such codes as a positive sign and willingness on the part of TNCs to get involved in the process, have tended to see in such codes only a confirmation of their oft-expressed suspicions of misbehaviour by TNCs.¹⁴¹ This attitude has only impeded the effective adoption of international measures to control accommodation payments by encouraging the exclusion of the TNCs from the bargaining table. Even though TNCs are targeted to be directly affected by any attempt to control and regulate accommodation payments, despite the acknowledgment that transnational corporations are new and significant non-political actors rivalling nation states as international actors, they have not been directly integrated in the process of looking for a solution.¹⁴² In all the attempts made to date, the fact that TNCs would prefer to have a uniform international code to control accommodation payments made in direct consultation with them, rather than limiting their participation to lobbying individual nation-state representatives, has been ignored.¹⁴³

¹⁴¹ Jacoby, *supra*, note 4, at 207-209.

¹⁴² Even in the proceedings of the Working Group, only the representatives from the International Chamber of Commerce were allowed to participate.

¹⁴³ TNCs lobby by exerting political and social pressure on members of their national government at home and "in the corridors" at the international negotiations from which they have been excluded. Some observers have suggested that business representatives ought to increase substantially their

Another major problem which international organizations like the United Nations face concerns the manner of effectively enforcing measures against accommodation payments even if a consensual agreement is reached on standards. The current approach has been to pass resolutions in the sponsoring organizations, with a call upon the individual nation-states to implement the codes through domestic law and other less coercive means.¹⁴⁴ This mode of implementation is not effective because nation-states would decide the issue of enforcing such measures and determining the sanctions for their breach. After a comprehensive cost-benefit analysis, a state might decide the cost of enforcement to be too costly and to abstain from taking any action whatsoever. This dependence on domestic enforcement policy severely limits the effectiveness of international agreements on standards.

Lastly, the control of accommodation payments is, relatively, a very recent concept. Reaching a consensus on their control is a difficult, if not impossible, task because the issue is more closely linked to cultural mores than many other issues on the international

lobbying efforts in order to protect the relevant business interests. See: G. W. Coombe, "Multinational Codes of Conduct and Corporate Accountability: New Opportunities for Corporate Counsel" (1980) 36 *Bus. Law.* 11 at 27-29.

¹⁴⁴ One example from the United States involves the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices". In the Fall of 1981, the U.S. Department of State and the U.S. Department of Justice sent a letter to a large number of U.S. businesses endorsing the Restrictive Business Practices rules "as representing a multilaterally agreed set of voluntary guidelines in the antitrust field." The letter was signed by the Assistant Secretary for Economic and Business Affairs of the U.S. Department of State, the Legal Adviser of the U.S. Department of Justice. See also: J. I. Charney, "Transnational Corporations and Developing Public International Law" (1983) *Duke L.J.* 748 at 752.

bargaining table. The search for ways to eliminate accommodation payments through an international forum becomes very frustrating¹⁴⁵ especially due to the absence of any applicable rules of international law governing sovereign nations and bodies as structured and powerful as the TNCs. Even when possible agreements are debated, each participating country tries to secure its best interest and the maximum possible flexibility, thereby making the task of drafting such an agreement an insurmountable obstacle. Added to this is the fact that in such a multilateral process, a successful convention must first be negotiated and then accepted, ratified or acceded to by each of the contracting parties, a step requiring legislative approval in many countries. Once opened for signature, a convention will ordinarily require a minimum number of accessions and ratifications before it will enter into force.¹⁴⁶ Negotiation of the draft U.N. agreement took over three years only to reach the point of stalemate. Had agreement been attained, it is reasonable to expect that many more years would have been required to obtain the necessary number of accessions or ratifications and the required implementing legislation.

Thus, in spite of the attractions of an international code of provisions or a multilateral convention regulating accommodation payments, and even after several years

¹⁴⁵ See T. N. Gladwin & I. Walter, "The Shadowy Underside of International Trade" *Saturday Review* (July 9, 1977) at 16, 58, where the authors comment that "there are signs that the search for ways to eliminate payoff competition could become as frustrating as the search for new international rules to govern the use of the seas, which has produced many conferences but few agreements."

¹⁴⁶ The minimum number of accessions and ratifications required itself became a matter of controversy in the draft U.N. agreement on illicit payments. "Report of the Committee on an International Agreement on Illicit Payments" *supra*, note 108 at 15-16, para 56-57.

of conferring, investigating, and drafting laws, codes, and treaties, the United Nations and other international bodies have not been able to come up with a satisfactory solution to the problem of accommodation payments.

7. Single State Regulation: A. The American Experience

When the problem of accommodation payments was first recognised, it was thought that such payments could be controlled and regulated on a national scale by home or host states, and the problem could be managed by a sovereign state without any interference or support from any other state or institution. The sections following discuss the attempt made by United States of America to control and regulate accommodation payments as a home state and the Canadian laws under which Canada regulates accommodation payments as a host state.

The United States of America, in view of the fact that approximately ninety percent of world's TNCs are headquartered in the U.S., decided to take upon itself the responsibility of controlling TNCs' global activities.¹⁴⁷ It made its first and only attempt to regulate accommodation payments to foreign officials by making them illegal through The Foreign Corrupt Practices Act, 1977 (FCPA).¹⁴⁸ Though the Watergate Scandal precipitated the FCPA, its enactment was aimed at solving the problem of accommodation

¹⁴⁷ Borton & Gross, "Control of Multinational Corporations' Foreign Activities" (1976) 35 Washburn L.J. at 435-436.

¹⁴⁸ Pub. L. No. 95-213, sec. 101-104, 91 Stat. 1494 (1977) (codified at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-(1) & (2), 78ff(a), (c) (1988)). The FCPA was introduced in the 95th Congress by Senators Williams and Proxmire as S. 305, after a similar anti-bribery bill S. 3644, was passed by the Senate but failed to pass the House before adjournment of the 94th Congress. S. Rep. No. 114, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S. Code Cong. & Admin. News 4098, 4099 [hereinafter cited as S. Rep. No. 114]. The Senate bill was passed in lieu of the House bill in December, 1977, 1123 Cong. Rec. 38599 (Senate); 123 Cong. Rec. 38776 (House). The FCPA was signed into law by President Carter on Dec. 19, 1977 13 *Weekly Comp. Pres. Doc.* 1909 (Dec. 20, 1977).

payments by U.S. corporations abroad, which had become the centre of public attention during the 1970's when the press reported allegations of a number of accommodation payments made by U.S. corporations to foreign government officials.¹⁴⁹ These alleged transactions were not insignificant - they involved, on the one hand, such U.S. corporate giants as Lockheed, Exxon, Mobil, and Gulf, and, on the other hand, prime ministers, princes, and presidents of foreign governments.¹⁵⁰ In 1975, the Senate Committee on Banking, Housing and Urban Affairs held hearings on illegal payments by the Lockheed corporation to the Prime Minister of Japan.¹⁵¹

Prior to the enactment of the FCPA, the Securities and Exchange Commission (SEC) had been the most aggressive government agency in discouraging the American TNCs from making accommodation payments to foreign officials. It became involved, not because of the illegality of payments, but because secret slush funds tend to make

¹⁴⁹ See, e.g., *New York Times* (Aug. 26, 1975) at 1.

¹⁵⁰ L.E. Longobardi, "Reviewing the Situation: What is to be done With the Foreign Corrupt Practices Act?" (1987) 20 Vand. J. Transnat'l L. 431 at 449-61.

¹⁵¹ See Lockheed Bribery: Hearings before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong, 1st Sess. (1979). Senator Proxmire, the law's original author, recounted the developments of that scandal in a speech on the Senate floor :-

The Japanese discovered that the Lockheed Corporation had paid a \$ 1.4 million bribe to their Prime Minister. The Prime Minister - the top elected official in Japan - was convicted. He was sent to jail. His life was ruined. His Government, friendly to the United States, fell..... No Lockheed official went to jail. No Lockheed official was fined. The corporation was actually rewarded big for paying the bribe. The bribe was a brilliant investment. For that \$ 1.4 million bribe Lockheed paid the Prime Minister, the firm made tens of millions of dollars of profits in return for that bribe. This was a shocking, shameful development that sullied the reputation of our country.

financial statements false or misleading and impair the efficiency of capital markets.¹⁵² The SEC's power is derived from the Securities Act of 1933¹⁵³ and the Securities Exchange Act of 1934,¹⁵⁴ requiring detailed disclosures to investors by corporations issuing registered securities.¹⁵⁵ The disclosure requirements of the securities laws have been the principal means through which the SEC has attempted to regulate the international activities of American TNCs. U.S. Congress apparently concluded that disclosure under securities laws would achieve two purposes: (1) it would inform the investors, who, in turn, would express their displeasure on the making of accommodation payments by refraining from further investment in a TNC involved in practising the use of such payments; and (2) would lead to investors questioning the management regarding their decisions to use such payments at shareholder meetings and thereby inhibiting illegal and unethical activities by issuers, corporate insiders, broker-dealers, and others engaged in various aspects of the securities industry.¹⁵⁶

¹⁵² *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 1st Sess. 5 (1975) at 67 (testimony of SEC Commissioner Philip A. Loomis, Jr.).

¹⁵³ 15 U.S.C. §§ 77a-77aa (1988).

¹⁵⁴ 15 U.S.C. §§ 78a-78jj (1988).

¹⁵⁵ Corporations with assets exceeding \$1,000,000 and shareholders numbering 500 or more, and corporations with securities listed and registered for public trading on the national securities exchange, must be registered for public trading with the SEC. Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78l (1988). This would include almost all American transnationals.

¹⁵⁶ L.D. Solomon & D.C. Gustman, "Questionable and Illegal Payments by American Corporations" (March 1980) *J. of Bus. Law* 67 at 68; Also see *infra*, notes 191-196 and accompanying text.

Akin to the requirement of disclosure is the concept of materiality which runs through the disclosure provisions under both of the Acts. The securities laws only require the disclosure of material facts. Whether a particular fact is material depends upon an assessment of its significance within the context of the relevant facts and circumstances of a situation. In both these Acts, the traditional theory has been that reasonably prudent investors will wish to be kept apprised of those matters which directly affect their investment, that is, financially, as opposed to ethically, material information. However, it should be noted that the SEC's objective is not to find out whether an accommodation payment was made or not, but to discover whether it was reported accurately. In its actual functioning, the SEC makes a case-by-case determination of materiality, taking into consideration all relevant facts and circumstances, rather than viewing accommodation payments as material *per se*.¹⁵⁷

Building on the integrity-disclosure concept and the suspicions aroused by the Congressional hearing on the Watergate scandal which revealed a pattern of accommodation payments in the United States by American TNCs and the widespread use

¹⁵⁷ Address by SEC Chairman Raymond Garrett before the American Society of Corporate Secretaries (June 27, 1975) (portions inserted in the record of *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 1st Sess. at 59-60 (1975)). See also: "SEC Report on Questionable and Illegal Corporate Payments and Practices", (1976) Fed. Sec. L. Rep. (CCH), No. 642, pt. II, at 17, 21, 26, 27.

of corporate "slush funds", the SEC, as a first step in the regulation of accommodation payments, established a voluntary disclosure program in 1975.¹⁵⁸

The results of the voluntary disclosure program were alarming: over 400 companies voluntarily disclosed substantial accommodation payments, 117 of which were Fortune 500 companies.¹⁵⁹ In 1976, a Securities and Exchange Commission (SEC) report informed that a large number of American corporations were involved in making accommodation payments to foreign and domestic officials.¹⁶⁰ The largest disclosed payments were by Exxon of \$56.7 million, by Northrup of \$30.7 million, and by Lockheed of \$25 million.¹⁶¹ This report found that payments to foreign government officials constituted the largest group, with "sales type" commission and political payments

¹⁵⁸ See "Hearings on Activities of American Multinational Corporations Abroad Before the Sub-Comm. on International Economics Policy of the House Comm. on International Relations", 94th Cong., 1st Sess. 57, at 63-64, 66 (1975) (statement of Phillip Lomms, Jr., Commissioner, Securities and Exchange Commission); see also "SEC Offers Amnesty in Corporate Payoffs" *Business Week* (Aug 4, 1975) at 20; also note, "Disclosure of Payments to Foreign Government Officials Under the Securities Acts" (1976) 89 *Harvard L. Rev.* at 1848.

¹⁵⁹ House Comm. on Interstate & Foreign Commerce, Unlawful Corporate Payments Act of 1977, H.R. Rep. No. 640, 95th Cong., 1st Sess. 4 (1977) [hereinafter Unlawful Corporate payments]; See generally Summary: U.S. General Accounting Office, Impact of Foreign Corrupt Practices Act on U.S. Business: Report To Congress (1981) [hereinafter cited as GAO Summary].

¹⁶⁰ Of the 97 companies listed in the report, 77 showed or were suspected of questionable or outright illegal payments to foreign political or commercial interests. One of these, EXXON, had questionable foreign payments totalling over \$56 million between the years 1963-75. Other companies involved in questionable foreign contributions or payments were Northrup (\$30 million), Lockheed Aircraft (\$25 million), General Telephone & Electronics (\$13 million), Gulf Oil (\$6.9 million) and ITT (nearly \$3 million). G. Greanias & D. Windsor, *The Foreign Corrupt Practice Act: Anatomy of a Statute* Table 2-2 at 20-31 [hereinafter cited as Greanias and Windsor] (citing report of the SEC on questionable and Illegal Corporate Payments and Practices, Submitted to the Committee on Banking, Housing & Urban Affairs, U.S. Senate, 94th Cong, 2d Session (May, 1976).

¹⁶¹ G. Greanias & D. Windsor, *Ibid.* at 20-22.

to party officials constituting the next largest group.¹⁶² The report outlined methods by which accommodation payments were made.¹⁶³

In response, Congress held hearings from which a number of conclusions were drawn.¹⁶⁴ It was apparent to Congress that it should do something about the problem. Some members of Congress expressed outrage because of the moral decline which the problem manifested, others were concerned about the impact foreign payments had on corporate stock-holders, but nearly every member of Congress expressed support for some type of legislation¹⁶⁵. This rare consensus among legislators from both parties led to an even rarer event - the enactment within one year of a law designed to remedy the problem. The final bill was passed with little debate,¹⁶⁶ and was signed by President

¹⁶² *Ibid.* at 23.

¹⁶³ *Ibid.* "[SEC] Chairman Roderick M. Hills identified six major types of accommodation payments: (1) phoney 'bonuses' to company employees in order to make illegal domestic political contributions; (2) payments from revolving cash funds at a foreign subsidiary to make illegal domestic and foreign political contributions; (3) secret kickbacks on purchase or sales contracts made through foreign-bearer stock corporations; (4) funds passed through consultants for illegal political payments and commercial payments; (5) money paid directly to foreign officials for favourable business concessions; and (6) money paid to consultants or commission agents with inadequate documentation of purpose and value." *Ibid.*

¹⁶⁴ See *Prohibiting Bribes to Foreign Officials: Hearings on S. 3133, S. 3379 and S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976)* [hereinafter cited as "Senate Hearings on Prohibiting Bribes"]; *Unlawful Corporate Payments: Hearings on H.R. 3815 and H.R. 1602 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Comm., 95th Cong., 1st Sess. (1977)* [hereinafter cited as House Hearings on Unlawful Payments].

¹⁶⁵ "Senate Hearings on Prohibiting Bribes", *Ibid.* at 2.

¹⁶⁶ The Congressional Record reveals only four pages of debate in the House. See 123 Cong. Rec. 38, 776-79 (1977).

Carter on December 19, 1977.¹⁶⁷ The Foreign Corrupt Practices Act was Congress' response to the above allegations¹⁶⁸, and was the first United States effort at prohibiting foreign accommodation payments.¹⁶⁹

The FCPA, thus enacted, was the "harshest, most comprehensive effort"¹⁷⁰, not only of the United States but of any nation, to prohibit payments, made directly or through intermediaries, to foreign government officials or political parties in an effort to secure business abroad.¹⁷¹ It established a two-track approach to solving the problem of accommodation payments made by American corporations to foreign officials. First, it set up accounting provisions for corporations that were designed to serve as indirect internal deterrence by (1) requiring accurate book-keeping, record-keeping, and accounting

¹⁶⁷ Foreign Corrupt Practices and Investment Disclosure Bill: State on Signing S. 305 Into Law, (Dec. 26, 1977) 13 *Weekly Comp. Pres. Doc.* 1909. President Carter stated upon signing the FCPA into law :-

"I share Congress' belief that bribery is ethically repugnant and competitively unnecessary. Corrupt Practices between corporation and public officials overseas, undermines the integrity, and stability of governments and harms our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions... These efforts, however, can only be fully successful in combating bribery and extortion if other countries and business itself take comparable action."

Ibid.

¹⁶⁸ The FCPA was not the Government's first attempt at dealing with the issue of corporate bribery. However, the Internal Revenue Code has been amended so that bribes cannot be computed as taxable income if they would have been unlawful when made in the United States. Greanias and Windsor, *supra*, note 160 at 12-13.

¹⁶⁹ Special Prosecutor Archibald Cox discovered evidence that payments had been funnelled through foreign agents in order to provide non-recorded slush funds from which domestic political contributions could be made. Additional investigation by the Securities & Exchange Commission showed that portions of these payments were kept as illicit payments which were used to retain overseas business. "Fourth Survey of White Collar Crime" (1987) 24 *Am. Crim. L. Rev.* 405 at 587.

¹⁷⁰ Rubin, *supra*, note 123 at 223.

¹⁷¹ FCPA: 104(a)(2)(B).

for transactions and asset dispositions, and (2) creating a system of internal accounting controls which provide "reasonable assurances" that transactions are properly authorized.¹⁷² Second, the FCPA created an anti-bribery provision which prohibited certain types of payments to foreign officials, political parties or their officials, or intermediaries who will make such payments.¹⁷³

The use of this two-track approach makes the FCPA a somewhat complicated statute. The accounting provisions apply only to "issuers" registered under the Securities Exchange Act of 1934,¹⁷⁴ and since most TNCs fall under this category, the accounting standards were codified as an amendment to the Securities Exchange Act of 1934.¹⁷⁵ Acknowledging the SEC's principal investigatory role in foreign accommodation payments, Congress concluded that as with the rest of securities laws, the SEC should continue to have a role in the investigation of violations of criminal prohibitions by

¹⁷² Greanias & Windsor, *supra*, note 160, at 10.

¹⁷³ *Ibid.* at 12.

¹⁷⁴ Greanias & Windsor define issuers and domestic concerns as follows:

An *issuer* is defined as any entity having a class of securities registered under Section 12 of the 1934 Exchange Act, or which is required to file reports under Section 15(d) of the same act. A *domestic concern* includes individuals who are citizens, nationals or residents, joint-stock companies, business trusts, unincorporated organizations, or sole proprietorships having their principal place of business in the United States or organized under the laws of a state, territory, or commonwealth of the United States.

See *supra*, note 160, at 14.

¹⁷⁵ 15 U.S.C. § 78m(b)(2) (1982).

companies under its jurisdiction, and have the primary responsibility for civil enforcement of the FCPA accounting standards.¹⁷⁶

The accounting standards, comprising track one of the FCPA, impose two sets of requirements on issuers. First, the issuers are required to "make and keep books, records, and accounts, which in reasonable detail accurately and fairly reflect the financial transactions and dispositions of assets."¹⁷⁷ Second, issuers are required to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances"¹⁷⁸ that (1) all transactions were authorized; (2) all transactions were recorded in such a way to comply with generally accepted accounting principles and to maintain accountability for assets; (3) any access to assets was authorized; and (4) the books and records were periodically checked against existing assets to determine any possible discrepancies.¹⁷⁹ The implementation of the accounting provisions of the FCPA was left in practice to the accounting profession.¹⁸⁰ The penalties for violating the standards are those generally applicable to securities law violations.¹⁸¹ Criminal prosecutions for

¹⁷⁶ S. Rep. No. 114, *supra*, note 148, at 4109.

¹⁷⁷ Foreign Corrupt Practices Act, 15 U.S.C. § 102, U.S.C. § 78m(b)(2)(A) (1982).

¹⁷⁸ *Ibid.* § 78m(b)(2)(B).

¹⁷⁹ *Ibid.* § 78m(b)(2)(B)(i)-(iv).

¹⁸⁰ As primarily an accounting concern and only secondarily a line of defense against accommodation payments, the accounting provisions are not discussed in detail in this paper.

¹⁸¹ 1 Foreign Corrupt Practices Reporter 106 (W.A. Hancock ed. 1988) [hereinafter referred to as FCPA Reporter]; see 15 U.S.C. § 78ff (1982).

violation of the accounting standards are the responsibility of the Department of Justice (DOJ), and the maximum criminal penalty was \$100,000 and/or not more than five years imprisonment.¹⁸²

The anti-bribery provisions, on the other hand, apply to both issuers¹⁸³ whose securities were registered with the SEC and all other forms of domestic business concerns whether carried on by individuals or in corporate or partnership form,¹⁸⁴ and are codified separately.¹⁸⁵ A violation of the bribery provisions of the FCPA occurred when the four following elements were met:

1. a corrupt payment or offer to pay anything of value was made
2. to (a) a foreign official; (b) a foreign political party, party official, or candidate; or (c) an intermediary for any such person
3. while knowing or having reason to know that the purpose of the payment was to influence any official act or decision of the foreign official, party, or candidate (including a decision not to perform a function or to use influence); and

¹⁸² 15 U.S.C. § 78ff(a) (1982); S. Rep. No. 114, *supra*, note 148, at 4109; See also *The United States Trade Enhancement Act of 1987: Report on S. 1409 Before the Committee on Banking, Housing and Urban Affairs*, 100th Cong., 1st Sess. 44-54 (1987) [hereinafter "Hearings on S. 1409"] at 48 (stating that enforcement of criminal violations for corporate "bribery" of foreign officials is primarily under the prosecutorial authority of the DOJ, which can also bring civil actions against domestic concerns whose securities are not registered with the SEC).

¹⁸³ 15 U.S.C. § 78dd-1 (1982).

¹⁸⁴ 15 U.S.C. § 78dd-2 (1982). Also note that under the FCPA, the term "domestic concern" refers only to those domestic concerns which are not issuers.

¹⁸⁵ 15 U.S.C. § 78dd-1 & 78dd-2 (1982).

4. the payment was made to assist an issuer or domestic concern in obtaining or retaining business or directing business to any person.¹⁸⁶

Under the FCPA,¹⁸⁷ the SEC and the DOJ were given the shared responsibility for investigation and enforcement of the FCPA bribery provisions. The SEC could seek injunctions against violations by SEC reporting companies and their officers, directors, employees, agents, and stockholders. The DOJ had similar authority for violations by domestic concerns. However, the DOJ alone was responsible for criminal prosecutions under the Act.¹⁸⁸ Violation of the anti-bribery provisions carries a maximum penalty of \$1 million for issuers and non-issuers; as well as \$10,000 or five years imprisonment for corporate officials who wilfully violate the provisions.¹⁸⁹

¹⁸⁶ 15 U.S.C. §§ 78dd-1, 78dd-2 (1982).

¹⁸⁷ See *supra*, notes 176 & 182 and accompanying text.

¹⁸⁸ 15 U.S.C. § 78dd-2(c) (1982).

¹⁸⁹ 15 U.S.C. §§ 78ff(c)(1)-(3) and 78dd-2(b)(1)-(3) (1982). Employees and agents (in contrast to officers and directors) of either issuers or domestic concerns can be convicted of criminal violation of sections 103 and 104 *only* if the issuer or the domestic concern itself "is found to have violated" the provisions of the sections. 15 U.S.C. § 78ff(c)(3) & 78dd-2(b)(3) (1982).

a. Problems with the FCPA

While post-Watergate morality in the United States in conjunction with several other national policy concerns clearly mandated meaningful congressional action against accommodation payments, the solution had inherent problems. The unilateral action by the U.S. in the FCPA was bound to place its companies at a competitive disadvantage in overseas markets vis-a-vis foreign companies.¹⁹⁰ Foreign companies, free to resort to such payments, could bid foreign contracts away from American companies, thus adversely affecting the United States' balance of trade as well as domestic production and employment. Fearing that, as a cost of compliance and uncertainty of provisions of the FCPA, the United States companies would have to "forego legitimate export opportunities", the President in 1978 directed the Department of Justice to provide the private sector with written guidance concerning its enforcement priorities.¹⁹¹ In June 1979, based on its conclusion that the Act was costing the U.S. \$1 billion per year in lost trade,¹⁹² the White House Export Disincentive Task Force¹⁹³ went so far as to draft

¹⁹⁰ See *The Commons Problem*, *infra*, note 277-280 and accompanying text.

¹⁹¹ Statement on United States Export Policy, 14 *Weekly Comp. of Press Doc.* 1633 (1978).

¹⁹² An informal survey of United States companies and a check with United States embassies in a dozen states yielded this figure. *New York Times* (June 12, 1979), § 4, at 1, and *ibid.* June 13, 1979, § 4, at 2. Numerous private studies support this result. See, e.g., N. Jacoby, "Foreign Payoffs Law: A Costly Error", *New York Times* (Jan. 22, 1978) § 3, at 14; F. Butterfield, "U.S. Law Against Bribes for Millions in Lost Sales in Asia", *New York Times* (June 26, 1978), at 1; D. C. Gustman, "The Foreign Corrupt Practices Act: A Transactional Analysis", (1978-79) 13 *J. Int'l L. & Econ.* 367 at 381, 400. Gustman observes at 381:

There appears to be growing support that the Act has caused the loss of millions of dollars in export sales. A Saudi Arabian businessman, who has represented American companies, was quoted recently as saying that the new Act prevented American manufacturers from winning a \$3 billion

recommendations to the President that key provisions of the Act be immediately weakened and eventually abandoned.¹⁹⁴ These recommendations were never finalized and passed on to the President, apparently because of the protest which they immediately drew from Senator William Proxmire, the sponsor of the Foreign Corrupt Practices Act.¹⁹⁵ In November, however, after more than a year of resistance, the Criminal Division of the DOJ finally issued the written guidance called for by the President, in the form of (1) a public announcement of enforcement priorities by Assistant Attorney General Phillip Heymann,¹⁹⁶ and (2) the Department's establishment of a review procedure "permitting any party covered under [the anti-bribery provisions of the Act] to seek a statement of the

communications contract that went, instead, to European companies.

¹⁹³ This task force was established by the Carter Administration in the fall of 1978 for the purpose of exploring ways of increasing United States exports, *New York Times* (June 12, 1979), § 4, at 1.

¹⁹⁴ The task force in its draft recommendation proposed three steps: (1) issuance by the DOJ of written guidance relating to the Act, including establishment of enforcement priorities and creation of a business review procedure that would provide companies with advance reaction of the Department to specific overseas proposals; (2) amendment of the Act "to take enforcement responsibilities away from the Securities and Exchange Commission"; and (3) periodic reports by the administration to the public as well as Congress about export losses caused by the Act, for the purpose of paving the way for a legislative proposal to amend the Act so as to "permit U.S. companies to be guided by the laws of the foreign countries where they do business." *Ibid.* at 15.

¹⁹⁵ *New York Times* (June 13, 1979) at 7.

¹⁹⁶ In a speech given in New York on November 8, 1979, Heymann listed the following factors as those to which the Department would attach the most significance in determining whether to prosecute a given case under the Act: (1) whether the bribe is paid in a market in which all the other competitors are United States companies; (2) whether the bribe is paid in a country making an effort to enforce domestic legal prohibitions against such conduct; (3) the level of the official bribed; (4) the ratio of the bribe to the underlying economic transaction; (5) the past conduct of the corporation; and (6) the level of the corporate officials involved in consummation of the bribe. *Legal Times of Washington* (Nov. 12, 1979) at 25.

Department's present enforcement intention concerning proposed business conduct [under those provisions].¹⁹⁷

In short, the United States government was torn between the conflicting objectives of raising the ethical standard upon which United States corporations conduct foreign business, and maintaining the competitive position of its corporations in world markets. Two reasons underlie this dilemma: first, the moral standard which the United States government wished to impose on its nationals in the conduct of their foreign operations diverges from that dictated by the climate for doing business in most host states;¹⁹⁸ and second, most home states besides the United States were willing to acquiesce in their nationals resorting to whatever business practices necessary to compete successfully in foreign markets.

¹⁹⁷ The official citation to the procedure is 28 C.F.R. § 50.17. Paragraph (k) provides that "[a]n FCPA review letter will not bind or obligate any other agency," thus creating the dilemma for some requesting parties that information disclosed for the purpose of obtaining a review letter could serve as the basis for a civil action brought by the Securities and Exchange Commission under section 103 of the Act, not to mention a treble damages action brought by private parties under the antitrust laws.

¹⁹⁸ According to N.H. Jacoby in *Bribery and Extortion in World Business*, *supra*, note 4: "Corrupt payments are so much a part of nearly every culture that most languages provide a word for them." The authors follow this statement with a twenty-two word glossary.

I. Accounting Provisions

The accounting provisions in the FCPA had two major flaws. Firstly, commentators suggested that the FCPA was excessively suppressive and vague, and that zealous compliance with its requirements would largely reduce the ability of American corporations to compete effectively in foreign market places.¹⁹⁹ United States exporters also expressed concern about unnecessary paper-work burdens and liability for the unauthorized acts of their agents, and expressed concern about the Act's accounting provisions which required books and records to be kept "in reasonable detail".²⁰⁰ Critics pointed out that this standard was so vague that corporations would be constrained to hire "more watchers than workers".²⁰¹

Secondly, according to the critics, the accounting provisions in the 1977 Act imposed upon a minority U.S. shareholder of a domestic or foreign firm, the unreasonable and unrealistic expectation, that they exert influence over the accounting practices of a subsidiary and ensure that they were consistent with those mentioned under the Act.

¹⁹⁹ See "The Business Accounting & Foreign Trade Simplification Act: Joint Hearings on S. 708 before the sub-committee on Securities and the sub-committee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs", 97th Cong, 1st Sess. (1981).

²⁰⁰ FCPA sec. 102.

²⁰¹ Carley & Crock, *infra*, note 208, at 56.

II. Antibribery Provisions

The criminalization of foreign accommodation payments, track two of the FCPA, became the most controversial, and most ambiguous portion of the 1977 law. Businesses were not sure as to specifically which payments were exempted from the purview of the Act and which were not. Part of this ambiguity was a result of the different approaches taken by the House and the Senate of the United States in describing payments which it did not intend to include within the purview of the FCPA.

From a review of the Senate version of the FCPA, it becomes clear that the Congress never intended to prohibit *all* accommodation payments - it intended from the beginning to permit "facilitating" or "grease" payments.²⁰² The House attempted to exempt these types of payments by specifying that only payments made "corruptly" to foreign officials were prohibited, and by defining "foreign official" as any official except those whose duties are essentially ministerial or clerical.²⁰³ The Senate, on the other

²⁰² H.R. Rep. No. 640, 95th Cong., 1st Sess. 8 (1977) [hereinafter cited as H.R. Rep. No. 640]; see also R. Shine, "Congress Focuses on Foreign Corrupt Practices Act", *Legal Times* (Feb. 21, 1983) at 34. The Senate Banking Committee Report to Accompany S. 305 (the Senate version of the FCPA) stated:

"The statute covers payments made to foreign officials for the purpose of obtaining business or influencing legislation or regulations. The statute does not, therefore, cover so called 'grease' payments' such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties." (S. Rep. No. 95-114, 95th cong., 1st Sess. 10 (1977).

²⁰³ H.R. Rep. No. 640, *Ibid.*; see also Shine, *Ibid.* at 34.

hand, attempted to exempt facilitating payments by prohibiting only payments made either to obtain or retain business or to influence legislation or regulation - the so-called "business purpose test".²⁰⁴ Finally, the two different approaches were combined, leading to the prohibition in the current law of payments which are corruptly made to foreign officials (other than those whose duties are essentially ministerial or clerical) with the purpose of obtaining or retaining business.²⁰⁵

A second element of the antibribery provisions which created problems was the provision prohibiting a corporation from making a payment to an agent while knowing or even "having reason to know" that the payment will be passed on to a foreign official. This basic prohibition on payment to foreign officials extended to any foreign political party or official thereof or any candidate for foreign political office,²⁰⁶ *and to third parties who made such payments while "knowing or having reason to know" that some or all of the money will be paid as an accommodation payment.*²⁰⁷ This last provision embodied both a subjective and objective standard for imposing liability on corporations; subjective because the "while knowing" language asks whether the corporation or corporate official actually knew what ultimate disposition of the funds would be, and

²⁰⁴ See Shine, *ibid.*

²⁰⁵ See H.R. Rep. No. 831, 95th Cong, 1st Sess. 12 (1977).

²⁰⁶ 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2) (1982).

²⁰⁷ 15. U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (1982).

objective because the "having reason to know" language asked whether a hypothetical corporation or official under the existing circumstances would have known that the money would be used to make accommodation payments to foreign officials. This, more than any other aspect of the law, was cited as having a chilling effect on legitimate business transactions, and was said to force "the business person to play F.B.I. personnel with his foreign sales agents".²⁰⁸ Furthermore, the vagueness in the clause allowed "U.S. Govt. prosecutors to second guess business-persons."²⁰⁹

Lastly, the Act did not state whether or not extortion would constitute a valid defence.²¹⁰ Critics contended that even if there was no defense with respect to accommodation payments made in response to extortion to secure business, it should be available when an accommodation payment was made to maintain business. Extortion is generally not a defense in the United States where the threat is merely economic, because legal remedies exist to attack that threat in a separate cause of action against the offending official.²¹¹ But, in the case of accommodation payments, such a cause of action may

²⁰⁸ W. M. Carley & S. Crock, "Senate to Begin Debate on Administration Plan to Ease Rules Against Paying Bribes Overseas" *Wall Street Journal* (May 20, 1981) at 56.

²⁰⁹ *Ibid.*

²¹⁰ Under U.S. law, extortion is generally a defense where the threat is to personal or physical property. Eg. *Crawfor v. State*, 231 Md. 354, 190 A.2d 538 (1963).

²¹¹ *Hornstein v. Paramount Pictures*, 292 N.Y. 468, 55 N.E.2d 740 (1944) which, nevertheless, recognized that, under certain circumstances, the threat of economic harm might give rise to an extortion defense. The cases arising under the domestic analogue of the FCPA, 18 U.S.C. § 201(b) (1982) are divided on the availability of an extortion defense where there is an economic threat.

not be legally or realistically available to a U.S. transnational in a foreign state, and it was contended that since this rationale for rejecting the defense of extortion may not be valid in the accommodation payments context, perhaps economic extortion should be permitted as a defense to liability under the Act.

b. 1988 Amendments to Foreign Corrupt Practices Act

All the above inspired legislators to change the law and efforts were initiated in this direction in 1979. This effort to amend the Foreign Corrupt Practices Act of 1977 ended nine years later on August 23, 1988, with the enactment of the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act, or Trade Act).²¹² The FCPA revisions, which are Title V of the Trade Act, amend both the accounting and the anti-bribery provisions of the FCPA.

²¹² Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat.1107 (1988) (hereinafter referred to as the Trade Act of 1988). However, Senator William Proxmire, Democrat from Wisconsin, who was one of the most active members of the US Congress involved in drafting the original FCPA, charged that the Reagan Administration, along with a small number of influential corporate lobbyists, have managed to "smoothly conceal destruction of the [the Senate's] important anti-bribery statute' by slipping the FCPA amendments into the massive Omnibus Trade Bill. He labelled the new amendments the "[B]ring [B]lack [B]ribery [B]ill". See 134 Cong. Rec. S9617-18 (daily ed. July 14, 1988) (statement of Sen. Proxmire) (arguing against amending the FCPA during the 100th Congress) at 10,581.

I. Accounting Provisions

The Trade Act makes three substantive amendments to the accounting provisions of the FCPA. First, the Act clarifies the terms "reasonable assurances" and "reasonable detail" as used in section 13(b)(2) of the Securities Exchange Act of 1934.²¹³ As noted above, the FCPA requires issuers to make and keep books, records, and accounts, which, *in reasonable detail*, accurately and fairly reflect transactions and dispositions of the issuer's assets, and to devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances* that corporate assets are properly accounted for as specified in the statute.²¹⁴

The Trade Act clarifies these provisions by stating that the terms "reasonable assurances" and "reasonable detail" mean "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their affairs."²¹⁵ This has assured the

²¹³ 15 U.S.C. § 78m(b)(2)(A)-(B) (1988).

²¹⁴ *Ibid.*

²¹⁵ The Trade Act of 1988, *supra*, note 212, S. 5002 (Codifies at 15 U.S.C. § 78m(b) (1988)); The Senate version of the Trade Act attempted to clarify the term reasonable to a greater extent by expressly stating that, in determining whether a prudent official would be satisfied with the level of detail and degree of assurance, comparisons between benefits to be obtained and costs to be incurred in obtaining such benefits would be proper. (See S. 1420, 100th Cong., 1st Sess., § 1603 (1987) (Senate version of H.R. 3) [hereinafter cited as Senate Bill]). However, the conferees deleted the reference to the cost/benefit test, concluding that it was unnecessary:

The conference committee adopted the prudent man qualification 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 the costs of compliance. The Conferees therefore deleted the Senate cost-benefit language as superfluous and in response to concerns that such a

TNCs that they would not be required to expend excessive resources in order to comply with the earlier unclarified ambiguous standard.

Second, the Trade Act added a new paragraph 13 (b)(6)²¹⁶ to the accounting provisions defining the responsibility of an issuer over the accounting practices of a subsidiary in which it owns a minority share. The new section provides that:

Where an issuer...holds 50 percentum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).²¹⁷

Thus, now, if the corporation owns less than a majority of the shares of the foreign company, its compliance with the FCPA as to such a company is presumed whenever good faith efforts have been demonstrated to influence the company "to the extent

statutory provision might be abused and weaken the accounting provisions at a time of increasing concern about audit failures and financial fraud and resultant recommendations by experts for stronger accounting practices and audit standards. (See Conference Report to Accompany H.R. Conf. Rep. 576, 100th Cong., 2d Sess. (1988) at 917 (citing Report of the National Commission on Fraudulent Financial Reporting, Oct. 1987)).

²¹⁶ 15 U.S.C.A. § 78m(b)(6) (West Supp. 1989).

²¹⁷ Trade Act of 1988, *supra*, note 212, § 5002 (codified at 15 U.S.C. § 78 m(b) (1988)).

reasonable under the ...circumstances" to comply with the record-keeping and internal accounting control requirements. Whether or not such good faith efforts were reasonable will be determined by such factors as "the relative degree of ...ownership...and the law and practices governing the business operations of the country in which such a firm is located."

The conference committee explained that this provision was a recognition by Congress that it is unrealistic to expect a minority owner to exert too much influence over the accounting practices of a subsidiary, and that the amount of influence exerted must, by necessity, vary from case to case.²¹⁸

As a planning matter, therefore, whenever a U.S. corporation holds a significant minority shareholding in a foreign company as more than a passive investor, the subject of proper record-keeping and internal accounting controls should be made an agenda item at an early board meeting. If the foreign majority owners object to the scope of the record-keeping and internal accounting controls proposed by the representative of the U.S. minority shareholder, perhaps because of the costs involved, the representative can at least propose a resolution to adopt the degree of auditing that the representative believes is appropriate. If the resolution is voted down by representatives of the majority

²¹⁸ *Ibid.* See H.R. Conf. Rep. 576, 100th Cong., 2d Sess. 917 (1988) [hereinafter cited as Conference Report].

shareholders, then sufficient efforts at compliance would seem to have been made, and the U.S. shareholder's obligations under the accounting provisions of the FCPA would seem to have been satisfied.

The third amendment made by the Trade Act to the accounting provisions stipulates that no criminal liability shall be imposed for violating the accounting provisions, unless the violation is done knowingly.²¹⁹ According to the conference committee, this provision did nothing more than codify a current SEC enforcement policy not to impose liability for insignificant or technical infractions or inadvertent conduct. At the same time, the conference committee stressed that criminal penalties would be imposed for knowing or purposeful violations of the accounting provisions.²²⁰

II. Antibribery Provisions

The Trade Act also makes numerous changes to the anti-bribery provisions. For purposes of discussion, the various amendments can be arranged into two groups: (1) those attempting to clarify the types of payments which are illegal under the Act; and (2) those which go to the question of who should be liable for violations, and under what circumstances.

²¹⁹ The Trade Act of 1988, *supra*, note 212, § 5002 (codified at 15 U.S.C. § 78m(b) (1988)).

²²⁰ Conference Report, *supra*, note 218 at 916, 917.

1. Types of Payments

As discussed above,²²¹ Congress enacted the FCPA in 1977 in reaction to corporate practices which came to light through the SEC's voluntary disclosure program, and the antibribery and accounting provisions were designed to prevent the situation from recurring. Some commentators have alleged, however, that Congress acted too swiftly in an attempt to demonstrate its resolve and did not adequately define the types of payments which would be prohibited.²²²

The Trade Act contains six amendments which affect the definition of prohibited payments. First, the new law modifies the description of the activities of foreign persons for which payments are prohibited. Prior law prohibited payments made for the purpose of "influencing any act or decision of such [a person] in his official capacity, including a decision to fail to perform his official functions....."²²³ The Trade Act amendment prohibit giving anything of value to certain persons for the purpose of "influencing any act or decision of such [person] in his official capacity, *or inducing such a [person] to do*

²²¹ See *supra*, notes 148-169 and accompanying text.

²²² L. E. Longobardi, "Reviewing the Situation: What is to Be Done with the FCPA" 20 Vand. J. Transnat'l L. 10.

²²³ 15 U.S.C. §§ 78dd-1(a)(1)(A), (2)(A), (3)(A) (1982); 78dd-2(a)(1)(A), (2)(A), (3)(A) (1982).

*or omit to do any act in violation of a lawful duty of such [person]....*²²⁴ The significance of this amendment arises out of the fact that it has in a way broadened the range of accommodation payments which are prohibited. The TNCs are now statutorily prohibited from making any accommodation payments for a purpose which might not be included in the *official* duty of the foreign official.

Second, as noted above, the 1977 FCPA prohibited payments made "to assist... in obtaining or retaining business for or with, or directing business to, to any person...."²²⁵ Some had interpreted this clause, which became known as the "business purpose test," to mean that payments could be made to foreign officials as long as the payment was not directly related to a current or future business deal. As an example of the ambiguity, legislators and prosecutors discussed throughout the legislative process of the 1988 FCPA the payments made by United Brands company in 1974. In that case, Eli M. Black, Chief Executive Officer of United Brands, agreed to pay \$2.5 million to the Honduran Minister of Economy, Abraham Bennaton Ramos, in return for a reduction in the Honduran banana

²²⁴ The Trade Act of 1988, *supra*, note 212, § 5003, amending § 30(a)(1)A of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78dd-1, 78dd-2 (1988) (emphasis added); The conference committee rejected an amendment in the House version which would have retained the reference to "official functions." It settled on language referring to the foreign official's lawful duty, which the conference committee noted conformed the FCPA to the domestic bribery statute in 18 U.S.C. Section 201 (1988) (Conference Report, *supra*, note 218, at 918). Conforming the Foreign Corrupt Practice Act with domestic bribery law would require the broadening of the Act. The domestic bribery law strictly prohibits all corrupt payments intended to influence official functions (18 U.S.C.A. § 201 (1981)). This Act, on the other hand, exempted from the beginning certain facilitating payments (See *supra*, notes 202-205 and accompanying text). See also: Porrata-Doria, "Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the past?" (1985) 38 Rutgers L. Rev. 29.

²²⁵ 15 U.S.C. §§ 78dd-1(a), (2), (3), 78dd-2(a)(1), (2), (3) (1982).

export tax and a 20 year extension of certain trade concessions. After the banana export tax was reduced from \$.50 to \$.25 per box and \$1.25 million was deposited into Bennaton Ramos' Swiss bank account, Black committed suicide, and the SEC discovered the payments during an investigation.²²⁶ There was some question as to whether this payment, which was certainly the type of payment Congress intended to prevent in passing the 1977 law, would be covered under the FCPA as drafted. It might be argued in United Brand's defense that the payments were not made to retain or obtain business, but rather to create a more favourable environment for the continuation of business.

Because of this perceived ambiguity, the House version of the Trade Act contained a provision amending the business purpose test to read "to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person, *including the procurement of legislative, judicial, regulatory, or other action in seeking more favourable treatment by a foreign government.*"²²⁷ The conference committee rejected the House amendment because of its concern that it created further ambiguity and could be interpreted as prohibiting legitimate business activity, such as lobbying. However, in retaining the business purpose test contained in prior law, the conferees made it clear that this test was not to be narrowly construed, stating:

²²⁶ *Washington Post* (July 20, 1978) at C1.

²²⁷ H.R. 3, 100th Cong., 1st Sess., § 701(a), amending 15 U.S.C. § 104(1), (2), (3) (1988).

The conferees wish to make clear that the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favourable tax treatment.²²⁸

The conferees also made it clear in the conference report that the term "retaining business" should not be construed so broadly as to prohibit companies from lobbying or otherwise representing their interests to the foreign government.²²⁹

The third clarification of the types of payments prohibited by the FCPA involves the exemption for so-called facilitating or grease payments. The definition of facilitating, or grease payments, which were permitted in the original 1977 FCPA, depended upon the identity or status of the foreign official who was the ultimate payee. Foreign officials to whom payments were legal consisted of those whose duties were "essentially ministerial or clerical."²³⁰ Thus, in order to benefit from the exemption for grease payments to minor foreign officials, it was necessary to determine whether their duties were ministerial or clerical as opposed to policy-making. This distinction was not always evident, particularly in unfamiliar cultures, and might have required advice from local counsel.

²²⁸ Conference Report, *supra*, note 218 at 918.

²²⁹ *Ibid.* at 918-19.

²³⁰ 15 U.S.C. § 78dd-2(d)(2) (1982).

The 1988 amendments eliminated this status test in favour of a straightforward exception made to secure "routine governmental action."²³¹ The focus has thus been changed from the status of the payee to the purpose for which payments were made. The statute defined "routine governmental action" in terms of a laundry list of petty bureaucratic tasks such as issuing permits and licenses and processing visas.²³² However, to make clear that the exception was not to swallow up the rule, the definition of "routine governmental action" did not include "any decision by a foreign official... to award new business or to continue business with a particular party...."²³³

By providing examples of activities which amount to a "routine governmental action," the amended statute gains enormous clarity over the old law. However, the questions which remain unanswered are whether the listed actions secured by the facilitating payment are "ordinarily and commonly performed" by a foreign official, and

²³¹ 15 U.S.C. § 78dd-2(h)(4)(A) (1988).

²³² The Trade Act defines "routine governmental action" as:

"[A]n action which is ordinarily and commonly performed by a foreign official: 1) in obtaining permits, licenses, or other official documents to qualify a person to business in a foreign country; 2) processing governmental papers, such as visas and work orders; 3) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; 4) providing phone service, power supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and 5) actions of a similar nature."

The Trade Act of 1988, *supra*, note 212, § 5003, amending § 30A(b) of the Securities Exchange Act of 1934.

²³³ *Supra*, note 231.

the meaning of the fifth illustrative example of a routine governmental action - "actions of a similar nature." In practice it may be surmised that few U.S. or foreign legal opinions have ever been sought on making accommodation payments. Payments in connection with routine governmental action are likely to be made, if at all, by local freight forwarders, customs agents, or other local service organizations in the foreign country whose modest fees encompass even more modest tips or accommodation payments to local officials to speed up administrative actions, all without the knowledge of the U.S. client.

The fourth and fifth clarifications in the 1988 amendments provide two affirmative defenses for certain categories of expenditures. First, it is now an affirmative defense that the payment was "lawful under the written laws and regulations of the foreign official's...country."²³⁴ It is hard to imagine any payment that an overzealous U.S. prosecutor would claim to be an accommodation payment that would nonetheless be explicitly permitted by the laws of a foreign country. So, again, a theoretical clarification without much practical significance has occurred. The likelihood that questions might arise under these provisions regarding the status of governmental decrees or pronouncements, as opposed to "written laws," cannot be ignored. Second, it is now an affirmative defense that the payment was a reasonable expenditure on behalf of a foreign official directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or

²³⁴ 15 U.S.C. § 78dd-1(c)(1) (1988).

agency.²³⁵ This second affirmative defense simply reflects an existing DOJ enforcement policy that payments to reimburse foreign officials for visits to product demonstrations or tours of manufacturing facilities are not venal and should not be classified as corrupt.²³⁶ Once again, no change of significance has occurred. The Trade Act provides no clue as to how to determine whether a particular expense is reasonable and bona fide.

The last issue concerning the types of payments prohibited by the FCPA relates to so-called "nominal" payments. The Senate version of the Trade Act created an affirmative defense for any "nominal" payment, gift, offer, or promise of anything of value to a foreign official which constituted a "courtesy, a token of regard or esteem or in return for hospitality" if it is of "reasonable value in the context of the type of transaction involved, local custom, and local business practices."²³⁷ This language is similar to that found in

²³⁵ Trade Act of 1988, *supra*, note 212, § 5003(c), amending Sec. 104(c)(2) of the Foreign Corrupt Practices Act. The original version of the FCPA neither expressly included or excluded these types of payments from the law's prohibition, but business groups were concerned that the Act's prohibitions were ambiguous enough that they felt even bona fide expenditures might trigger an SEC or DOJ investigation. The language in the Trade Act now reads: it shall be an affirmative defense...that...the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to - (A) the promotion, demonstration, or explanation of products of services; or (B) the execution of performance of a contract with a foreign government or agency thereof.

²³⁶ See enforcement actions and review releases collected in (1979) 25 Foreign Corrupt Practices Act Reporter at 110 and particularly DOJ cases at 125. "To date, the SEC enforcement actions can be characterized as conservative in that they have used FCPA only as an added count in cases they would have brought anyway." *Ibid.* at 110.

²³⁷ Senate Bill, *supra*, note 215, § 1604(c). In the earliest versions of the Act amendments the exception was intended to make it clear that U.S. companies were not prohibited from giving gifts to foreign officials as courtesies. The early drafts did not include the requirement that the gift be one of reasonable value in the context of the transaction, local custom, or business practice. However, opponents of this amendment in the House argued that this exception would create a loophole allowing bribery of foreign officials unless a limitation was placed upon the value of the gift. Proposals for modifying this language ranged from requiring that the gift be "nominal" to putting a dollar

the Foreign Gifts and Decorations Act and the Congressional Rules permitting members of the U.S. Congress to receive "nominal" gifts from domestic and foreign entities.²³⁸ The House provision of the Trade Act contained no such provision. The conferees rejected the affirmative defense for nominal payments without any discussion.²³⁹

2. Parties Subject to Liability

Two of the amendments to the FCPA contained in the Trade Act concern the standards and scope of corporate and individual liability for violations of the accounting and/or anti-bribery provisions. The first of these involves the question of third-party payments. Senator Proxmire predicted that the changes made by the Trade Act in this area would "tear the heart out of the antibribery law."²⁴⁰ At the same time, the third-party payment provisions of the original FCPA were also the target of the most criticism by supporters of FCPA reform in the business community.²⁴¹

limit of \$5,000 on the value of the gift. These proposals were rejected.

²³⁸ Foreign Gifts and Decorations Act, Pub. L. No. 89-673, 80 Stat. 952 (codified as amended at 5 U.S.C. § 7342 (1988)).

²³⁹ Conference Report, *supra*, note 218, at 922.

²⁴⁰ 134 Cong. Rec. S8528 (daily ed. June 24, 1988) (statement of Sen. Proxmire); see also 134 Cong. Rec. S92744 (daily ed. July 25, 1988) (Senator Proxmire discussing Ashland Oil Case).

²⁴¹ J. C. Bliss & G. J. Spak, "The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration?" (1989) 20 Law & Pol'y Int'l Bus. 441 at 459.

As explained above, the original version of the FCPA not only prohibited corporate entities and officers from making accommodation payments to certain foreign persons, it also prohibited corporate entities or officers from giving anything of value to "any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to certain foreign persons.²⁴² As many companies engage the services of third parties abroad to assist in marketing their products, most commonly on a commission basis, this section was primarily intended to prohibit the use of such intermediaries as a conduit for the payment of accommodation payments.

Apart from the perceived evil of serving to disguise an accommodation payment, foreign agents or intermediaries serve a multitude of legitimate purposes in foreign sales efforts. Export sales are inherently uncertain, particularly for "big ticket" items, and marketing efforts over several years may be needed to effect a single sale. The cost of maintaining a U.S. expatriate employee in a foreign country over such an extended period could be prohibitive, and for that reason many companies prefer to use local "reps" who receive a fee contingent upon the sale. While the amount of the fee received by the intermediary could be very large, even as a small percentage of the cost of an expensive product, the intermediary also runs the risk of expending many years of futile effort on a particular project and receiving nothing at all.

²⁴² 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3) (1982).

If "reason to know" was construed broadly under the FCPA as originally enacted, a question arose as to whether the engagement of any intermediary would be suspect in a country thought to approve of the making of accommodation payments. Another question was the extent to which legitimate reasons for engaging an intermediary negated "reason to know" if the sales agent later did engage in accommodation payments. In the minds of the commentators, "hazy prohibitions" in the 1977 FCPA such as "reason to know" were seen to have curtailed legitimate promotional efforts and to have "deterred many American business from making any payment, legal or not, to secure business."²⁴³

The 1988 amendments deleted "reason to know" and imposed liability for an accommodation payment only if it was made with "knowledge" that all or a part of the payments would be used for bribery. "Knowledge," however, was then defined as follows:

- (A) A person's state of mind in "knowing" with respect to conduct, a circumstance, or a result if-
 - (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
 - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
- (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high

²⁴³ Greanias & Windsor, *supra*, note 160 at 122; see also *supra*, notes 203-206 and accompanying text.

probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.²⁴⁴

In short, "reason to know" has simply been redefined as a "high probability" of knowledge of a fact or that a result is "substantially certain" to occur.

By way of background, the new definitions set forth in the amendments are derived from the Model Penal Code and have been interpreted in the courts under several criminal statutes. As explained in the Conference Report on the 1988 FCPA amendments, knowledge of a criminal act encompasses such phrases as "deliberate avoidance of knowledge," "willful blindness," "conscious disregard of the facts," or "head in the sand."²⁴⁵ The basic difficulty with such metaphors is that once an accommodation payment has occurred, the hindsight which is thereby gained means to many people that, in retrospect, it was highly probable that an accommodation payment would occur, since it did in fact occur.

The most practical way to try to protect against the application of such retrospective analysis is to conduct a "due diligence" investigation at the time the intermediary is retained. The exporter's records can then demonstrate that, at all relevant times, there were no facts indicating any probability of an accommodation payment.

²⁴⁴ 15 U.S.C. & 78dd-2(h)(3) (1988).

²⁴⁵ Conference Report, *supra*, note 218 at 920-21.

Cases that have applied the "willful disregard" test in interpreting other criminal statutes have underlined this duty to investigate. For example, in *United States v. Kaplan*²⁴⁶ an attorney was convicted of defrauding insurance companies through submitting false medical bills. The defendant argued that he did not know that the bills forwarded to him were false. The conviction was upheld because clients and insurance companies had asserted in the past that the bills were too high, and despite these warnings, the attorney had made no effort to investigate.

In the abstract, the new definition is certainly narrower than an undefined "reason to know". However, the limited number of cases that have been prosecuted under the bribery provisions of the FCPA all have involved sets of facts with no ambiguity at all as to the intended purpose of the accommodation payments. Thus, the practice of the SEC and the DOJ has been to concentrate upon clear violations, and the most that can be expected from this portion of the amendments is to help ensure that such practice will continue.²⁴⁷

The final amendment relating to the question of who could be held responsible for violations of the FCPA changed what became known as the "Eckhardt Amendments" to

²⁴⁶ 832 F.2d 676 (1st Cir. 1987)

²⁴⁷ J. E. Impert, "A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restriction on the Use of Sales Agents" (1990) 24 Int'l Law. 1009 at 1015.

the original FCPA. The Eckhardt Amendments in the original FCPA effectively prevented the prosecution of employees or agents for violating the FCPA unless the domestic concerns or issuers were found to have violated the Act.²⁴⁸ The Trade Act, following the proposal of the House, deleted the clause "whenever a domestic concern or issuer is found to have violated sub-section (a)" which existed as preface to the provision²⁴⁹ imposing penalties against officers in the original FCPA. This has the effect of permitting the prosecution of corporate officers or agents, regardless of whether the domestic concern or issuer has been shown to have violated the FCPA.

3. Penalties

As a last matter, in addition to modifying the requirements for a violation of the FCPA, the 1988 amendments increased the penalties. The maximum fine for a corporation has been increased from \$1 million to \$2 million, while the maximum penalty for an individual officer or director of the corporation has been increased from \$10 thousand to \$100 thousand. The possibility of imprisonment for up to five years remains unchanged. In addition, a new civil penalty of \$10 thousand may be imposed on

²⁴⁸ 15 U.S.C. § 78dd - 2(b)(3) (1982).

²⁴⁹ *Ibid.*

corporations and individuals by the SEC or the DOJ each time when they were found of violating the antibribery provisions of the amended Act.²⁵⁰

c. Analysis of the 1988 Amendments

Apart from the comments provided in the discussion relating to the various amendments in the preceding pages, it must be noted that overall the amendments did not clarify all the ambiguities. Two of the amendments designed to clarify the antibribery provisions under the FCPA appear to create at least as much ambiguity as the prior law. First, it is doubtful that the revision of the basic antibribery clause from "a decision to fail to perform his official functions" to "do or omit to do any action in violation of a lawful duty"²⁵¹ will have much practical effect for prudent business persons or their attorneys wishing to avoid the appearance of impropriety. Nowhere does the Trade Act define "lawful duty."

Second, the so-called business purpose test also survived the amendment process without being either removed from the statute or clarified to any great extent. Those seeking to relax the burden the FCPA imposes on U.S. business succeeded in excluding the proposed phrase "including the procurement of legislative, judicial, regulatory, or other

²⁵⁰ 15 U.S.C. § 78dd-2(g) (1988).

²⁵¹ *Supra*, note 223-224 and accompanying text.

action in seeking more favourable treatment by a foreign government" from the House version of the Trade Act. However, the statement by the conference committee warning against a restrictive interpretation of the "retaining business" requirement throws the issue into some doubt.

Furthermore, it should also be noted that to the extent the FCPA revisions clarify the law, they should not be interpreted as encouraging accommodation payments. The affirmative defense granted for payments which are permitted under the written law of the foreign country where the payments are made will permit U.S. companies to make these types of payments with less fear of prosecution. The affirmative defense for lawful payments and the exemption for facilitating payments are rather narrowly drawn and are not likely to be interpreted by risk averse corporate managers as authorizing the wholesale making of accommodation payments.

Thus, in spite of the fact that the Trade Act clarified a number of provisions of the original FCPA and codified DOJ and SEC's practice, significant ambiguities still remain. The 1988 amendments are unlikely to change the way a U.S. corporation makes sales abroad. The impact of the 1988 amendments is likely to be marginal. Wherever the line is drawn in any particular case between permissible and impermissible behaviour, people will wish to be comfortably within the permissible zone. In practice, this means that U.S. corporations and their employees will continue to exercise "due diligence" to ensure that

any violation of the FCPA that may occur has not been authorized and has happened without the knowledge of anyone subject to the Act.

As noted earlier, to satisfy the "willful disregard" test a corporation must make some investigations.²⁵² It is true that Congress rejected a proposed due diligence defense to the FCPA under which a corporation could escape liability for the unauthorized actions of its employees if it demonstrated that it had established procedures reasonably expected to prevent and detect such violations.²⁵³ However, even without a statutory exemption, due diligence will, in all probability, continue to be an implicit defense in establishing the absence of the requisite degree of knowledge.²⁵⁴

In achieving an adequate level of due diligence, procedures should be adopted that govern how a foreign intermediary is retained. An awareness must exist of "red flags," which would indicate the possibility of an accommodation payment. Among such warning signs could be a request for a commission at a level substantially above the going rate for agency work in a particular country; disclosure of family or business ties with government officials; or a request that the commission be paid in a third country.

²⁵² "Knowledge" is a required element of liability under the FCPA. In other contexts, "knowledge" has been held to include "willful blindness". See *supra*, notes 245-246 and accompanying text.

²⁵³ Conference Report, *supra*, note 218 at 922.

²⁵⁴ G. H. Mazzarantani, "Foreign Corrupt Practices Act" (1989) 26 Am. Cr. L. Rev. 855 at 871.

All this being said, the FCPA remains a formidable danger for any U.S. exporter engaged in foreign selling activities. The primary danger of a violation of the FCPA remains in the activities of a foreign intermediary steeped in another culture, particularly in a country where accommodation payments may be prevalent. Without an international agreement effectively binding and persuading all other countries to step up their efforts against accommodation payments, the U.S. legal prohibitions remain incomplete constituting only half of the complete equation.

7B. The Canadian Situation

Though the United States of America has been the only home country to take measures specifically against accommodation payments made to foreign officials, there are antibribery legislative provisions in host countries which, though not directed specifically towards the control of such payments, could be effectively used in the regulation of the same. The following discussion, using Canadian legislative provisions, attempts to show how such provisions could be used in controlling accommodation payments in these host countries.

In Canada, all corporations are subject to sections 119 to 121, 124, 125, 393, 426, and 465 of the Canadian Criminal Code, which deals with offenses against the administration of law and justice in Canada.

Section 119 makes bribery of judicial officers, members of Parliament and members of provincial legislatures an indictable offence. It creates offenses which apply both to the person who accepts a bribe and to the person who offers a bribe. It is an element of both the offenses that the offer, acceptance or solicitation must be done *corruptly* and there must be an attempt to influence the office-holder *in his or her official capacity*. The term "corruptly" has not been defined in this Part of the Code but has been considered by the courts in relation the secret commission offence in s. 426, discussed below, where it

was held not to mean wickedly or dishonestly but to refer to an act done *mala fide*, designed wholly or partially for the purpose of bringing about the effect forbidden by the section.²⁵⁵ Section 120 deals in a similar way with cases of bribery of Government officers. Section 121 provides provisions for punishment of persons who attempt to defraud the Government by means of bribery. The gist of the offenses under these sections, as held in *Martineau v. The Queen*²⁵⁶, is influence peddling and the sections are aimed at prohibiting the use of money or advantage or benefit of any kind to secure the improper use, actual or pretended, of the real or pretended influence that the official enjoys.

Sections 124 and 125 criminalize selling or purchasing official positions, influencing or negotiating appointments or dealing in offices. Section 393 criminalizes the receiving of any valuable consideration for failure to perform the duty to collect a fare or toll or ticket or admission.

Section 426²⁵⁷ deals with secret commissions and private corruption. Subsection

²⁵⁵ *R. v. Brown* (1956), 116 C.C.C. 287 (Ont. C.A.).

²⁵⁶ [1966] S.C.R. 103; [1966] 4 C.C.C. 327.

²⁵⁷ Sec 426. (1) Every one commits an offence who

- (a) corruptly
 - (i) gives, offers or agrees to give or offer to an agent, or
 - (ii) being an agent, demands, accepts or offers or agrees to accept from any person, any reward, advantage or benefit of any kind as consideration for doing or

(1)(a) states that a person who *corruptly* gives, offers or agrees to give or offer an agent, or who, being an agent, *corruptly* demands, accepts or offers or agrees to accept any reward, advantage or benefit of any kind in return for doing or not doing an act, or for showing favour or disfavour to another person, in relation to the business of his principal, commits this indictable offence. Subsection (1)(b) describes another form of this offence which involves the giving to an agent or the using by an agent of a *receipt, account or other writing* in which the principal has an interest and in which a false, erroneous or defective statement, intended to mislead the principal, is contained. In order to be convicted of an offence under subsection (1)(b), the accused must have *the intent to deceive* a principal. Subsection (2) makes it an offence for a person to be *knowingly privy* to an offence under subsection (1). A cursory examination reveals that it concerns both

forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal; or

- (b) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account, or other writing
 - (i) in which the principal has an interest,
 - (ii) that contains any statement that is false or erroneous or defective in any material particular, and
 - (iii) that is intended to mislead the principal.
- (2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).
- (3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
- (4) In this section "agent" includes an employee, and "principal" includes an employer.

those who give and those who take secret commissions. According to Geoffrey M. Read,²⁵⁸ the section protects three interests which appear in progressively larger concentric circles. The innermost circle comprehends the integrity of the agent and the right of his principal to rely upon it. The next circle of interest comprehends the right of others who would compete with the donor of these rewards, advantages or benefits to do so on a fair economic basis. Finally, the greatest circle comprehends the general public interest in the free market system, of which competition without undue restraint or injury is the cornerstone. The fundamental purpose of the section, as stated in *R. v. Wilmott*,²⁵⁹ is the protection of society and procurement of general deterrence in this regard is deemed to be the best means of accomplishing this.

However, for the purposes of our discussion, it is section 465 of the Criminal Code which is most relevant and extends the application of the above-mentioned criminal code provisions to sums and transactions held outside Canada. According to it

"(3) Everyone who, while, in Canada, conspires with anyone to do anything referred to in sub-section (1)²⁶⁰ in a place outside Canada that is an offence

²⁵⁸ G. M. Read, "Secret Commissions" (1984) 26 Crim. L. Q. 182 at 202.

²⁵⁹ (1967) 1 C.C.C. 171; 49 C.R. 22 (Ont.C.A.)

²⁶⁰ Sec. 465 (1)(a) & (b) respectively refer to conspiracies regarding murder and prosecution of a person with the knowledge that the person did not commit that offence. Sec. 465 (1)(c) reads as follows: "every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable;"

under the laws of that place shall be deemed to have conspired to do that thing in Canada.

(4) Everyone who, while in a place outside Canada, conspires with anyone to do anything referred in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

(5) Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada, and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division."²⁶¹

Since all the acts described in sections 119-121, 124-25, 393, and 426 are indictable offenses, at least in theory, Canada (or any other host countries having similar provisions) could take judicial action in cases of accommodation payments. Canada can successfully prosecute an accommodation payment which had been agreed either in Canada to be paid outside Canada, or outside Canada to be paid inside Canada. The only difference being that if the sum is to be paid outside Canada, a successful prosecution in Canada would require that the transaction be the subject of an agreement conspired in Canada, and an offence under the laws of the country in which it is actually paid or proposed to be paid. However, it is worth noting that for a prosecution under any of the sections discussed, read with section 465(4), it is not mandatory for the transaction to be classified as an

²⁶¹ *Criminal Code*. R.S., c. C-46, s. 465.

offence under the laws of the country where it originated. The mere fact that it was intended to actually take place in Canada could lead to a successful prosecution.

However, to date, there has not been any judicial decision based on the above combination of statutory provisions. There may be two reasons for such a vacuum. Firstly, due to the clandestine nature of transactions which involve accommodation payments and the extreme degree of secrecy maintained in their dealings, especially at stages when they are still being negotiated, the absence of any specialised agency to look into such offenses and provide information pertaining to them makes the task arduous for those who would be willing to bring actions against such transactions. Secondly, Canada and other states with similar legislation would not be able to effectively enforce these provisions because of the problems relating to extradition and investigation discussed in the following section.

8. Problems in Single State Regulation

On a close review of the unilateral approaches discussed in the preceding chapter, we see that the American approach is a home state approach because it is directed towards TNCs originating in America. As seen by us the Canadian criminal code provisions are an example of a host state approach. These provisions attempt to extend the application of its own statutes to the behaviour of TNCs originating in some other country. However, both the approaches have inherent problems. This chapter describes the problems and difficulties inherent in single state regulation both when the regulating state is a home and when it is a host to TNCs.

Problems in Unilateral Home State Regulation

A home state's interest in unilateral control of accommodation payments made by TNCs is subject to an important disincentive which economists call the "commons problem" as well as other practical difficulties. Most, if not all, states have enacted criminal sanctions for accommodation payments made to domestic public officials like the Canadian criminal code provisions.²⁶² But very few have proscribed such payments to

²⁶² "Almost every country has a law against bribery of public officials....The problem is that within any country there may develop a set of court or policy precedents that gives a much better indication of the nature of the law than the actual legal documents themselves." Kugel & Cohen, *Government Regulation of Business Ethics: Non-U.S. Laws and International Guidelines* (Book II: 1978). This book collects the domestic laws of seventy-one foreign countries pertaining to corruption. See also *Bribery*

foreign officials. As seen, only the United States has enacted criminal legislation dealing specifically with the problem.²⁶³ Throughout the rest of the world, national anti-corruption statutes either expressly limit their applicability to payments to domestic public officials²⁶⁴, or simply prohibit accommodation payments to "public officials".²⁶⁵ Though a zealous prosecutor might convince a court to interpret the latter sort of statute as embracing accommodation payments to foreign officials, in reality prosecutors in home states have demonstrated little ambition to take measures against such payments. As pointed out by Jacoby, home states

"must be aware of the practice (of accommodation payments to foreign officials) and, if not condoning it, they certainly have not interfered with it thus far.... They regard corruption in business government relations in the Third World as a fact of

Laws in Denmark, England, France and the Federal Republic of Germany (U.S. Library of Congress Law Library, 76-1249 LL (1976) (hereinafter cited as Library of Congress Compilation No. 1); *A Compilation of Bribery and Extortion Laws in OPIC* [Overseas Protection Investment Corporation] Countries (U.S. Library of Congress, Law Library) 76-1076 LL (1976); "Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved, Report of the Secretary General", 61 U.N. ESCOR (Agenda Item 13) U.N. Doc. E/5838 (1976) (hereinafter cited as Secretary General's Report) (report of the Secretary General summarizing national responses to a note-verbale transmitted by the Secretary General to governments requesting relevant information on the subject of corrupt practices); and Seidman, "Why Do people Obey the Law? The Case of Corruption in Developing Countries" (1978) 5 Brit. J. L. & Society 45.

²⁶³ A description of the United States foreign anti-bribery law has been discussed in the preceding part.

²⁶⁴ See, e.g., The English Prevention of Corruption Act, 1906, c. 34, 1(1), 1(2), discussed in Library of Congress Compilation No. 1, *supra*, note 262, at 7.

²⁶⁵ See, e.g., The French Law on the Corruption of Public Servants and Employees of Private Enterprises (as modified by the Law of February 16, 1919), arts. 177, 178 of the Criminal Code, reprinted in Library of Congress Compilation No. 1, *Ibid.* at 9-10.

life; unfortunate and regrettable, to be sure, but something over which they lack effective control."²⁶⁶

a. The Commons Problem

This indifference towards accommodation payments is a classic manifestation of what is known as a "commons problem." The "commons", according to economist Thomas C. Schelling, is a "paradigm for situations in which people (here, States) so impinge on each other in pursuing their own interests that collectively they might be better off if they could be restrained, but no one (State) gains individually by self-restraint."²⁶⁷ A commons problem exists whenever there is an opportunity open to all members of a group ("a common opportunity") which, when exploited by one member, generates at least as much cost as benefit for the group as a whole, but which confers all the benefit on that member and most of the cost on the other members of the group. Some member of the group will thus seek to use the common opportunity hoping to obtain the benefit, while imposing the cost on other members. The others then have no practical choice but to exploit the opportunity themselves in order to protect their welfare (i.e. gain some benefit

²⁶⁶ Jacoby, *supra*, note 4, at 32. The authors refer specifically in this quote to the home countries of Western Europe. Elsewhere in the book the authors generalize their statement to cover other home states as well, e.g. Japan. *Ibid.* at 162.

²⁶⁷ D. R. Slade, "Foreign Corrupt Payments: Enforcing a Multilateral Agreement" (1981) 22 Harv. Int'l L. J. 117 at 123 (hereinafter cited as Slade).

to offset their costs). The "tragedy of the commons"²⁶⁸ is that, although it is in the self-interest of each member of the group to exploit the common opportunity once some other member has done so, in the end no member is better off than if he/she had not chosen or been forced to engage in the activity in the first place. This outcome occurs because each member's expected benefit is negated by the cost imposed on him/her by the others. In fact, once all members are seeking to exploit the common opportunity each member is worse off than if no one had ever engaged in the activity, since the total costs generated by each member's engaging in the activity exceed (rather than merely equal) the total benefits so generated.

²⁶⁸ Hardin, "The Tragedy of the Commons" (1968) 162 SCI. at 1243, 1244:

"The tragedy of the commons develops in this way. Picture a pasture open to all... As a rational being, each herdsman seeks to maximize his gain.... He asks, 'What is the utility to me of adding one more animal to my herd?' This utility has one negative and one positive component.

- 1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.
- 2) The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision making herdsman is only a fraction of -1.

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another, and another....But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy....Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all."

In the case of international business,²⁶⁹ the common opportunity open to all home states is to permit their nationals to engage in the practice of making accommodation payments. A state permits its nationals to use accommodation payments in the hope that this policy will enable some of its less competitive nationals to bid contracts away from more efficient foreign corporations and thus benefit the national economy. The cost of this policy (the loss by foreigners of contracts) will be borne by the economies of other states. However, all states face the same incentives. In order to preserve their share of foreign markets, other states are forced in turn to permit their nationals to make accommodation payments,²⁷⁰ and as a result, cumulatively worse off than if accommodation payments were prohibited in the first place.

It could be argued that apart from the fact that the making of accommodation payments significantly increases the cost of the transaction, permitting accommodation payments has no effect on market efficiency because the TNC apt to win the contract, were accommodation payments forbidden, is also the competitor who can afford to pay the maximum amount of accommodation payments,²⁷¹ and therefore a state is not apt

²⁶⁹ Other examples of international commons problems are trade wars, the arms race, the depletion of fisheries, and the export of strategic commodities.

²⁷⁰ Assistant Attorney General of the US, Phillip Heymann has described the process as follows: "Each time any company makes an accommodation payment there is created a one-sided incentive for its competitors to follow suit, in a race to the bottom." "Heymann Speech on Enforcement Priorities Under FCPA" *Legal Times of Washington* (12 November 1979) at 20.

²⁷¹ Slade, *supra*, note 267, at 124.

to significantly increase its share of foreign markets through permitting accommodation payments. However, there are two rebuttals to this assertion: (1) the mere fact that a more competitive company can afford a larger sum as an accommodation payment does not necessarily mean that it would pay the sum, since it may adhere to a higher set of morals in the conduct of its business; and (2) a large TNC which is less efficient than a small competitor can nonetheless afford to pay a larger sum as an accommodation payment because it can draw off the profits of related enterprises.²⁷²

Not only are the perceived economic benefits derived from the procurement of business through accommodation payments dubious, but a policy permitting nationals to pay accommodation payments to foreign officials also creates other problems for home states. The profits of their nationals from foreign business are reduced,²⁷³ adversely affecting domestic employment and tax revenues,²⁷⁴ the foreign corrupt activities of their

²⁷² *Ibid.*

²⁷³ This is true unless all TNCs succeed in passing on their accommodation payments to host state taxpayers by raising their contract prices. While this phenomenon doubtless exists, it is improbable that TNCs succeed in passing on the entire amount, or even the greater portion of their accommodation payments.

²⁷⁴ The United States denies a tax deduction from gross income for the cost of foreign bribes. I.R.C. sec. 162 (c)(1). But most home states do not adhere to this policy. See Letter by Commissioner of Internal Revenue Service Donald C. Alexander to Robert C. Nix, Chairman, House Subcommittee on International Relations (responding to a request for a list of developed countries following the policy embodied in I.R.C. sec. 162 (c)(1); reprinted in "Activities of Multinational Corporations Abroad: Hearings Before Subcommittee on International Economic Policy of the House Committee on Internal Relations, 94th Cong., 1st Sess. 75 (1975). The letter indicates that only Belgium specifically follows such a policy (recently such a policy has also been adopted in Canada). Many states, including Germany, France, Japan, and Luxembourg, have laws which would disallow foreign bribes as deductions unless the identity of the recipient and an adequate business purpose are disclosed upon audit. See, e.g., section 205(a) of the German Fiscal Code, reprinted in Library of Congress Compilation No. 1, *supra*, note 262,

nationals interfere with the conduct of foreign policy;²⁷⁵ and the contagion of foreign corruption can spread to domestic business and politics.²⁷⁶

Since each home state confronts the above problems if it permits its nationals to make accommodation payments, and no state substantially benefits from this policy, home states are clearly worse off than if they all agreed to prevent their nationals from engaging in such practices.

b. Solving a Commons Problem

at 14. However, in an interview on German television, an official of that state's Finance Ministry suggested that Germany, for one, will allow its companies to deduct foreign bribes without much inquiry, because if Germany changed its laws, its firms would be "out of business"....The others would get the business in our stead." *New York Times* (Oct. 5, 1975) at 109. See also: *Wall Street Journal* (Feb. 17, 1981) at 1.

²⁷⁵ A comprehensive exploration into how accommodation payments by transnational enterprises can undercut the foreign policy objectives of their home states is contained in Popkin, "Corporate Bribery of Foreign Officials" (Maryland International Law Society Occasional Paper Series No. 2, 1977). One example cited by the author is Lockheed's payments to help the company sell its airplanes to Japan, about which Senator Frank Church had the following comment: "Mr. Kodama is a prominent leader of the ultraright wing militarist political faction in Japan. In effect, we have had a foreign policy of the U.S. Government which has vigorously opposed this political line in Japan and a Lockheed foreign policy which has helped to keep it alive through large financial subsidies in support of the company's sales efforts. *New York Times* (Feb. 5, 1976) at 1, as cited in Popkin, *Ibid.* at 8. Corruption may also erode the popular support and eventually topple a regime friendly to the home country of nationals inducing the corruption. See Popkin, *Ibid.* at 15.

²⁷⁶ Senator William Proxmire argued in connection with his efforts to obtain passage of the Foreign Corrupt Practices Act, "If we permit bribery to become a regular policy of United States corporations doing business abroad, it will only be a matter of time before these same practices afflict our own domestic economic system." Press Release, *Business Week* (May 17, 1976) at 162.

David R. Slade, in his article "Foreign Corrupt Payments: Enforcing a Multilateral Agreement"²⁷⁷ suggests that the first step towards solving a commons problem is for the members of the group confronted by the problem (the "common members") to ratify a "social contract" according to which all members surrender their freedom to exploit the common opportunity. Only if the freedom of the first commons member to exploit the common opportunity is restricted can the group ward off the dilemma of all other members having either to follow suit or to suffer a reduction in welfare. In the case of foreign corruption, this social contract should take the form of a multilateral agreement according to which each state promises to prevent its nationals from paying accommodation payments to foreign officials.

The negotiation of a social contract, however, is by itself insufficient to solve a commons problem. A mutual promise not to exploit the common opportunity, without more, merely causes the "freeloader effect." The freeloader effect, a corollary of the commons problem, is that a commons member can (and thus most likely will) try to capture the benefit of the common opportunity when other members refrain from exploitation.²⁷⁸ A naked social contract gives rise to the freeloader effect because, by committing its parties to refrain from exploiting the common opportunity, it creates the

²⁷⁷ *Supra*, note 267, at 125.

²⁷⁸ The other side of this problem is that any member who unilaterally refrains from exploitation permits a redistribution of welfare toward the other members, as these members continue to secure the benefit of the common opportunity while imposing costs on the refraining member.

possibility of gain for the member who breaches the social contract. In short, according to Slade,²⁷⁹ due to the freeloader effect, a social contract, alone, plants the seed of its own demise. In order to solve the commons problem permanently, the contract must contain an effective enforcement mechanism. Unless one commons member has an effective right to recover for damages caused by another's breach of the social contract, the following sequence of events will probably occur. First, one of the members, tempted by the prospect of reaping the benefit of the common opportunity for the first time, and undeterred by any sanction, will breach the social contract. Then, other members will discover the breach and, for lack of any other recourse, will also breach in order to prevent any further redistribution of welfare. Eventually, the commons problem will reemerge.

For these reasons, unless a home state agreement on the prevention of accommodation payments contains provisions adequately ensuring its enforceability, it stands little chance of providing a permanent solution to the problem of corrupt international transactions.

Hence, because the phenomenon of accommodation payments is, from the point of view of home states, a commons problem, it is in the best interest of all home states to

²⁷⁹ *Supra*, note 267, at 126.

not only proscribe payments made to its domestic public officials, but also those made by its own nationals to foreign public officials. But, making all home states agree to such a social contract, with adequate assurance as to its enforceability, is another herculean task with no less difficulties and problems.²⁸⁰

Problems in Unilateral Host State Regulation

As far as the difficulties in regulation of accommodation payments from the point of view of host states are concerned, the main problems which these states confront in regulating these payments relate to the impotency of the host state to enforce its laws on the TNC or its officials, lack of means to promptly discover the making of such payments, and the lack of any existing infrastructure to obtain the support and co-operation of the home state.

In the unilateral control of accommodation payments by host states, the mode and manner through which such payments are made, and the absence of a specialised governmental agency to oversee the negotiations between the TNC and the domestic official makes the possibility of prompt discovery of an offer or demand for such payments a very bleak one. Even when such payments are actually discovered, they are

²⁸⁰ For discussion as to the consensual agreement on an international agreement to eliminate accommodation see section 6 of this paper.

not very easily regulated by a single state because usually such payments involve more than one country and pass through various different channels to avoid identification of the original parties. The lack of any multilateral agreement facilitating the free, smooth and continuous flow of information regarding all aspects of such transactions combined with problems related to gathering of evidence pertaining to such transaction, establishing jurisdiction over the issue, obtaining extradition of TNC officials involved in the transaction, and actually enforcing the national law severely impedes host states in their efforts to regulate accommodation payments made by TNCs.

The task for the host state becomes all the more complicated if it itself is a developing nation. By invoking its laws to prohibit accommodation payments made by the TNC, it risks the chance of displeasing a strong economic power, which may cause more loss than the host state would gain. The TNC, in such circumstances, might retaliate by locking out its already existing establishments and moving to a country which would be more open to its "friendly" offers. In one instance, an SEC investigation prompted General Telephone and Electric Corporation (GTE) to admit having made accommodation payments to a certain influential persons in the Philippines. Marcos was so outraged at GTE's admission that he ordered the Philippine long distance company not to accept bids from American companies for certain equipment.²⁸¹ Apart from the fact that American

²⁸¹ F. Butterfield, "U.S. Law Against Bribes Blamed for Millions in Lost Sales in Asia" *New York Times* (June 26, 1978) at D10.

companies lost business, Filipinos lost a significant number of jobs when GTE, as retribution, immediately laid off employees at its Manila factory.²⁸²

Furthermore, in an attempt to control and regulate accommodation payments by host states, many states fear that economic and political chaos may ensue if they try to change a practice which has been accepted as customary behaviour.

²⁸² *Ibid.*

9. Suggested Reforms to Control Accommodation Payments

In the previous chapters we have seen that various multilateral efforts in forums such as the United Nations and the unilateral efforts by the United States to formulate a practically effective method to control accommodation payments have failed to work due to the following factors: lack of consensus between developing and developed countries; cultural inhibitions; vested interests of people entrusted with the responsibility of regulating accommodation payments; ineffective mode of enforcement of international agreements; commons problem; host state's lack of adequate control over the TNCs; lack of information; problems of jurisdiction and extradition.

I do not pretend to have solutions for all these issues, especially those concerning host state's control of TNCs, enforcement of international agreements, issues of jurisdiction and extradition. Present day international law must still evolve substantially in order to solve these issues and provide a multi/supra-national legal system for control of TNC activities. Until that is done, we cannot be assured of how well any multilateral agreement on accommodation payments or a general code of conduct will function. Even if these issues are resolved, in the absence of an enforcement agency which can actually impose sanctions against sovereign nations for a breach of the agreement or a code, a solution will remain elusive. However, I do believe that, in the evolution of international

law as stated above and in the establishment of the adequate enforcement agency, it would not be possible for nation states to exclude TNCs from the process.

This chapter looks at the possible benefits to be derived from the direct participation of TNCs in the process of controlling accommodation payments and suggests measures which may prove to be more effective than previous efforts, as described and analysed in Chapters 5 and 7 of this dissertation, in dealing with the aforementioned problems in the world wide control of accommodation payments. It suggests measures for the host states, which unlike home states are not significantly affected by the commons problem, that could be effectively used in reducing and controlling accommodation payments.

TNC Participation

As noted earlier, the UN convention negotiations proved to be neither effective nor of any significance in shaping national attitudes concerning accommodation payments. I believe a major reason for the ineffectiveness of this approach, apart from lack of consensus among developed and developing countries and an effective implementation mechanism, was the unwillingness of the body and states involved in the discussions to recognize TNCs as a new dimension in international politics and to include them in the process.

It appears that TNCs were given no say in any of the stages of the process. They were not given the desired representation. Some might argue that the representation desired by the TNCs is made accessible to them through their home country governments. However, makers of this argument miss the point, as stated by J. I. Charney²⁸³ that

"Collective or corporate units such as TNCs are certainly not mere numbers of individuals standing in quasi-contractual relations to one another. They themselves have ends which they pursue with more or less consistency; they have a settled policy which no individual can modify at will. Their collective character is as fixed as the character of an individual... Their effectiveness depends upon the social bonds that unite their members and upon the need of human nature for group-life such as they afford. Their home state cannot make them; they can always destroy them. They may recognize them, but in so doing they merely recognize something which exists as a fact and which is in no sense produced by recognition.

The group dynamics of TNCs create own behavioral patterns among human participants. Consequently, they often acquire a personality that is distinct from the participating individuals. Thus, if TNCs are going to have their interests faithfully represented, they ought to be recognized as distinct entities within a legal system.

There are practical differences between direct participation in a legal system and a direct participation via an intermediary, such a home government. Part of the difference lies in imperfections in the communication process. Thus, the home state may dilute legal commands applicable to the TNC and may likewise alter the desires and interests its TNCs when communicating with the international community. The international system is particularly susceptible to these imperfections in communication because of the amorphous structure of the international legal system, the complex interests of home states, and the relation between home states and their TNCs. A second practical difference between direct

²⁸³ J. I. Charney, "Transnational Corporations and Developing Public International Law" (1983) Duke L.J. 748 at 771.

participation and indirect participation is the element of commitment to the rules: direct participation usually breeds commitment; exclusion usually does not."²⁸⁴

One of the main reasons for this neglect of TNCs, especially from the standpoint of developing countries, is the perception that a power struggle is taking place between themselves and the TNCs. Developing countries view TNCs as an extension of the western world's power, and thus as a new type of colonialism. This perception must change. TNCs, like other businesses, value certainty, especially when the transactions they perform involve a significant amounts of money and longterm policies. Their inclusion in the negotiating process would not only make the approach more practicable, but would also greatly enhance the likelihood of compliance to rules developed to regulate accommodation payments. The inclusion of TNC representatives in the process will also minimize the risks of failure and maximize the possibility of reaching positive results by establishing a regime tailored to the particular needs and characteristics of TNCs.

The following discussion looks at measures which address the problem of accommodation payments in host states which may usefully supplement the home state and international efforts described above. Unlike the previous efforts the means suggested focus on eliminating the root causes of accommodation payments.

²⁸⁴ *Ibid.* at 765.

Reduction in Opportunity

As seen, attempts to regulate accommodation payments have been opposed by many countries on the basis that such means or practice in business form a part of their culture. This has also led to a conflict of views between the developed and the developing countries on the very question of their control. Before I suggest any reformative means to counter this attitude, let us look at how the use of accommodation payments became embedded in those cultures and countries which claim cultural roots to them.

In the history of most of the developing countries, widespread opportunities for government officials to disobey laws prohibiting them from supplementing their income by extorting money (or receiving it as bribe) for the exercise of their official discretionary powers inevitably bred disobedience. Throughout the world, officials engage in bribery or extortion activities when they have discretionary powers in relation to government contracts, permits, access to the head of the line and potential recipients anxious to pay for these. The statutes or legislative instruments that granted the power to distribute governmental largesse, and the working rules of the applicable government departments, created opportunities for bribery and extortion. Four characteristics create the conditions in which accommodation payments flourish: (1) broad discretion unrestricted by mandatory criteria or guidelines; (2) minimal procedures for accountability; (3) secrecy;

and (4) the very existence of the private sector. By granting very broad discretion to responsible officers or Ministers in the authoritarian colonial tradition, the law itself raised the incentive to resort to accommodation payments. As Gunnar Myrdal has observed, governmental policies to control private enterprises became

individualized and discretionary...partly out of necessity, but partly by predilection and choice, government policies become implemented less by general rules than detailed, individualized, discretionary, administrative choices.... The wholesale resort to discretionary administrative controls...increased the demands on administration. Such controls breed corruption; the spread of corruption, in turn, gives corrupt politicians and dishonest officials a vested interest in retaining and increasing controls of this type.²⁸⁵

Lack of procedures to control this discretionary decision-making only created further opportunities for accommodation payments. Officials were permitted to award government contracts without adequate study, reports by trained staff, comment by interested parties or public discussion. High officials could give favours with few requirements to account. The lack of control in discretion encouraged its abuse. In short, corruption did not necessarily reflect vast concentration of governmental power. It reflected the weakness of control by the centre over its agents.

²⁸⁵ Gunnar Myrdal, *Asian Drama: An Inquiry into the Poverty of Nations* (New York: Pantheon, 1968) at 1131.

Secrecy led to same result. The British tradition of governmental secrecy, perhaps the most stringent in the world, continued in its former colonies. Secrecy shielded decisions from scrutiny. It drew reinforcement from the British tradition that held business affairs almost inviolate from government inquiry, let alone public exposure.²⁸⁶

Finally, development through an authoritarian state structure generated unaccountable power and the very existence of the private sector offered extraordinary opportunities for high level bribery.

Viewed against this background, one significant reason for use of accommodation payments in these countries lies in widespread opportunities to make them. Thus, the solution for opportunity to commit crime lies in reducing the opportunity. One way host governments can diminish such opportunities is by enacting laws that are clear and unambiguous, and that minimize the discretionary authority granted to the officials who administer them. The narrower the scope of authority conferred on public officials to make decisions affecting the profits and losses of TNCs, the smaller will be the temptation to TNCs to seek to obtain a favourable decision by using accommodation payments. Moreover, host governments should ensure that no individual public official has the power to make significantly important decisions like those related to awarding of contracts for

²⁸⁶ R. S. Seidman, "Why do People Obey the Law? The Case of Corruption in Developing Countries" (1978) 5 Brit. J. L. & Soc'y 45 at 57.

the purchase of services and supplies or of concessions to develop natural resources. Host states should ensure that their national laws governing such procurement require that competing TNCs submit sealed bids, to be opened publicly by a committee of public officials with *collective authority to act*.

Organizational Structure

As noted, most countries have a surfeit of criminal laws punishing accommodation payments. The problem lies in detection and enforcement. The act of using accommodation payments has no particular victim to alert the state agencies. Hence, one way to facilitate detection and enforcement would be by developing some means to persuade one of the parties involved in the transaction to denounce the other. Standing offers of clemency and an informer's share in the amount of accommodation payments detected and recovered might prove to be of help in this direction.

A number of countries have attempted to develop new investigative institutions to combat corruption.²⁸⁷ It is suggested that legislation leading to the establishment of a specialized anti-corruption unit for investigation of corruption offenses, including

²⁸⁷ A police scandal in Hong Kong in the 1970s led to an erosion of public confidence, as a result of which a new entity was created, the Independent Commission against Corruption. This Commission is an example of a single-purpose anti-corruption entity independent of any other authority save judicial review and necessary budgetary support.

accommodation payments, be adopted by the nations. Such national units could be put under the control of one superior body perhaps formed on a regional basis. Arrangements could further be made for regular meetings between these regional bodies to discuss and disseminate information among themselves on various aspects of transnational corporate activity in their regions. Such a network would provide greater security, accountability and, above all, specialized knowledge on such offenses and would allow political authorities to measure the rate of success with given resources and to assign anti-corruption responsibility to identifiable persons. This would also allow host states more opportunity to invoke their statutory provisions at the appropriate time and take action against the TNC and its own official involved in the accommodation payments in question.

No doubt, such an organizational structure might entail additional costs for the state. But, it should also be remembered that making accommodation payments a crime only in statute books, without providing effective means of enforcement, will not achieve results.

Decision Making

Government officials receive accommodation payments in secret. Publicizing the decisions involved, a roundabout measure, might help. The International Commission of Jurists has rightly recommended that "to inspire confidence and to reduce the possibility of maladministration especially in regard to capital investment in public developmental projects, full accounts on such projects be made the subject of independent and expert examination, and that reports thereon be regularly submitted to the legislature."²⁸⁸

Moreover, there are institutional devices in most countries that are responsible for maintaining secrecy of government contracts. According to Robert Seidman, "secrecy classifications, nominally in the interests of state security, frequently cloak corruption around the world. Secrecy stands ally to authoritarianism, constraining participation and containing corruption."²⁸⁹

Hence, in order to combat accommodation payments the host states must devise institutions to ensure that decisions requiring the exercise of official discretion are closely monitored and make public the justifications for these decisions. This process of

²⁸⁸ International Commission of Jurists, *The Riddle of Law and Human Rights* (Geneva: ICJ, 1966) at 49.

²⁸⁹ R. B. Seidman, "Why do People Obey the Law?: The Case of Corruption in Developing Countries", (1978) 5 Brit. J. L. & Soc'y, 45 at 65.

disclosing the justification and opening up the opportunity for investigation by independent agencies would tend to instill a fear in the official's mind, resulting in reduced cases of accommodation payments.

Disclosure Statutes

It is not realistic to expect that any law requiring the reporting of questionable acts by public officials will result in voluntary confessions. Nevertheless, the attempt by all nations to incorporate laws or regulations requiring comprehensive disclosure (all of a person's financial assets, obligations and relationships upon entering a government position), a periodic summary (all income or business activity on a yearly basis), or disclosure of a reportable event (receipt of outside income, sale or purchase of any asset exceeding a certain value) can be invaluable tools in controlling accommodation payments. Such disclosure requirements in host countries, directed towards its own officials, would also be more practical and easy to implement in comparison to disclosure requirements of home countries directed towards TNCs.

The value of such disclosure statutes would be twofold. They would function as an early-warning device, an indicator that a person whose financial picture and life-style are inconsistent with the salary of a public official should be required to explain the situation, or should be watched carefully. A second useful function of this would be to

provide a separate vehicle of prosecution when the underlying corruption or allegation of being a recipient of an accommodation payment may not be provable.

Adequate Compensation to Public Officials

Host states, especially in developing countries, should compensate their public officials sufficiently so that they are able to support their families decently without having to resort to shakedowns of TNCs. Such a policy of adequate pay to public officials will add to government expenditure and to taxes, but will significantly diminish the *social costs* of accommodation payments.²⁹⁰ Open public expenditures and taxation will displace an equal or greater amount of surreptitious "taxation" of the private sector by public officials.²⁹¹ The economy will gain in efficiency, and the society will benefit.

Political Contributions

It is a reality of life that significant financial or personal gains are expected by major political contributors. Most legal systems leave space to accommodate this reality in personnel appointments at policy-making levels and in other discretionary areas

²⁹⁰ *supra*, chapter 3b.

²⁹¹ This point is forcefully made by N. Miller in *The Founding Finaglers* (New York: David McKay, 1976).

consistent with that society's traditions. All, however, have limits beyond which the distribution of government benefits and advantages should legally be required to be impartial or governed by objective standards designed to secure a decision on the merits of the case. When political favouritism becomes so pervasive as to threaten professionalism in the operation of government programmes, mechanisms must be found to limit its influence. Therefore, it is suggested that promoting integrity and professionalism be integrated into the legal structure of the society, and disclosure laws governing political financing be amended so as to compel the candidates or political parties to disclose any contributions they have received, thereby permitting the voting public and the news media to react to those contributions, not only when they are made before an election, but also afterwards, when the contributors receive unwarranted consideration.

Deterring Accommodation Payments by disallowing deductions in tax laws

Many home states, in order to deter TNCs and other businesses from using accommodation payments, disallow a deduction of the same in their tax provisions.²⁹² This particular way of attempting to discourage TNCs from making accommodation payments has been the subject of a debate for commentators. Many commentators have argued for and against such provision.

Those in favour of allowing a deduction of accommodation payments in tax laws make the arguments that tax laws are an inappropriate vehicle for deterring accommodation payments because; (1) they are an ineffective means of deterrence because the severity of the penalty bears no relation to the amount of the gain realized from making the payment;²⁹³ (2) the nature of agency involved in adjudicating over accommodation payments is not appropriate for tax laws should only be used to collect

²⁹² Section 67.5 of the Income Tax Act as. am. S. C. 1991, c. 49 provides :

"Non Deductibility of Illegal Payments: In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under any of sections 119 - 121, 123 - 125, 393, and 426 of the Criminal Code or an offence under Section 465 of the Criminal Code as it relates to an offence described in any of those sections."

A similar provision actually in effect in the U.S.A. is section 162(c)(1) of the Internal Revenue Code, Pub. L. No. 85-866.

²⁹³ T. J. Pariott, "The Tax Treatment of Bribes, Kickbacks, and Other Payments to Foreign Officials", *Tax Notes* (21 November 1983) 645.

revenue and not to police, prohibit or punish particular behaviour;²⁹⁴ and (3) that such an approach is an improper exportation of individual state's morality.²⁹⁵

Those in favour of disallowing a deduction of accommodation payments in tax laws resort to the morally wrongful nature of such payments and argue that the allowance of a deduction would (1) frustrate the public policy of discouraging such payments, and would acknowledge such payments as legitimate costs of doing business;²⁹⁶ (2) interfere with home state foreign policy by undermining the international policy objective of promoting democratically accountable governments in developing host countries and the free enterprise system in general;²⁹⁷ and (3) would reduce the cost of accommodation payments to the payer and encourage payors to make larger and more frequent payments, which in turn would exacerbate the problem of unfair competition and misallocation of resources.²⁹⁸

I do not agree with the arguments put forth against disallowing the deduction of accommodation payments in tax laws because as far as the issue of exportation of morality

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ M. Chu & D. Magraw, "The Deductibility of Questionable Foreign Payments" (1978) 87 Yale L.J. 1091 at 1095-96.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

is concerned TNCs should not only have the benefits of the statutory provisions of their home states and none of the burdens imposed by other laws just because they have operation outside the territorial limits of their home country. Further, I do not agree with the argument that such provisions are an ineffective and unfair means of deterring accommodation payments because the makers of this argument miss the point that the issue is not whether tax laws are an effective and unfair means of deterring foreign bribery, but whether or not a payment declared to be illegal should be deductible. Also, the policy of disallowing a deduction for accommodation payments imposes an immediate cost on every such payment and thus positively has, howsoever small it might be, an deterrent effect. Furthermore, there should be no reason to allow them as tax deductions for it would effectively amount to state subsidising of accommodation payments. Thus, it is only proper for nation-states not to allow deduction of accommodation payments in their tax provisions.

Other Options

Other than the measures which I have already mentioned, there remains one other field, which though at present appears to be feeble, might be developed in order to successfully influence world opinions and values concerning accommodation payments.

I am referring to "soft law" like that of OECD guidelines on the issue.²⁹⁹ Such guidelines possess the flexibility to reflect and encompass the changing attitudes within the world business community. In the absence of sufficiently developed international principals on the issue, such codes, despite the ambiguity in their legal status in contrast to either national laws or multilateral conventions, possess the ability to act as a standard without becoming a rigid barrier. It is this character which provides them with the potential for greater acceptance and may prove to be one of the most effective tools for those who wish to use law to mold values and play an important role in shaping the ultimate world consensus on accommodation payments.

²⁹⁹ *supra*, chapter 5, section b.

10. Conclusion

Controlling accommodation payments in the TNC-government business relationship is like reducing crime, or liquidating the subcultures that sustain professional criminals. This problem, like a multiheaded hydra, has to be attacked at many points. Despite its stubborn recuperative powers, it can be subdued in time through persistent action based on understanding. I do not believe that the problem is incapable of resolution. There is no contradiction between a free enterprise system and a high standard of business ethics. The success of great businesses has been their ability to compete and succeed on the basis of quality of the goods and services they offer. This competitive system is not honestly served by, and there is no long-term benefit to be gained from the use of accommodation payments. Accommodation payments inevitably need to be controlled and eventually eliminated. The application of measures mentioned in the preceding chapter would substantially promote this objective and, in the long run, promote higher morality in doing business in the international community. Such a rise in ethical standards would restrain TNCs and officials accustomed to resorting to accommodation payments and, in turn encourage TNCs who are willing to compete on the basis of the quality and efficiency of their product to invest in host countries and discourage those who resort to accommodation payments from contaminating the market in host countries because their reputation in their home countries will seriously be affected. The complete resolution to the problem lies in the willingness of both the home and host countries to seriously tackle

the issue of accommodation payments. Once this is reached, I do not think that substantive issues like those concerning definitions in the substantive law to control accommodation payments will pose any problem. In my opinion, it is the issues concerning jurisdiction, extradition, enforcement, & information exchange which constitute the major hurdle in reaching to a practical and effective solution to control such payments on an international level. In this dissertation, I have not dealt with these issues because to resolve these issues international law itself will have to evolve substantially. Until then and until the time an international agreement is reached on the issue and effective means to implement it are developed, host countries and TNCs remain responsible for limiting accommodation payments, and the measures suggested will be the most effective means of addressing their problem.

Annex I

Draft International Agreement to Prevent and Eliminate Illicit Payments in International Commercial Transactions

Article 1

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

- (a) The offering, promising or giving of any payment, gift or other benefit by any person, on his own behalf or on behalf of any other natural or juridical person, to a public official, either directly or indirectly with the intention of inducing such official to perform or refrain from the performance of his duties in connexion with an international commercial transaction.
- (b) The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other benefit, as consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction.

Article 2

- (a) 'Public Official' means any person whether appointed or elected who, at the national, regional or local level holds a [legislative,] administrative, judicial or military office or who is an employee of a government or of a public or governmental authority or agency or an employee of an entity which provides a public service and which is owned [or controlled] by such body and any other person when performing a public function.
- (b) 'International commercial transactions' includes any sale, contract or other business transaction with a national, regional, or local Government or any authority or entity referred to in paragraph (a) of this article [and any application for governmental approval of a sale, contract or business transaction], which under the laws of that State is open to foreign persons or enterprises [or to suppliers of imported goods, services, capital or technology].
- [(c) 'Intermediary' means any natural or juridical person who negotiates with or otherwise deals directly or indirectly with a public official on behalf of another natural or juridical person. However, the term does not include any employee of the person on whose behalf the intermediary is acting.]

Article 3

- [(a) Each Contracting State shall ensure that contracts which are entered into by agencies or instrumentalities of its Government for international commercial transactions include a provision that no payment, gift or other benefit which would constitute an offence under article 1 has been or will be offered , promised or given in connexion with the transaction.]
- (b) Each Contracting State shall, in accordance with national and international law, [endeavour to] take all practicable measures [, and particularly administer its national laws and regulations,] for the purpose of preventing the offenses referred to in article 1 [involving its own public officials or public officials of another State.]

Article 4

- (1) Each Contracting State shall take such measures as may be necessary to establish its jurisdiction:
 - (a) over the offenses referred to in Article 1 when they are committed in the territory of that State,
 - (b) over the offence referred to in Article 1(b) when it is committed by a public official of that State,
 - (c) over the offence referred to in Article 1(a) relating to any payment, gift or other benefit in connexion with the negotiation, conclusion, retention, revision, or termination of an international commercial transaction when the offence is committed by a national of that State, provided that any element of that offence, or any act aiding or abetting that offence, is connected with the territory of that State.
- (2) This Agreement does not exclude any criminal jurisdiction exercised in accordance with the national law of a Contracting State.

Article 5

- (1) A Contracting State in whose territory the alleged offender is found, shall, if it has jurisdiction under article 4, paragraph 1, be obliged without exception whatsoever to submit the case to its competent authorities for the purpose of prosecution, [through procedure in accordance with the laws of that State.] [Those authorities shall take their decision in the same manner as in the case of any ordinary offence under the law of that State.]

(2) The obligation provided for in paragraph 1 of this article does not apply if the Contracting State has extradited the alleged offender, or if the Contracting State knows that a prosecution has been undertaken in another State, for the same offence and with respect to the same person.

Article 6

(1) (a) Each Contracting State shall ensure, under penalty of law, that [person resident or] entities established in its territory maintain accurate records of payments made by them to an intermediary, or received by them as an intermediary, [for the purpose of securing] [in connexion with] an international commercial transaction.

(b) These records shall include, inter alia, the amount and date of any payment or payments [exceeding \$50,000] which are made to an intermediary in a calendar year or which are attributable to a particular international commercial transaction; the name, address, and nationality of the intermediary or intermediaries receiving such payments; [and, to the extent ascertainable by the party concerned, the name and address of any public official who is employed or retained by or has a financial interest in the intermediary.]

(2) The records maintained pursuant to paragraph 1 of this Article shall be made available for the purpose of criminal investigation and proceedings to the competent law enforcement authorities of another Contracting State in accordance with the provisions for mutual assistance in Article 10.

[Article 7]

- (a) Each Contracting State shall prohibit its persons and enterprises of its nationality from making any royalty or tax payments to, or from knowingly transferring any assets or other financial resources in contravention of United Nations resolutions to facilitate trade with or investment in a territory occupied by an illegal minority regime in southern Africa.
- (b) Each Contracting State shall require, by law or regulation its persons and enterprises of its nationality to report to the competent authority of that State any royalties or taxes paid to an illegal minority regime in southern Africa in contravention of United Nations resolutions.
- (c) Each Contracting State shall submit annually, to the Secretary-General of the United Nations, reports on the activities of transnational corporations of its nationality which collaborate directly or indirectly with illegal minority regimes in southern Africa in contravention of United Nations resolution.]

[Article 8]

- (a) Each Contracting State recognizes [agrees to ensure that its national law provide] that if bribery or illicit payment are decisive in procuring the consent of a party to a contract relating to an international commercial transaction such party may at its option institute judicial proceedings in order to have the contract declared null and void.]

Article 9

- (a) The Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.
- (b) Each Contracting State shall biannually furnish, in accordance with its national laws, to the Secretary-General of the United Nations, information concerning its implementation of this agreement. Such information shall include legislation and administrative regulation, as well as general information on judicial proceedings and other measures taken pursuant to such laws and regulations. Where final convictions have been obtained under laws within the scope of this Convention, information shall also be furnished concerning the case, the decision and sanctions imposed in so far as it is not confidential under the national law of the State which provides the information.
- (c) The Secretary-General shall circulate a summary of the information referred to in paragraph (ii) of this article to the Contracting State.

Article 10

1. Contracting States shall afford one another the greatest measure of assistance in connexion with criminal investigations and proceedings brought in respect of the offence [referred to in article 1] [within the scope of this Convention whether committed by natural or juridical persons]. The law of the State requested shall apply in all cases.

2. Mutual assistance shall, inter alia, include, as far as permissible under the law of the State requested [and taking into account the need for preserving the confidential nature of documents and other information transmitted to appropriate law enforcement authorities]:

- (a) Production of documents or other information, taking of evidence and service of documents, relevant to investigations or court proceedings;
- (b) Notice of the initiation and outcome of [any public] criminal proceeding concerning an offence referred to in article 1, to other Contracting States which may have jurisdiction over the same offence according to article 4.

3. Contracting States shall upon request enter into negotiations towards the conclusion of bilateral agreements with each other to facilitate the provision of judicial assistance in accordance with this article. [Such agreements shall, inter alia, make provision for the taking of evidence and conduct of interviews under the law of the Contracting States.]

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

Article 11

1. The offenses referred to in article 1 shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States. Contracting States undertake to include the said offenses as extraditable offenses in every extradition treaty to be concluded between them.

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it [may at its option] [shall] consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty [shall] [may at their option] recognize the offence as an extraditable offence between themselves subject the conditions provided by the law of the requested State.

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

Article 12

(a) Any dispute between Contracting States concerning the interpretation or application of this Agreement shall be settled by bilateral consultations unless it is freely and mutually agreed by all States concerned that other peaceful measures be sought on the basis of sovereign equality of States.

[(b) Any dispute between Contracting States concerning the interpretation or application of this Agreement which cannot be settled through bilateral consultation, shall, at the request of either Contracting State be submitted to an ad hoc arbitral tribunal for settlement in accordance with the applicable principles and rules of public international law.]

Article 13

Alternative 1

(a) This Agreement shall enter into force [30 days] after the receipt by the depository of the Xth instrument of ratification, [acceptance or approval] or accession.

Alternative 2

In respect of article 'a' to 'n', this Agreement shall enter into force [30 days] after the receipt by the depository of the Xth instrument of ratification, [acceptance or approval] or accession. In respect of articles 'o' to 'z', this Agreement shall enter into force [30 days] after the receipt by the depository of the 'X + Yth' instrument of ratification, [acceptance or approval] or accession.

(b) The depository for this Agreement shall be the Secretary-General of the United Nations.

Article 14

- (a) Any Contracting State may at the time of its signature, ratification, [acceptance or approval] or accession, enter [a] reservation[s] with respect to the following articles:
- (b) ...
- (c) ...
- (d) No reservation shall be permitted in respect of any provision of this Agreement other than those referred to in paragraph 1 of this article.
- (e) Any reservation entered at the time of signature shall be subject to confirmation at the time of ratification, [acceptance or approval] or accession.
- (f) The entry and confirmation of any reservation in accordance with paragraph (a) and (e) respectively of this article shall be communicated in writing to the depository.
- (g) A reservation shall take effect from the time of the entry into force of the present Agreement with respect to the reserving State.

Annex II

DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

Article 1

1. Each Contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law:

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

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

Article 2

For the purpose of this Agreement:

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

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

acquisition of proprietary interests or production rights from a Government by a foreign national or enterprise;

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

Article 3

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

Article 4

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction:

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

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

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

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

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

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

Article 5

1. A Contracting State in whose territory the alleged offender is found, shall, if it has jurisdiction under article 4, paragraph 1, be obliged without exception whatsoever to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.
2. The obligation provided for in paragraph 1 of this article shall not only apply if the Contracting State extradites the alleged offender.

Article 6

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

[Article 7]

1. Each Contracting State shall prohibit its nationals and enterprises of its nationality from making any royalty or tax payments to, or from knowingly transferring any assets or other financial resources in contravention of United Nations resolutions to facilitate trade with, or investment in a territory occupied by, an illegal minority regime in southern Africa.
2. Each Contracting State shall require, by law or regulation, its national and enterprises of its nationality to report to the competent authority of that State any royalties or taxes paid to an illegal minority regime in southern Africa in contravention of United Nations resolutions.
3. Each Contracting State shall submit annually, to the Secretary-General of the United Nations, reports on the activities of transnational corporations of its nationality which collaborate directly or indirectly with illegal minority regimes in southern Africa in contravention of United Nations resolutions.]

[Article 8]

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

Article 9

1. Contracting States shall inform each other upon request of measures taken in the implementation of this Agreement.
2. Each Contracting State shall furnish once every second year, in accordance with its national laws, to the Secretary-General of the United Nations, information concerning its implementation of this Agreement. Such information shall include legislative measures and administrative regulations as well as general information on judicial proceedings and other measures taken pursuant to such laws and regulations. Where final convictions have been obtained under laws within the scope of this Agreement, information shall also be furnished concerning the case, the decision and sanctions imposed in so far as they are not confidential under the national law of the State which provides the information.
3. The Secretary-General shall circulate a summary of the information referred to in paragraph 2 of this article to the Contracting States.

Article 10

1. Contracting States shall afford one another the greatest possible measure of assistance in connexion with criminal investigations and proceedings brought in respect of any of the offenses [referred to in article 1/within the scope of this Agreement]. The law of the State requested shall apply in all cases.
2. Contracting States shall also afford one another the greatest possible measure of assistance in connexion with investigations and proceedings relating to the measure contemplated by article 1, paragraph 2, as far as permitted under their national laws.
3. Mutual assistance shall include, as far as permitted under the law of the State requested and taking into account the need for preserving the confidential nature of documents and other information transmitted to appropriate law enforcement authorities [and subject to the essential national interests of the requested State]:
 - (a) Production of documents or other information, taking of evidence and service of documents relevant to investigations or court proceedings;
 - (b) Notice of the initiation and outcome of any public criminal proceedings concerning an offence referred to in article 1, to other Contracting States which may have jurisdiction over the same offense according to article 4;
 - (c) Production of the records maintained pursuant to article 6.

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

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

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

Article 11

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

2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it [may at its option/shall] consider its Agreement as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. Contracting States which do not make extradition conditional on the existence of a treaty [shall/may at their option] recognize the offence as an extraditable offence between themselves subject to the conditions provided by the law of the requested State.

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

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