

COMBATING CORRUPTION UNDER INTERNATIONAL LAW

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I. INTRODUCTION

The last ten years have witnessed rapid development the effort to combat corruption under international law. Recently, two regional anti-corruption conventions came into force. The first convention was negotiated and adopted by the members of the Organization of American States (OAS),¹ while the second was adopted under the auspices of the Organisation for Economic Co-operation and Development (OECD).² In addition, a number of international organiza-

1. See Organization of American States: Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention].

2. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Done at Paris, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention]. The OECD Convention was signed on November 21, 1997 by the twenty-six member countries of the Organisation of Economic Co-operation and Development and by five non-member countries: Argentina, Brazil, Bulgaria, Chile and the Slovak Republic.

tions are consistently devoting resources to this subject. These groups include several bodies within the United Nations, the European Union, and the International Bank for Reconstruction and Development (IBRD), also known as the World Bank Group (WB). Also involved are several non-governmental organizations, such as Transparency International and the International Chamber of Commerce.

The international response to corruption raises many important questions: How did corruption become a matter of concern for international law? Was it the result of globalization? Was it the result of a renewed sense of morality around the world? Is this part of a global outcry against the abuse of power? Are international efforts to combat corruption linked with the development of human rights? Is trade competition the primary motivating factor? When did corruption become part of the international agenda, and why? And where is it all going? While certainly provoked by these questions, this Article does not pretend to give definite answers. It seeks only to contribute to the understanding of the development of anti-corruption measures under international law by answering the following question: what is the status, direction, and development of the treatment of corruption under international law?

To that end, this Article revisits the history of international law's anti-corruption efforts in order to generate questions about the current status and future direction of the fight against corruption under international law. By stepping back and reviewing how international law has struggled with an issue traditionally considered to fall within the exclusive domain of national law and politics, this Article argues that the lessons of these developments are helpful, not only in understanding the current status of anti-corruption initiatives, but also in generating the questions and propositions for the future development of this field of international law. This is necessary to contribute to the emerging efforts to combat corruption worldwide in a more balanced, creative, and effective way.

Part II of this Article reviews the issue's origins in the investigations into illicit transnational corporate payments conducted aftermath of the Watergate scandal. The survey then continues through the results of these investigations, including the 1976 adoption of the Foreign Corrupt Practices Act in the United States and the largely unsuccessful programs of the United Nations during the late seventies and eighties. Part III reviews the emergence and development of international anti-corruption initiatives from the nineties to the present. These developments occurred in large measure as a result of the new

international realities of the post-Cold World era. Part III also addresses the main international instruments and policies to combat corruption that are being developed by states, international organizations, and non-governmental organizations. Part IV elaborates on the lessons learned from this history lesson, describes the current status of international anti-corruption initiatives, and raises some questions regarding the measures to combat bribery and corruption under international law. Finally, Part V presents the conclusion.

II. THE FIGHT AGAINST BRIBERY GOES INTERNATIONAL (1972-1988)

A. The Road to the American Foreign Corrupt Practices Act

1. *Watergate Investigations Give Rise to Investigations of Foreign Payments: The Bribery Inquisition.* In the early 1970s corruption became an issue of international concern as a direct result of political events in the United States. The Watergate investigations generated a high level of public awareness regarding the questionable conduct of some of the nation's political and business elite. Watergate led to other investigations into the role of major U.S. corporations in financing domestic political campaigns. These investigations, in turn, led to further inquiries into corporate involvement in foreign political campaigns, with questionable payments and contributions being made to foreign government officials. The hearings conducted by Congress on these issues revealed facts and events damaging to the stability and reputation of some foreign governments. In some cases, this caused other nations to undertake their own investigations. Thus, the issue of bribery and corruption in international business transactions was brought into the spotlight for the first time and progressively became part of the international agenda.

The inquiry that would eventually lead to the issue of foreign corrupt payments was triggered in July 1973, when Watergate Special Prosecutor Archibald Cox publicly called upon any company that had made questionable or illegal contributions to the 1972 U.S. Presidential campaign to make voluntary disclosures.³ The information obtained by Cox suggested that multinational companies had not only

3. See *Multinational Corporations and United States Foreign Policy, Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. of Foreign Relations*, 94th Cong. 5 (1975), microformed on CIS No. 76-S381-6 (Congress. Info. Serv.).

contributed illegally to U.S. political campaigns but had also actively channeled resources to foreign governments and foreign political parties. The Special Prosecutor's Office shared this information with American investigating authorities and Congress itself. The latter would play a significant role in the subsequent investigations.⁴

Armed with this information, the Securities and Exchange Commission (SEC or "Commission") initiated its own investigations, and in 1975 it moved against four major companies: Gulf Oil Corporation, Phillips Petroleum Company, Northrop Corporation, and Ashland Oil, Inc. The SEC alleged that the establishment of secret slush funds for unaccountable distribution of moneys abroad violated U.S. securities law requiring that public companies file accurate financial statements.⁵

In 1975, the SEC also initiated court proceedings against a fifth company, United Brands Corporation. Although this case turned out to be based on similar grounds, it was initiated not as a result of information provided by the Watergate Special Prosecutor's Office, but rather by a singular, dramatic event. On February 3, 1975, United Brands Corporation's then-Chairman, Eli M. Black, threw himself out of the twenty-second story of a New York skyscraper. His suicide led to the SEC investigation, whereupon insiders informed the Commission that the late chairman had agreed to pay \$2.5 million to senior officials of the Honduran government. This payment was made in exchange for the repeal of a recently-enacted tax on bananas.⁶ On April 9, 1975, the SEC charged United Brands with securities fraud for failing to report the payment of the first installment of this bribe. The SEC held that this payment was a materially relevant fact for re-

4. For example, in May 1975, Gulf Oil Corporation's Chairman testified before the Senate Subcommittee on Multinational Corporations that:

From the time of the initial disclosure in July of 1973, we have become involved in a variety of investigations. We have been or are being investigated by the Special Prosecutor's office, the Securities and Exchange Commission, the Internal Revenue Service, the Eckert, Seamans firm, a special review committee, and by this Senate committee. In addition, third party lawsuits have been filed and are currently pending.

Id.

5. See *The Activities of American Multinational Corporations Abroad, Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations, 94th Cong. 37 (1975), microformed on CIS No. 76-H461-15 (Congress. Info. Serv.)*.

6. The revelations are also cited as a cause of the later deposition of the Honduras President in a military coup. See JOHN T. NOONAN, BRIBES 656 (1984).

porting purposes and should have been disclosed to the investing public.⁷

These cases, and the inquiry commenced by Congress, suggested potential problems among certain corporations, exporters, and investors. The SEC initiated a voluntary disclosure program, inviting American corporations to reveal unreported foreign payments. With the cases against these first five companies proceeding, this new program implied that the SEC would look favorably upon companies who voluntarily disclosed questionable foreign payments.⁸

After several closed hearings on this issue, the Senate Committee on Foreign Relations decided to open the proceedings to the public to ascertain the magnitude of the problem and to determine whether it required a congressional response. The first of these public hearings was held on May 16, 1975.⁹ The inquiries that followed produced the most extensive documentation of business-government corruption ever produced in history.¹⁰ The American political system, and in particular Congress, must be duly credited for its contribution towards shedding light on a practice that is inherently cloaked in secrecy and subterfuge.

7. This payment had previously triggered a power struggle within the company and probably constituted one of the causes leading to the suicide. *See id*; *see also* Facts on File World News Digest, Apr. 19, 1975, LEXIS NEXIS, News Group File, Beyond Two Years.

8. The SEC program resulted in approximately 500 U.S. companies admitting to having made questionable payments to foreign officials. *See* NOONAN, *supra* note 6, at 674.

9. *See Multinational Corporations and United States Foreign Policy*, *supra* note 3, at 1.

10. *See* NOONAN, *supra* note 6, at XVI. The legislative history of the FCPA is extensive. Following are some of the most relevant hearings: *Multinational Corporations and United States Foreign Policy*, *supra* note 3; *The Activities of American Multinational Corporations Abroad*, *supra* note 5; *Lockheed Bribery, Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1975), microformed on CIS No. 75-S241-46 (Congressional Info. Serv.); *Protecting the Ability of the United States to Trade Abroad, Hearing on S. Res. 265 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 94th Cong. (1975), microformed on CIS No. 76-S361-5 (Congressional Info. Serv.); *Foreign and Corporate Bribes, Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. (1976), microformed on CIS No. 76-S241-38 (Congressional Info. Serv.); *Foreign Payments Disclosure, Hearings on H.R. 15481 and S. 3664 and H.R. 13870 and H.R. 13953 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong. (1975), microformed on CIS No. 77-H501-36 (Congressional Info. Serv.); *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure, Hearing on S. 305 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. (1977), microformed on CIS No. 77-S241-23 (Congressional Info. Serv.); *Unlawful Corporate Payments Act of 1977, 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 Commerce*, 95th Cong. (1977), microformed on CIS No. 77-H501-66 (Congressional Info. Serv.).

In his opening remarks at the first public hearing, Senator Frank Church described the concern of the Committee as not being a “question of private or public morality,” but rather a “major issue of foreign policy for the United States.”¹¹ Illegal political contributions to foreign governments and transnational bribery were defined during the hearings as threats to not only the principles of democracy and a free market economy, but also to the conduct of U.S. foreign relations, including the lawful pursuit of American business interests abroad. The hearings showed that the problem was complex and its extent serious. They also revealed that the legal authority then vested in U.S. administrative agencies to address the problem of foreign payments was limited and at best, residual.¹²

The SEC’s investigation and litigation first brought to light the foreign payment activities of United Brands and Gulf Oil. The information gleaned from the voluntary disclosure program provided further evidence of the problem’s magnitude. As with other U.S. agencies, the SEC’s involvement was triggered not by the corrupt payments themselves, but rather by the failure to provide full and fair disclosure of information relevant to the sale of publicly traded securities.¹³ According to the SEC, the information provided by the Watergate Special Prosecutor about the establishment of secret “slush funds” showed that the financial statements filed by these companies were inaccurate. Although the central issue for the SEC was that full and fair disclosure was lacking, the question of whether the funds were used for the payment of bribes to secure business helped establish the materiality of the evidence.¹⁴

11. *Multinational Corporations and United States Foreign Policy*, *supra* note 3, at 1.

12. For example, the IRS had no authority to investigate questionable foreign payments unless a deduction was claimed. And even when a deduction was claimed, investigation into its legitimacy was hampered by complications in fact-finding and international cooperation. It is telling that no foreign questionable payment case was initiated with information provided by the host government. Agencies such as the Antitrust Division of the Department of Justice, the Defense Department, and the Civil Aeronautics Board faced similar limitations. See *The Activities of American Multinational Corporations Abroad*, *supra* note 5, at 40-147 (1975). However, it should be noted that the SEC was instrumental in disclosing the issue of the problem itself.

13. To use the words of Commissioner Loomis, the SEC was not charged to act as “guardian of corporate morality,” but to seek disclosure of material information which would be considered important by investors in arriving at their investment decisions. *The Activities of American Multinational Corporations Abroad*, *supra* note 5, at 36.

14. In the SEC proceedings, bribery was a primary issue only in the United Brands investigation. In United Brands, the SEC obtained more specific information on the use of the money in question. The Commission found that the company deposited \$1.25 million into the Swiss

In proceeding with these cases, the Commission enjoin the targeted companies from engaging in specified illegal conduct in the future.¹⁵ Most importantly, the injunctions allowed the SEC to seek ancillary relief, such as the reimbursement of unlawful payments by individual defendants to the corporation and corporate undertakings such as special investigations, audits, and the preparation of reports.¹⁶ The reports generated from the SEC's action were made public by the House and Senate committees investigating these matters and illustrated the *modus operandi* of companies, their agents, and consultants who were attempting to secure favorable treatment for their international business transactions.

2. *The U.S. Legislative Response.* By the end of 1975, Congress had reviewed testimony and documents revealing a wide range of questionable behavior by U.S. companies in their dealings with foreign governments. These dubious activities included contributing four million dollars to a foreign political party;¹⁷ leasing a helicopter

bank account of a high official of the Honduran government but failed to reflect this transaction accurately on their books. *See id.* at 37, 70-74.

15. Alternatively, the SEC had the ability to initiate administrative proceedings that could result in the termination of the company's rights to issue or trade securities, but this remedy was considered more damaging to the shareholders, who were innocent victims of the company's disclosure violations. Another dilemma was between actual and potential shareholders. The investigations could damage actual shareholders if the prices of shares fell because of negative publicity, but disclosure protected potential investors. Another interesting issue faced by the SEC concerned construing whether bribery and foreign illicit political contributions constituted material information necessary for an investor to make its investment decisions. The SEC's inquiry focused on several questions, such as: whether the company relied on the payments to continue in business; if not, whether investors had the right to choose their investments on moral grounds, rather than on pure financial ones; and whether the making of these payments reflected the quality of corporate stewardship. *See id.* at 37-38, 60, 61, 62.

16. *See id.* at 37-38.

17. The Gulf Oil Corporation admitted to contributing to the then-ruling Democratic Republican Party of the Republic of Korea (DRPRK) a total of four million dollars for the 1966 and 1972 Korean national elections. According to the testimony of the company's Chairman, Mr. B. R. Dorsey, the contributions were made in response to solicitations of high party officials "accompanied by pressure that left little to the imagination." *Multinational Corporations and United State Foreign Policy*, *supra* note 3, at 9. The DRPRK won the second election by a slim margin, which gave rise to congressional speculation about the impact of the illicit contributions. Gulf did not receive anything in exchange except, perhaps, the "unfettered right to continue in business." *Id.* at 10. Senator Church referred to these revelations as a case study of the potential impact of transnational business in foreign relations "just as ITT served this subcommittee as a case study of a corporation attempting to influence U.S. policies toward Chile." *Id.* at 24. Given the American involvement in the reconstruction and development of post-war South Korea (which by that time had received nearly \$11 billion in foreign aid), U.S. Legislators wondered why the American corporation did not merely reject the solicitation.

for a foreign political candidate and a head of government;¹⁸ promoting the interests of foreign governments in matters of delicate U.S. foreign policy and national security;¹⁹ paying \$1.25 million in exchange for the repeal of tax regulations;²⁰ satisfying the bribery demands of foreign generals;²¹ incorporating a Swiss company to hire or contract with key figures in foreign countries to promote sales abroad;²² and using a governmental line of credit to make questionable payments overseas.²³

18. In 1966, Gulf Oil Corporation paid for the lease and eventual purchase of a helicopter for the use of then Bolivian presidential candidate General René Barrientos. These payments amounted to \$110,000 and were funneled through the "Bahamas Exploration Company." Two other payments were made by Gulf to officials of General Barrientos' political party, apparently at his demand. These payments totaled approximately \$350,000. *See id.* at 11.

19. Gulf Oil also made a \$50,000 contribution (again through Bahamas Exploration Company) to fund a public education program in the United States developed by Arab nations to promote their position in the Arab-Israeli conflict. *See id.* at 11, 18.

20. *See supra* notes 7-8 and accompanying text.

21. Northrop Corporation, a California-based military contractor, testified before the Senate Committee on Foreign Relations about payments made through one of its agents to officials in the Saudi government. In 1971 and 1972, an independent agent of Northrop twice requested that Northrop management send \$450,000 to be delivered to two high-ranking Saudi generals. According to the company's accounts, \$250,000 had been solicited by one general in 1971. After this payment was sent to his agent, a second general solicited \$150,000 in 1972. When the company resisted, the second general increased his demand to \$200,000, which was eventually transmitted to his agent. *See Multinational Corporations and United State Foreign Policy, supra* note 3, at 112.

22. Northrop was encountering difficulty getting NATO governments to consider its military products. One of its agents suggested establishing an independent company that could hire or share profits with individuals positioned to help the company sell aircraft in Europe, following a model supposedly established by Lockheed Corporation. Thus, Northrop incorporated EDC in Switzerland, concealing the names of businessmen and influential people who were not employed by Northrop but could gain the company access to the European decision-making circles. Northrop entered into a contract with EDC through which the latter would receive 1.5% of the sales price of any F-15 aircraft, regardless of EDC's participation (or lack thereof) in the transaction. Most troubling about the arrangement was that EDC was not accountable to Northrop for whom it engaged, hired, or associated with, nor did it have to report what kind of services were rendered to the company. *See id.* at 151-58.

23. Lockheed Corporation was the nation's largest defense contractor in the 1960s. However, in 1971 Lockheed faltered, and the United States government guaranteed a \$250 million line of credit for the company. The government established the Emergency Loan Guarantee Board to provide general oversight of the company, which, for all other purposes, remained under the ownership and control of its shareholders. The Watergate investigations failed to find any improper action in the establishment of Lockheed's credit line.

However, in April 1975, Lockheed was asked to reveal to the SEC any questionable payments made to foreign officials. Congressional investigation then focused on whether Lockheed had used monies from the line of credit to bribe foreign officials. When the credit line was approved back in 1971, Lockheed assured the Senate Banking Committee that it had sufficient orders to repay the loan and service fee under the guarantee. No one had suggested how these orders were secured or obtained. American legislators were concerned that Lockheed had

In the early stages of the congressional hearings, some U.S. officials stated that they would be surprised if the cases then under investigation by Congress were more than rare, isolated cases.²⁴ By late 1975, however, the evidence to the contrary was overwhelming.

On April 5, 1976, Senator William Proxmire introduced and initiated hearings on Senate Bill 3133, a measure that would prohibit payments by American corporations anywhere in the world, grant prosecutorial powers to the SEC, and require regular disclosure of all consultants' fees and commissions paid to foreign agents. As described by Senator Proxmire, the Committee on Foreign Relations' concern was that even though foreign corruption had received general condemnation, "many companies will continue paying bribes if they can get away with it, because the potential rewards are so great and the risks are minimal."²⁵ He noted that no one had gone to jail, only three corporations had fired their chief executive officers, and even Lockheed, which had endured a large amount of negative publicity, was reporting increased profits.²⁶

On May 12, 1976, the SEC submitted its now-famous report on questionable and illegal corporate payments and practices to the Senate Committee on Banking, Housing, and Urban Affairs. This report was the result of an analysis of the information obtained by the SEC through its enforcement²⁷ and voluntary disclosure programs.²⁸

misled and withheld information not only from the investing public, but from Congress as well. Congress had approved the Loan Guarantee Act on the basis of representations made about the viability of the L-1011 aircraft sales program. At the foreign payments hearings in 1975, Lockheed's Chairman argued that its foreign payment practice was not illegal under U.S. law; that during the 1971 Congressional hearings there had been no discussion about sales practices; that Lockheed did not even have a particular sales plan at that time; that questionable foreign payments were commonplace industry practice and were necessary to compete; and that Lockheed's L-1011 sales program had actually produced good returns for the U.S. government. Nonetheless, he was forced to admit that these payments were illegal in the countries in which they were made and ultimately represented expenditures of moneys owned by the company and its shareholders and guaranteed by the U.S. government. See *Lockheed Bribery*, *supra* note 10, at 1, 2, 6-10, 24-31; see also NOONAN, *supra* note 6, at 654-58.

24. For example, in response to Representative Solarz's question as to whether he had an intuitive guess as to the extent of these activities, the Vice President of the Overseas Private Investment Corporation responded:

I suspect in the minor kinds of things we are talking about in the sense of paying a bureaucrat to move some papers along, the practice may be not all that uncommon. I think in the sense of the very large payments, I would be surprised if there is a great amount of it. It is bad business and risky.

The Activities of American Multinational Corporations Abroad, *supra* note 5, at 14.

25. *Foreign and Corporate Bribes*, *supra* note 10, at 1.

26. See *id.*

27. The SEC brought a total of fourteen cases starting in early 1974 (when it decided that the information revealed by the Watergate Special Prosecutor Office's actions against American

Through both programs, the SEC was able to analyze information obtained from ninety-five companies. Sixty-six of these companies were engaged in manufacturing, and the two largest industry groups within this category were drug manufacturers and petroleum-related companies. Fifty-nine companies had been involved in payments to foreign officials (the most common questionable transaction), seventeen had been involved in foreign political payments, twenty-nine had been involved in sales-type commissions, and twenty-seven were involved in "other foreign matters," which included some kind of foreign payments or other questionable action.²⁹ Corporate revenues "related to" questionable payments ranged from twenty to 100 times the amount of the payments.³⁰ The total amount of reported questionable payments was close to \$250 million.³¹

The SEC's report came to several conclusions. The available information on questionable foreign payments indicated that such practices were neither isolated nor rare. While the information was not necessarily representative of the majority of American business (considering that over 9000 companies regularly filed with the SEC), the data did not necessarily represent the universe of violations or questionable actions. Many companies may have declined to fully disclose their activities. The SEC believed that in the long run, these investi-

companies showed serious reporting problems under the securities laws) until the publication of the report. Cases were brought against the American Ship Building Company, Ashland Oil, Inc., Gulf Oil Corporation, Minnesota Mining and Manufacturing Company, Phillips Petroleum Company, Northrop Corporation, Braniff Airways, Inc., General Tire & Rubber Corporation, Kalvex Inc., Lockheed Aircraft Corporation, Missouri Public Service Company, Sanitas Service Corporation, United Brands Company, and Waste Management, Inc. Special audit reports were prepared for the first six cases as part of the ancillary relief sought by the SEC in the respective actions. *See Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee, reprinted in* 353 SEC. REG. & L. REP. 36-41 (1976).

28. The complexities and magnitude of the foreign payments problem, as revealed by the SEC's enforcement actions, led the Commission to establish a set of procedures to encourage U.S. companies to voluntarily investigate any problem and disclose it to the SEC. These disclosures would not exempt the company from SEC enforcement action but would, pursuant to the Commission's stated policy, diminish that possibility. This program was specifically created to address the issue of foreign payments, bribery, and slush funds. Under the program, a company with problems would be required to take a number of steps, including: conducting an in-depth investigation of the facts relating to illegal foreign activities, issuing appropriate policy statements concerning such conduct, and filing the results of the investigation on Form 8-K. *See id.* at 3-5. Eighty-nine corporations came forward under the voluntary disclosure programs. *See id.* at 16-35 (Exhibit A).

29. *See id.* at 9.

30. *See id.* at 10.

31. *See id.* at 16-41.

gations would help to improve the system, as they would lead to the strengthening of corporate management and public confidence in business. Notwithstanding the serious problems revealed by the report, the Commission concluded that the free market system was generally sound, and the situation was controllable.³²

In its report, the SEC also included suggestions on how Congress could address the foreign payments problem. The Commission proposed legislation strengthening the issuer's requirements to maintain books and records that reflect accounting transactions and movements, to devise and maintain appropriate systems of control. The SEC's proposed legislation would also make it unlawful to falsify books or records or to cause someone to do the same.³³

Both the House and the Senate comprehensively reviewed the issue of questionable foreign payments.³⁴ The House Committee on International Relations and the Senate Committees on Foreign Relations and Banking, Housing, and Urban Affairs held extensive hearings on the matter.³⁵

In the summer of 1976, when it became clear that Congress would take action, President Ford submitted his administration's legislative proposal.³⁶ The President's bill contemplated reporting obligations of certain classes for foreign payments made by U.S. corporations (only significantly large payments), but would not make these payments unlawful as long as they complied with other existing applicable law.³⁷ This was a conservative approach.³⁸

32. *See id.* at 12.

33. *See id.* at 14. This proposal was introduced as Senate Bill 3418 by Senator Proxmire at the request of the SEC. *See* S. REP. NO. 95-114, at 1. (1977).

34. The U.S. Congress considered several bills to address improper payments abroad, including Senate Bill 3133 (introduced by Senator Proxmire on March 11, 1976) and Senate Bill 3379 (introduced by Senators Church, Clark, and Pearson on May 5, 1976), and the bill introduced on behalf of the Securities and Exchange Commission. *See* S. REP. NO. 95-114, at 1.

35. *See supra* note 10.

36. The proposal was the result of the Task Force on Questionable Corporate Payments Abroad, established by President Ford on March 31, 1976. *See* H.R. DOC. NO. 94-572, at 1 (1974).

37. The reports would be filed with the Secretary of Commerce. Commerce would make these reports available to the State Department, the IRS, the SEC, the Department of Justice, and to the appropriate congressional committees. The reports would be available to the public one year after their filing, except where the State Department or the Attorney General determined that they should not be made them public on the grounds of foreign policy or judicial process. *See id.* at 2.

38. For a critical analysis of President Ford's proposal see W. MICHAEL REISMAN, FOLDED LIES, 158 (1979).

After several drafts were exchanged, the Senate opted for the stricter approach proposed by Senator Proxmire that included criminalizing both the failure to report foreign payments and the payments themselves.³⁹ The eventual legislation listed foreign bribery as a criminal offense because the extensive disclosure of questionable foreign practices called for a policy response that could act as a self-detering Damocles sword.⁴⁰

By dealing with the foreign payments issue in the aftermath of Watergate, Congress strengthened its commitment to transparency as the best means to address conduct that, if not clearly illegal, was surely reprehensible.⁴¹ Because the foreign payments hearings revealed numerous international illicit practices rather than a small number of isolated cases,⁴² Congress ultimately chose to criminalize foreign bribery on moral grounds.

It is true that the SEC played a significant role in addressing this issue on its capital market-dimension.⁴³ However, it can be argued that, in view of the arguments raised against criminalization, this di-

39. S. 3664 94th Cong. (1975).

40. The Senate Report accompanying Senate Bill 305 concluded in this regard that:

The serious abuses, which the [Securities and Exchange] Commission has uncovered, justify an explicit congressional confirmation of our national commitment of ending corrupt foreign payments. While the Commission has made substantial progress in its enforcement program, the committee believes that legislation is appropriate to make clear that cessation of these abuses is a matter, not merely of SEC concern, but of national policy. . . .

The committee considered the matter extensively in the 94th Congress and concluded that the criminalization approach was preferred over a disclosure approach. Direct criminalization entails no reporting burden on corporations and less of an enforcement burden on the Government. The criminalization of foreign corporate bribery will to a significant extent act as a self-enforcing, preventive mechanism.

S. REP. No. 95-114, at 10 (1977).

41. For example, in response to the testimony of Lockheed's chairman on his company's position with regard to the disclosure of the names and nationalities of the officials alleged to have received payments, Senator William Proxmire remarked: "You and others talk about how we should stop this. Everybody in this room agrees it is a vicious and demoralizing practice. The way to start to stop it is to disclose it." *Lockheed Bribery*, *supra* note 10, at 32.

42. These practices were illicit at least to the extent that the conduct was prohibited in the host country or would have been unlawful if conducted in the United States.

43. For the SEC an important issue was the materiality of corporate bribery. Did not foreign bribery mean that certain investment or transaction relied not upon performance, but on favorable, and possibly temporary, corrupt governmental treatment? Did not foreign bribery and slush funds reveal significant corporate issues about the quality of the stewardship of a corporation? And finally, did an investor have a right to choose her investment on grounds other than strictly financial information, such as her personal position on business ethics? These questions raised concerns regarding the principles upon which the healthy functioning of the capital market should rest. See *The Activities of American Multinational Corporations Abroad*, *supra* note 5, at 59-61.

mension could have been addressed by the reporting and accounting obligations proposed by the Commission. For example, even though some had argued that foreign policy concerns weighed against detailed disclosure of information, Congress chose to press for full disclosure.⁴⁴ Similarly, in penalizing foreign bribery payments, Congress brushed aside foreign policy arguments, pointing to the fact that numerous other countries punish bribery through criminal sanctions.⁴⁵ Though it had been vigorously argued that the criminal approach would pose a serious disadvantage to American companies attempting to compete in the international market, it appears that Congress ultimately adopted sanctions because it simply considered the practice to be wrong.⁴⁶ In doing so, it laid the foundation for the current international developments.

Senate Bill 305, as amended by the Conference Report, was eventually approved with no opposition in the Senate or the House of Representatives.⁴⁷ On December 19, 1977, President Jimmy Carter signed into law the Foreign Corrupt Practices Act of 1977 (FCPA).⁴⁸

The FCPA amended the Securities and Exchange Act of 1934 and was the first national statute criminalizing bribery of foreign officials. The FCPA also established new accounting obligations as a result of the SEC's experience in the investigation of foreign illicit payments. Though doubts remain about its success in the areas of compliance and enforcement, the FCPA has unequivocally entered the business culture of American companies operating internationally. The American business community's strong interest in extend-

44. The State Department stated before the Subcommittee on International Economic Policy that since the U.S. Congress started revealing the questionable conduct of U.S. companies abroad, "the head of a friendly government" had been removed from office, "other friendly leaders" were under political attack, and the property of an American company had been expropriated in one country even though the bribing scandal had occurred in a different one. *Id.* at 22. For Congress, however, it was not the disclosure that had affected foreign relations, but the pervasive existence of the practice.

45. The State Department had also expressed concern that legislating the conduct of American business abroad could be considered an extraterritorial measure and a foreign imposition of U.S. moral standards. *See id.* at 24.

46. Interestingly, bribery is one of only two specific words used to exemplify sufficient cause to impeach high government officials, including the President of the United States. *See* U.S. CONST. art. II, § 4.

47. *See generally* H.R. Rep. No. 95-831 (1977); 123 Cong. Rec. 38,599, 38,779 (1977).

48. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 & 78dd-2 (1994)). The Act was amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302.

ing FCPA disciplines abroad suggests that Congress achieved, at least to some degree, the Act's intended deterrent effect.

The FCPA has been amended twice since its passage in 1976. In 1988, Congress amended the FCPA as part of a broad legislative effort to strengthen the global competitiveness of American businesses. These measures were enacted as part of the Omnibus Trade and Competitiveness Act of 1988. The amendments to the FCPA were included in Title V, Subtitle A of the Omnibus Act.⁴⁹ The 1988 amendments were aimed at reaffirming Congressional commitment to stemming transnational corporate corruption, while limiting the exposure of U.S. businesses to violations of the FCPA by clarifying certain areas of the Act.⁵⁰ The FCPA was again amended through the International Anti-Bribery and Fair Competition Act of 1998.⁵¹ However, the 1998 amendment's intent was to adopt the conventional international law obligations negotiated at the seat of the OECD.⁵²

3. *The 1976 Foreign Corrupt Practices Act as Amended.* The following description seeks to provide a basic summary of the organization and content of the Act.⁵³ This will be helpful to

49. See Omnibus Trade and Competitiveness Act §§ 5001-03.

50. The final congressional report on the amendments contains three congressional findings and two conclusions:

The findings noted (1) the significant contribution Congress made in enacting the Foreign Corrupt Practices Act (FCPA) in 1977, while citing (2) unnecessary concern among exporters about the scope of the Act and (3) unnecessary and costly paperwork burdens imposed on issuers of securities by unclear and excessive accounting standards. The conclusions states that (1) the principal objectives of the FCPA should be maintained because they are important to the nation and our trade relationships and (2) exporters should not be subject to conflicting demands by diverse agencies enforcing the FCPA.

H.R. CONF. REP. NO. 100-576, at 916 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1949.

51. Pub. L. No. 105-306, 112 Stat. 3302.

52. See discussion *infra* Part III.B.1.

53. The FCPA has been the subject of thorough study and review by scholars and practitioners. See generally, *e.g.*, DON ZARIN, *DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT* (1998); JEFFREY P. BIALOS & GREGORY HUSISIAN, *THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH CORRUPTION IN TRANSITIONAL ECONOMIES* (1997); DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE* (1994); Mark Shaffer & Anna Welch, *Foreign Corrupt Practices Act*, 34 AM. CRIM. L. REV. 697 (1997); Matt T. Morley & Yan Liu, *De-Greasing the Wheels of Commerce: U.S. Anti-Bribery Initiatives Signal Stiffening FCPA Enforcement*, 11 INSIGHTS 2 (1997); Michael D. Mann & Maria L. Sachs, *Foreign Corrupt Practices Act—Books and Records Requirements: Enforcing Corporate Integrity*, 1011 PLI/CORP 303 (1997); Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749 (1996); Steven C. Perkins, *Bibliography on the Foreign Corrupt Practices Act of 1977*, 14 W. ST. U. L. REV. 491 (1987).

understand how and to what extent the OECD and OAS international agreements followed the FCPA model.

The FCPA has two main components: 1) provisions that make bribing a foreign official a crime (the foreign corrupt practice); and, 2) provisions regarding accounting practices. These two components will be addressed in turn.

a. Bribery of Foreign Officials

i. Who Is Subject to Criminal Liability under the FCPA?

Corporations that trade in the U.S. securities market, American corporations, nationals, citizens, and residents, can be liable under the FCPA for foreign corrupt practices, as can the officers, directors, employees, agents, and stockholders acting on behalf of these parties.⁵⁴ The FCPA's liability rests on two alternative jurisdictional grounds. Firstly, jurisdiction may lie when there is use of the mails or other means of interstate commerce corruptly in the United States in furtherance of a foreign corrupt practice.⁵⁵ Secondly, jurisdiction lies when there have been foreign corrupt practices outside the United States.⁵⁶ Foreign corporations and foreign natural persons, their officers, directors, employees, agents, and stockholders acting on their behalf can also be liable under the FCPA for acts in furtherance of foreign corrupt practices while within the territory of the United States.⁵⁷

ii. What Kind of Conduct Constitutes a Foreign Corrupt Practice? A foreign corrupt practice is basically any offer,

54. See 15 U.S.C. §§ 78dd-1(a), 2(a). The Act refers to issuers of U.S. securities and domestic concerns. For the purposes of the Act, issuers of U.S. securities include corporations that have a class of securities registered, or that are required to file reports under the Securities and Exchange Act of 1934. Domestic concern means "any individual who is a citizen, national, or resident of the United States, and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h); see also, BIALOS, *supra* note 53, at 31.

55. See 15 U.S.C. § 78dd(a).

56. See *id.* §§ 78dd-1(g), 78dd-2(i), as amended by International Anti-Bribery and Fair Competition Act of 1998.

57. See 15 U.S.C. §§ 78dd-3 as amended by the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-306, 112 Stat. 3302. Section four of the Act refers to "any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or domestic concern" as defined by the 1998 Act. International Anti-Bribery and Fair Competition Act § 4.

authorization of payment, or payment of anything of value to certain foreign recipients covered by the Act.⁵⁸ The Act covers offers and payments to foreign officials, including foreign government officials and officials of international organizations, foreign political parties and their officials, and foreign political candidates.⁵⁹ The Act also covers offers and payments to any other person where the offeror knows that all or a portion of what is given will directly or indirectly reach any of the foreign recipients described above.⁶⁰ For example, the FCPA covers payments made through agents or family members of foreign officials.

In addition, the offer or payment must be made for the purpose of influencing any act or decision of the foreign recipient in his official capacity, inducing the foreign recipient to act—or refrain from acting—in violation of his lawful duty, securing any improper advantage, or inducing such foreign recipient to use his influence to affect decisions of governments or instrumentalities.⁶¹

iii. Exceptions and Affirmative Defenses. The 1988 amendments to the FCPA established an exception and two affirmative defenses that sought to clarify the scope of the Act. The exception, commonly known as the “grease payment” exception, establishes that the FCPA does not apply to payments made to foreign government officials for routine governmental action.⁶² The

58. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). The Act refers to acts in furtherance of “an offer, payment, promise to pay or authorization of the payment of any money, or offer, gift, promise to give or authorization of the giving of anything of value.” *Id.*

59. See *id.* §§ 78dd-1(a)(1)-(2), 78dd-2(a)(1)-(2). As amended by the International Anti-Bribery and Fair Competition Act of 1998, the scope of foreign official was broadened to include not only “any officer or employee of a foreign government or any department, agency, or instrumentality thereof,” but any officer or employee “of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality or for or on behalf on any such public international organization.” *Id.* §§ 78dd-1(f)(1), 78dd-2(h)(2).

60. See *id.* §§ 78dd-1(a)(3), 78dd-2(a)(3). Under the Act, a person knows “with respect to conduct, a circumstance, or a result, if such person is aware that such person is engaging in such conduct, that such circumstances exist, or that such result is substantially certain to occur; or such person has a firm belief that such circumstances exist or that such result is substantially to occur.” *Id.* Knowledge is also established if a person is aware of a high probability of the existence of such circumstances. See *id.* §§ 78dd-1(f)(2)(A), (f)(2)(B), 78dd-2(h)(3)(A), (h)(3)(B).

61. See *id.* §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

62. See *id.* §§ 78dd-1(b), 78dd-2(b). These payments are construed in a limited manner to address such actions that are regularly and commonly performed by government officials and do not require any discretionary decision. In other words, these actions will not constitute actions within the decision-making process of officials in order to award new business or continue business with a particular party. See BIALOS, *supra* note 53, at 43-44.

first affirmative defense covers foreign payments that are lawful in the jurisdiction of the foreign recipient.⁶³ The second affirmative defense concerns reasonable bona fide expenditures incurred that are directly related to promotional activities or the execution of a contract.⁶⁴

iv. Scope of the Act and Penalties. As described above, the scope of the Act is very broad, especially as a result of the amendments implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In addition, the exception and affirmative defenses are limited in scope. In fact, they have not yet been tested or invoked in court proceedings.

To summarize, the FCPA applies to any person who has a certain degree of connection to the United States and engages in foreign corrupt practices. The Act also applies to any act by U.S. businesses, foreign corporations trading securities in the United States, American nationals, citizens, and residents acting in furtherance of a foreign corrupt practice whether or not they are physically present in the United States. In the case of foreign natural and legal persons, the Act covers their actions if they are in the United States at the time of the corrupt conduct. Further, the Act governs not only payments to foreign officials, candidates, and parties, but any other recipient if part of the bribe is ultimately attributable to a foreign official, candidate, or party. These payments are not restricted to just monetary forms and may include anything of value. The Act establishes stiff penalties for corrupt practices, including criminal and civil fines and prison sentences. Criminal fines can amount to a maximum of \$2,000,000 for corporations and \$100,000 for individuals; prison sentences can reach a maximum of five years. Civil fines and prison sentences can be applied simultaneously.⁶⁵

63. See 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1). The purpose of this provision was to remove potential jurisdictional conflicts with regard to permissible contributions or payments in foreign countries—for example, lawful campaign contributions or lobbying expenses. A valid defense requires that payments be lawful under the written law of the foreign recipient country. This requirement does not proscribe application of the common law, but rather ensures that the absence of a specific statute expressly prohibiting the payment does not of itself signify the validity of the payment. See also BIALOS, *supra* note 53, at 44-45.

64. See 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2). For example, it is permissible to send samples of products to foreign officials in order to make them aware of the quality of the products. The test of this exception is whether the expenditure has a corrupt purpose. See BIALOS, *supra* note 53, at 46-47.

65. See 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-2(g)(2), 78ff(c)(1), 78ff(c)(2)(A), (B).

b. Accounting Provisions. The accounting provisions of the FCPA were established to address the concern that companies were concealing improper foreign payments through either off-the-book payments or deceptive accounting practices, such as the maintenance of dual sets of books. The FCPA's accounting provisions are contained in an amendment to the Securities Exchange Act and apply to issuers of securities that have reporting obligations with the SEC.

The FCPA requires compliance with generally accepted accounting principles (GAAP), and transforms these requirements, in the opinion of the SEC, from professional to mandatory standards.⁶⁶ The Act establishes two basic requirements for issuers. Firstly, they must "make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."⁶⁷ Secondly, they must "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances"⁶⁸ that transactions and access to assets respond to management's authorization, that transactions are recorded as necessary, and that records and assets are regularly compared and action is taken with regards to differences.⁶⁹

Simply put, the first accounting requirement strengthens the criminalization of foreign corrupt practices by making it a separate offense under the Act if payments are not recorded with sufficient accuracy to reflect their true nature. In other words, if a payment is indeed a bribe but is not reflected in the books with sufficient candor to indicate such, the accounting requirement is violated.⁷⁰

The second requirement refers to the objectives that the issuers' general accounting systems must meet for the purposes of the statute. The standard of care of "reasonable assurances" allows companies to balance the burden of changing accounting practices with the requirements of the Act.⁷¹

The accounting provisions of the FCPA also contemplate criminal and civil penalties. Criminal consequences for "knowingly circumventing or knowingly falsifying documents or internal accounting controls" could result in maximum sentences of ten years in prison

66. See BIALOS, *supra* note 53, at 61.

67. 15 U.S.C. §78m(b)(2)(A).

68. *Id.* §78m(b)(2)(B).

69. *See id.*

70. See BIALOS, *supra* note 53, at 64.

71. *See id.* at 65.

and fines of up to \$1,000,000 for individuals and \$2,500,000 for corporations.⁷²

B. The International Consequences of the U.S. Congressional Investigations

1. *Immediate Consequences.* The investigations by Congress and various federal agencies into illicit and questionable foreign payments had consequences abroad, in countries as diverse as Honduras, Japan, Costa Rica, Italy, Bolivia, and the Netherlands. The bribery scandals did not discriminate between developed and developing countries. In fact, two of the most publicized scandals were connected to the senior government officials of wealthy, developed countries: Japan and the Netherlands. In both countries, the investigations resulted in political crises and exposure of the principal political figures involved.

The Dutch investigations led all the way to the royal family. Lockheed's Vice-Chairman admitted at a congressional hearing that the company had paid \$1.1 million to a "high government official of the Netherlands,"⁷³ who was later implied to be Prince Bernhard, the husband of Queen Juliana. In response, the Dutch government set up a special commission to investigate the scandal. Under interrogation about the payment, Prince Bernhard pled "loss of memory."

After the special investigative panel concluded that Lockheed "had to assume that the money indeed reached the prince," the Dutch government admitted publicly that Bernhard had succumbed to "dishonorable [offers] and favors" from Lockheed.⁷⁴ Bernhard, a hero of World War II, was spared from criminal prosecution in large measure due to public sympathy for the revered Queen Juliana, who, at one point, was asked not to abdicate her throne in order to prevent political crisis.⁷⁵ However, Prince Bernhard was stripped of his position as inspector general of the Dutch armed forces, and he was obliged to resign all his military and political posts, including his position on the World Wildlife Fund.⁷⁶

72. See 15 U.S.C. § 78ff(a).

73. See *Foreign and Corporate Bribes*, *supra* note 10, at 58.

74. The panel was not able to trace the money to Prince Bernhard's pockets. See William Drozdiak, *Holland's Prince Slips Back Into the Limelight*, WASH. POST, Nov. 4, 1977, at 16.

75. See *id.*

76. See *id.*

Japan's Prime Minister, Kakuei Tanaka, also fell victim to the Lockheed hearings and was forced to resign and submit to prosecution when it was alleged that Lockheed had made illicit payments totaling nearly \$25 million to high-ranking Japanese government officials.⁷⁷ Tanaka was eventually charged with accepting ¥500 million from Lockheed, and he was sentenced to four years in prison.⁷⁸ The Japanese criminal investigations shook Japan's ruling party and unleashed a fierce internal political crisis.⁷⁹

These scandals revealed, *inter alia*, that deep-seated corruption was not limited to developing nations; business officials of both developed and developing countries participated in corruption with similar levels of resourcefulness and imagination. Interestingly, none of these investigations led to a call for reform similar to that which preceded the FCPA.

Although no other developed or developing countries addressed foreign corruption, the issue was on the agenda of the United Nations. In 1975, the United States, Iran, and Libya each introduced—and later withdrew—proposals for a General Assembly resolution on corruption.⁸⁰ The General Assembly adopted a resolution on the basis of a fourth draft introduced by a group of developing and Central European countries.⁸¹

General Assembly Resolution 3514,⁸² condemning all corrupt practices, including bribery, was adopted on December 15, 1975.⁸³ The resolution was drafted to reflect the language and objectives of the New International Economic Order movement and reflected the

77. See William H. Jones & John F. Berry, *Lockheed Paid \$38 Million in Bribes Abroad*, WASH. POST, May 27, 1977, at E9.

78. See *Former Japanese Prime Minister Convicted for Bribery*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Oct. 12, 1983, available in LEXIS, News Library, All Group File.

79. See Kim Willenson et al., *Sordid Maneuvers*, NEWSWEEK, May 31, 1976, at 32.

80. The Iranian proposal called for governments to take strict measures against corruption, asked the Secretary General to conduct a study on ways to fight corruption (including establishing a code of conduct), and called upon governmental and non-governmental organizations to assist in these efforts. The Libyan proposal condemned what it called the immoral activities of multinational corporations that threatened the safety and security of people and states. Libya called for sanctions, including international boycotts, against bribing corporations. The U.S. proposal called for the General Assembly's condemnation of both the offering and solicitation of bribes and called for international cooperation to address the problem. See 1975 U.N.Y.B. 486, 487.

81. Algeria, Argentina, Benin, Bolivia, Colombia, Costa Rica, Cuba, Democratic Yemen, Ecuador, Egypt, Gabon, Guyana, Iran, Iraq, Libya, Madagascar, Nigeria, Pakistan, Peru, Romania, Somalia, Syria, Togo, Tanzania, Upper Volta, Venezuela, and Yugoslavia. See *id.* at 487.

82. G.A. Res. 3514, U.N. GAOR, 2d Comm., 30th Sess., U.N. Doc. A/10467 (1975).

83. See *id.*

antagonism between developed and developing nations characteristic of the 1970s.⁸⁴ For example, the resolution emphasized states' rights to take appropriate legal action within their jurisdictions against transnational corporations (TNCs). The resolution also called for the exchange of relevant information, encouraged home governments to cooperate with host governments to prevent bribery, and urged states to prosecute offenders within the scope of their national jurisdictions.⁸⁵

The resolution also requested the Economic and Social Council (ECOSOC) to direct the Commission on Transnational Corporations to include the foreign illicit payments issue in its work program. During the debates, the United States and Germany insisted that corruption be addressed both from the offering and the solicitation sides.⁸⁶ Notwithstanding the resolution's emphasis on the supply side, its confirmatory tone, and virtual lack of substance, it was the first truly international acknowledgment of corruption in international business transactions.

In March 1976, the Paris-based International Chamber of Commerce (ICC) announced the creation of a blue ribbon commission to study the problem of improper payments in international business transactions. The commission, headed by British international lawyer Lord Shawcross, was entrusted to propose guidelines of proper conduct for private and public agents in international trade.⁸⁷ The Commission issued its report "Extortion and Bribery in Business Transactions" in 1977. The report called for action at three levels: (1) an international treaty; (2) measures at the domestic national level; and (3) business self-regulation, including the establishment of an ICC panel to hear allegations of violations of the code's rules.⁸⁸ Unfortunately, the report was mired in controversy (particularly controversial was the panel proposal), and the ICC's work stalled for many years.⁸⁹

84. For example, the resolution cited the Declaration on the Establishment of a New International Economic Order, the Programme of Action on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States. The last document was cited for the proposition that transnational corporations should not operate in ways that violate the laws and regulations of host countries. G.A. Res. 3514, U.N. GAOR, 2d Comm., 30th Sess., U.N. Doc. A/10467 (1975).

85. *Id.*

86. See 1975 U.N.Y.B. 487.

87. See *Foreign and Corporate Bribes*, *supra* note 10, at 56.

88. Fritz F. Heinman, *Combating International Corruption: The Role of the Business Community*, in *CORRUPTION AND THE GLOBAL ECONOMY* 147, 150 (Kimberly A. Elliot ed., 1997).

89. *Id.*

In 1976, the United Nations continued its work on corruption. This work was mostly carried out by ECOSOC and the Commission on Transnational Corporations.⁹⁰ The Secretary General prepared a report to cover government measures adopted to combat corruption.⁹¹

On August 5, 1976, ECOSOC established the Ad Hoc Intergovernmental Working Group on Corrupt Practices (the "Ad Hoc Group").⁹² The group was charged with elaborating a proposal for an international agreement to prevent and eliminate illicit payments in international transactions.⁹³ Bribery was not ECOSOC's priority so much as the drafting of a code of conduct for transnational corporations.⁹⁴

When the Ad Hoc Group submitted its first report and outline to the United Nations in 1977 it was received with skepticism in some quarters. Several countries expressed the view that this issue should be placed in the transnational corporations code of conduct and that the bribery working group was duplicating its efforts.⁹⁵ In 1978, the Ad Hoc Group completed its work and submitted a report to ECOSOC that included the draft text of an international agreement to prevent and eliminate illicit payments in international commercial transactions. The report also recommended convening a diplomatic conference to conclude the proposed agreement.⁹⁶ ECOSOC resolved to establish a Committee on an International Agreement on Illicit Payments that would continue working on the draft and convene a diplomatic conference in 1980 to negotiate the illicit payments agreement.⁹⁷ However, ECOSOC emphatically noted again that its first priority was the elaboration of the TNC code of conduct, and it directed the Commission on Transnational Corporations to accelerate its work.⁹⁸

90. See 1976 U.N.Y.B. 459.

91. *Id.* at 460.

92. See 1976 U.N.Y.B. 460-61.

93. E.S.C. Res. 2041 (LXI), U.N. ESCOR, 61st Sess., 2032 mtg., U.N. Doc. E/5883 (1976).

94. See *id.* and E.S.C. Res. 2122 (LXIII), U.N. ESCOR, 63d Sess., 2085 mtg., U.N. Doc. E/6048 (1977). For example, the 1977 Council's resolution acknowledged the Economic and Social Council's reaffirmation that:

the formulation of a code of conduct by the Commission on Transnational Corporations should be given the highest priority and that the conclusion of an international agreement on illicit payments should in no way interfere with or delay that priority.

Id.

95. See 1977 U.N.Y.B. 531-32.

96. See 1978 U.N.Y.B. 550.

97. E.S.C. Res. 1978/71, U.N. ESCOR, 2d Sess., 38 mtg., U.N. Doc E/1978/133 (1978).

98. See *id.*

Another body created by ECOSOC, the Group of Experts on International Standards of Accounting and Reporting, also submitted a report in 1977 to the Commission on Transnational Corporations and to the Secretary General. Regrettably, a strong connection between this group's work and the foreign corruption problem was never established.⁹⁹ In 1979, ECOSOC established the Ad Hoc Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting that was charged with continuing the work of the Group of Experts and providing recommendations to the Commission on Transnational Corporations on other steps that ought to be taken in this area.¹⁰⁰

In 1979, the United States introduced a draft resolution proposing to convene an international conference that would conclude an international agreement on illicit payments. ECOSOC took no action on this proposal, which was eventually withdrawn.¹⁰¹ In 1980, India, on behalf of the Group of 77, introduced a draft resolution that conditioned this conference on the adoption of the TNC code of conduct. In contrast, the United States' second draft resolution proposed that the Council convene an international conference no later than June 30, 1981, to adopt an agreement on illicit payments.¹⁰² ECOSOC transmitted both these proposals to the General Assembly, which acted on neither. Nonetheless, the spirit of the Indian proposal governed ECOSOC's approach to the issue.

The United Nations' efforts to develop an illicit payments agreement was caught in the West-East and North-South struggles of the 1970s and 1980s. The illicit payment agreement draft was to some extent held hostage at ECOSOC by the Group of 77.¹⁰³ Developing countries (with the support of the communist bloc) conditioned consideration of the proposal on the completion of the code of conduct for transnational corporations. Despite substantial efforts, negotiation, and ECOSOC's commitment to its completion, the code of conduct made little progress during the 1980s and finally died in the early 1990s. In 1981, the United States made a final, unsuccessful attempt

99. See 1977 U.N.Y.B. 532.

100. See 1979 U.N.Y.B. 628.

101. See *id.* at 626.

102. See 1980 U.N.Y.B. 668.

103. See Jay M. Vogelsson, *Corrupt Practices in the Conduct of International Business: Section Recommendations and Reports*, American Bar Association Section of International Law and Practice Reports to the House of Delegates, 30 INT'L L. 193, 195 (1996).

to advance the international illicit payments issue. The issue did not return to the United Nations until the 1990s.

2. *No Significant Progress in the International Agenda.* As noted above, efforts to develop an international agreement during the late 1970s were impaired because the issue was tied to the completion of the draft code of conduct. ECOSOC did not even address foreign illicit payments from 1981 to 1988. The TNC code of conduct negotiations continued during this time but did not produce a final code agreeable to all parties. The main sources of conflict remained the nature of the code under international law (mandatory versus hortatory), standards of treatment and compensation regarding transnational corporations (whether a minimum international legal standard existed or national standards sufficed), and questions of sovereignty over natural resources. The negotiations were mired in North-South tensions.

Starting in 1988, however, the changing world economy gradually affected the United Nations' work in this area. For example, in its 1988 report on international arrangements and agreements related to TNCs, the Secretary-General concluded that recent developments demonstrated important changes at the multilateral level, such as new efforts to limit national protectionist and regulatory measures.¹⁰⁴ The Secretary-General also noted "the shift of emphasis in international negotiations to formulating standards of treatment of TNCs" rather than their standard of conduct.¹⁰⁵ A year later, in its report on the status of negotiations of the TNC code of conduct, the Secretary-General noted the trend towards the "transnationalization of economic activity, [and] the ongoing round of multilateral trade negotiations aimed at establishing an international regime on foreign direct investment measures. . . ."¹⁰⁶ The Uruguay Round of the General Agreement on Trade and Tariffs (GATT), *perestroika* and *glasnost* in the Soviet Union, the collapse of the communist bloc in Europe and central Asia, the widespread economic liberalization and internationalization programs pursued by a number of developing countries, and other events began to change the traditional conceptualization of international trade and economic relations. A new world was around the corner, and with it new issues—or at least new approaches to old issues.

104. See 1988 U.N.Y.B. 427, 428.

105. *Id.* at 428.

106. 1989 U.N.Y.B. 387.

III. THE WORLD CHANGES AND INTERNATIONAL ANTI-CORRUPTION INITIATIVES FLOURISH (1989-1999)

A. The United Nations' Contribution

1. *New Approaches at the United Nations*

a. Addressing Corruption in Relation with the Fight Against International Organized Crime. The changes in the world economy of the late 1980s, including the trend towards globalization, also brought renewed awareness of international criminal activity. The United Nations addressed this issue by encouraging international efforts against global organized crime. Corruption was reintroduced to the United Nations agenda as an item under study related to ECOSOC's work against organized crime.¹⁰⁷

In late 1989, the Department of Technical Co-Operation and Development and the Government of Netherlands held an Interregional Seminar on Corruption in Government at the Hague.¹⁰⁸ The seminar was organized in anticipation of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.¹⁰⁹ A draft manual on practical measures against corruption was reviewed at the seminar, as were a number of recommendations, including strengthening international cooperation to combat corruption, elaborating an international code of conduct for public officials, and including corruption in the study of international criminal jurisdiction.¹¹⁰

107. On July 14, 1989, the Economic and Social Council stated in resolution 1989/70 on International Co-Operation In Combating Organized Crime its concern that:

organized crime has increased in many parts of the world and has become more transnational in character, leading, in particular, to the spread of such negative phenomena as violence, terrorism, *corruption*, illegal trade in narcotic drugs and, in general, undermining the development process, impairing the quality of life and threatening human rights and fundamental freedoms. . . .

E.S.C. Res. 1989/70, U.N. ESCOR, 1st Sess., 50th mtg. at 1, U.N. Doc. E/RES/1989/70, E/1989/INF/7 (1989) (emphasis added).

108. See Report of the Secretary-General: Crime prevention and criminal justice, U.N. Economic and Social Council, 1st Sess., Agenda Item 5, at 5, U.N. Doc. E/1990/36 (1990).

109. See *id.*

110. The seminar also noted the connection between corruption and organized crime, particularly drug trafficking. It recommended national measures such as economic competition, deregulation, professionalization, parliamentary democracy, increased public accountability, freedom of the press, and provision of adequate channels for complaints. There was also discussion of measures to enhance co-operation by witnesses through protection from retribution and financial rewards, forfeiture and confiscation of corruptly gained assets, and provisions against money laundering. See *id.*

In 1990, the Secretary General completed a manual on practical measures against corruption that had been previously circulated in the Hague Seminar.¹¹¹ The manual sought to guide national efforts to combat corruption by reviewing problems encountered by policy-makers and practitioners, and it included various suggestions to assist countries in the development of their own domestic anti-corruption programs.¹¹²

In late 1990, the General Assembly adopted recommendations on international cooperation for crime prevention and criminal justice in the context of development, which included a paragraph of recommendations on corruption.¹¹³ The recommendations called for the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs of the Secretariat to prepare a manual on methods of combating corruption and to provide technical training to judges and prosecutors handling corruption cases.¹¹⁴

In 1992, the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders called upon the Crime Prevention and Criminal Branch to develop a draft international code of conduct for public officials.¹¹⁵ In November 1994, the United Nations International Drug Control Program organized a Ministerial Forum Against Corruption in Pretoria, South Africa.¹¹⁶ One year later, the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended a number of measures for the prevention of corruption, for example, the establishment of inde-

111. See *Manual Prepared by the Secretariat: Practical Measures Against Corruption, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/CONF.144/8 (1990), revised by U.N. Doc. A/CONF.144/8/Corr.1 (1990).

112. See *id.*

113. Paragraph 8 of the recommendation called for nations to take measures against public corruption. This recommendation called for nations to review the adequacy of their criminal laws against corruption, devise other non-criminal mechanisms against corruption, adopt measures to detect and prosecute corrupt officials, address issues of forfeiture of funds arising out of corrupt practices, and take measures against enterprises involved in corruption. See G.A. Res. 45/107, U.N. GAOR, 45th Sess., Agenda Item 100, U.N. Doc. A/RES/45/107.

114. See *id.*

115. See E.S.C. Res. 1992/23, U.N. ESCOR, 1st Sess., 41st mtg., Annex I, U.N. Doc. E/RES/1992/23, E/1992/INF/7 (1992). The code of conduct was eventually adopted on December 12, 1996. See G.A. Res. 51/59, U.N. GAOR, 51st Sess., 82d Plenary Mtg., Item 101, at Annex, U.N. Doc. A/RES/51/59 (1996).

116. See *Background Paper Prepared by the Secretariat on International Action Against Corruption, Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/CONF.169/14 (1995).

pendent bodies to monitor governmental conduct.¹¹⁷ The Ninth Congress also encouraged the international community to continue strengthening cooperative efforts, and it noted the significant role the United Nations could play in combating international corruption. In Part IV below, it will be further suggested that, in studying the efforts to combat corruption under international law, the work and role of the United Nations should be reassessed toward a more balanced and comprehensive development of the international anti-corruption agenda.

The United Nations has since developed and encouraged a number of studies, meetings, and activities related to crime prevention and corruption matters. Currently, several units, such as the United Nations Crime Prevention and Criminal Justice Program and the United Nations Development Program, regularly address this subject.¹¹⁸

b. The United Nations Again Addresses the Foreign Illicit Payments Issue. In the late 1980s and early 1990s, for reasons similar to those that motivated the United Nations to address organized crime and corruption, the work of the Commission on Transnational Corporations also began to shift. New areas of study were gradually introduced, such as the relation between TNCs and environmental matters, intellectual property, and trade-related investment measures.¹¹⁹

With mounting concern about corruption, the Commission in early 1991 requested a report from the Secretary General on the issue of corruption in international business transactions.¹²⁰ The Secretary General's report recalled the earlier draft international agreement on

117. See 1995 U.N.Y.B. 1154. Spain had previously hosted an international meeting of corruption experts in preparation for the Congress. E.S.C. Res. 1994/19, U.N. ESCOR, 1st Sess., 43d mtg., U.N. Doc. E/RES/1994/19, E/1994/INF/6 (1994).

118. The United Nations Development Programme (UNDP) supports international and non-governmental initiatives, including publications, conferences, and symposia, as part of its program on accountability and transparency known as "PACT." PACT has three primary aims:

- (1) Facilitating co-ordination and policy dialogue among stakeholders, including providing a forum for issues and concerns on the international development agenda;
- (2) building and strengthening national capacities to develop and implement comprehensive anti-corruption reform strategies, and
- (3) creating and strengthening partnerships at the global, regional and national levels for strategic intervention.

Pauline Tamesis, *Different Perspectives of International Development Organisations in the Fight Against Corruption*, in CORRUPTION AND INTEGRITY IMPROVEMENT INITIATIVES IN DEVELOPING COUNTRIES 129, 131 (1998).

119. See e.g., 1990 U.N.Y.B. 497.

120. See 1991 U.N.Y.B. 465.

this issue and noted that the draft had attained a substantial degree of support. It also expressed the view that national laws alone were not always effective in dealing with corruption and that international action was still necessary.¹²¹

By this time, the issue that had blocked the illicit payments agreement proposal—the negotiation of a TNC code of conduct—had lost its force and finally came to an end in 1992. After a July meeting, the Secretary General reported that the delegations had failed to reach a consensus on a TNC code of conduct and had expressed the view that a different international instrument on foreign investment was necessary, given the changing international economic environment.¹²² Thus, the way was paved for the United Nations to again address the issue of bribery in international business transactions.

In 1994, two significant, related events had a positive impact on the work conducted by the United Nations. First, the OECD recommended that its member countries criminalize foreign bribery, and second, the governments attending the Summit of the Americas committed themselves to a renewed fight against corruption and bribery. Influenced by these events, the East and Central African Seminar on Corruption, Human Rights and Democracy held late that year in Uganda called upon all African leaders to adhere to the recent OECD recommendation and to follow the example set by the American nations.¹²³

The progress made at the OECD and the OAS led the United States, along with Argentina and Venezuela, to submit a draft resolution in June 1996 for a United Nations Declaration on Corruption and Bribery in Transnational Commercial Activities.¹²⁴ After several drafts and attempts at negotiation, the declaration was adopted in late 1996.

Though not binding, this declaration represents the most extensive expression of the international community's commitment to fight corruption and bribery in international business transactions to date. Finally, it is significant to note that the General Assembly has also

121. *See id.* The report was submitted in July 1991. *See id.*

122. *See* 1992 U.N.Y.B. 644, 645.

123. *See id.*

124. *See Argentina, United States of America and Venezuela: Draft Resolution: Corruption in Transnational Commercial Activities*, E.S.C., 1st Sess., Agenda Item 6(i), U.N. Doc. E/1996/L.26 (1996). The proposal was also based on General Assembly resolution 50/106, which recommended that the ECOSOC reconsider the draft international agreement on illicit payments that had been abandoned years previously. *See* G.A. Res. 50/106, U.N. GAOR 50th Sess., Agenda Item 95(h), U.N. Doc. A/RES/50/106 (1996).

adopted other resolutions related to corruption and bribery, including the recently implemented International Code of Conduct for Public Officials,¹²⁵ which offer valuable resources in the analysis of international law.

2. *The 1996 U.N. Declaration.* The U.N. Declaration Against Corruption and Bribery in International Commercial Transactions (“1996 U.N. Declaration”) was adopted without vote by the General Assembly on December 16, 1996.¹²⁶ Though not legally binding, the resolution expresses the interest and concern of the international community in the development of anti-corruption measures. More balanced than its 1975 predecessor, it encourages countries to continue anti-corruption efforts in multiple fora, and to criminalize and prosecute corruption and bribery in international commercial transactions.¹²⁷

The third paragraph of the preamble sets the tone of the document. Its approach to corruption and bribery comprehensively states that the global fight against these practices is essential to “an improved international business environment,” fosters greater competition, and “form[s] a critical part of promoting transparent and accountable governance, economic and social development and environmental protection in all countries.”¹²⁸

The 1996 U.N. Declaration presents a model definition of the basic elements of bribery in both its “passive” and “active” characterizations,¹²⁹ following to some extent the OECD/FCPA model. In addi-

125. See G.A. Res. 51/59, U.N. GAOR 51st Sess., 82d mtg., Agenda Item 101, U.N. Doc. A/RES/51/59 (1996). The Code was devised as an additional resource for member countries in their efforts to combat corruption. The Code defines public office as a position of trust “implying a duty to act in the public interest” and provides general principles and guidelines for the treatment of conflicts of interests, disclosure of assets, acceptance of gifts or favors, confidential information and political activities of public officials.

126. See G.A. Res. 51/191, U.N. GAOR, 51st Sess., Agenda Item 12, Annex, U.N. Doc. A/RES/51/191 (1996). To urge the member states to implement the Declaration, the General Assembly adopted in December 1997 the Resolution on International Cooperation Against Corruption and Bribery in International Commercial Transactions. See G.A. Res. 52/87, U.N. GAOR 52d Sess., 70th mtg., Agenda Item 103, U.N. Doc. A/RES/52/87 (1997). This call was reiterated in December 1998. See G.A. Res. 53/176, U.N. GAOR 53d Sess., 91st mtg., Agenda Item 92, U.N. Doc. A/RES/53/176 (1998).

127. See G.A. Res. 51/191, U.N. GAOR, 51st Sess., Agenda Item 12, Annex, U.N. Doc. A/RES/51/191 (1996).

128. *Id.*

129. Paragraph 3 of the 1996 U.N. Declaration states that bribery may include “the offer, promise or giving of any payment, gift or other advantage, directly or indirectly, by any private or public corporation, including a transnational corporation, or individual from a State to any public official or elected representative of another country.” *Id.* It also operates in the reverse,

tion, it encourages states to bar tax deductions on bribery payments; develop accounting standards and practices that can help avoid and combat corruption and bribery; develop business codes and best practices against corruption; examine the possibility of legislating “illicit enrichment by government officials without demonstrable cause” as a criminal offense; provide mutual legal assistance and cooperation; and ensure that bank secrecy does not hinder corruption investigations and proceedings.¹³⁰

The number of items addressed by the Declaration is ambitious and reflects concerns developed in different international fora. The illicit enrichment concept, for example, was originally enshrined by the Latin American countries in the OAS Convention. It is now side by side with commitments to improve accounting standards and practices, business codes, and bank secrecy, concepts derived from the FCPA/OECD developments, private organization efforts, and U.N. anti-money laundering programs, respectively.

The 1996 U.N. Declaration concludes with a call for states combating corruption to respect national sovereignty, territorial jurisdiction, international law (including the principles regarding the extra-territorial application of a state’s laws), human rights and freedoms.¹³¹ When read in conjunction with the preamble, these closing paragraphs reflect the balanced approach of current efforts to improve the international business environment in accordance with the tenets of democracy, transparency, human rights, sovereignty, and the rule of international law.

The United Nations is not currently a forum for the negotiation of obligations under international conventions, but it is an important setting to bring together different perspectives, mediate concerns, and promote future development. While it has failed to make significant progress regarding the foreign illicit payment proposal in the past two decades, considering the particular circumstances involved, its efforts at least “helped call attention to and raise international awareness of the adverse consequences of bribery in international commercial transactions.”¹³² The United Nations will continue to contribute generously to the development of law in this area, and it should play an

with the official soliciting, demanding, accepting, or receiving consideration “as undue consideration for performing or refraining from the performance of that official’s or representative’s duties in connection with an international commercial transaction.” *Id.*

130. *See id.*

131. *See id.*

132. *Id.*

important role in any serious effort to bring a universal dimension to anti-corruption commitments. The role of the United Nations, including its potential contribution to customary international law, merits further study.

B. Developing International Conventional Obligations

1. *The Work at the Organisation for Economic Co-operation and Development.* The U.S. government's determination to use the FCPA to extend liability to competitor companies in foreign countries positively influenced current international anti-corruption efforts. The American business community had argued that it had lost contracts to its European competitors due to the disparate standards in anti-corruption obligations.¹³³ In some European countries, such as Germany and France, companies were able not only to extend "courtesies" to foreign government officials without fear of criminal or civil liability, but could actually deduct such payments as tax deductible expenses.

As noted earlier, these concerns in part led Congress to enact the 1988 Amendments to the FCPA and advise the President of the need to negotiate an agreement with American trading partners at the OECD.¹³⁴ However, the United States did not adopt an aggressive policy in this regard until President Clinton took office.

The State Department, which had traditionally expressed doubts about the success of FCPA-like international initiatives, made this objective a top policy priority. Then-Secretary of State, Warren Christopher, and Assistant Secretary of State for Economic and Business Affairs, Daniel K. Tarullo understood that, under the new international circumstances, the corruption issue raised not only trade concerns, but economic development and democratic accountability concerns that could be better addressed and advanced by the United States under the leadership of the State Department. In the words of Mr. Tarullo "it was an instance of confluence among international aims rather than the frequent case of conflicts among foreign policy aims" that led the State Department to successfully advocate for re-

133. The U.S. Commerce Department estimated losses of \$100 billion from differences in anti-corruption standards in the three years prior to 1996. See *US Anti-Corruption Drive Pays*, J. COMMERCE, June 20, 1996, available at LEXIS, World Library, Allwld File.

134. See 15 USC. §§78dd-1; see also Henry Rossbacher & Tracy W. Young, *The Foreign Corrupt Practices Act Within the American Response to Domestic Corruption*, 15 DICK. J. INT'L L. 509, 527 (1997).

newed international cooperation in the fight against corruption. As explained by Mr. Tarullo, the confluence of international aims and favorable circumstances included: a) the growing views of economists about the deleterious effects of corruption on economic development; b) the growing sense in some developing countries that efforts by developed countries to police their own companies would be well received; c) the change in the views of mainstream U.S. businesses that had come to believe that no-bribery policies would be sounder for their businesses as a whole; d) the growing laudable intolerance for bribery among members of the public, and in particular in Europe; and e) the recent establishment of Transparency International.¹³⁵

The same confluence of circumstances led the State Department to the conviction that an extended campaign for OECD action could be successful. The first effort centered on convincing other OECD nations to take “concrete and effective steps” to counteract corrupt foreign practices in ways consistent with their own legal traditions and practices. It was not until the State Department realized that this approach would be used by certain countries to take no action, that the administration sought a more harmonized approach that resulted in the adoption, as a working model, of the U.S. response against foreign bribery. Eventually, taking initiatives to export FCPA-like obligations became a central part of U.S. foreign policy.¹³⁶ Interviews conducted by Glynn, Kobrin, and Naim with State Department officials reveal that the negotiations between the United States and its trading partners at the OECD were not easy: the Americans had to resort to the media to place additional pressure on its European partners.¹³⁷ They also note that the escalation of bribery scandals in the

135. These favorable circumstances, in addition to efforts to reorient the State Department to a broader set of concerns than traditional foreign policy issues by the Clinton administration led the way for the State Department to take a prominent role in advancing an anti-corruption agenda internationally. At times, according to Professor Tarullo, the State Department had difficulty maintaining its broader set of aims because USTR and the Department of Commerce tended to focus exclusively on the trade and commercial aspects of bribery. Comments by Professor Daniel K. Tarullo to a previous draft of this article. See also Patrick Glynn, et al., *The Globalization of Corruption*, in *CORRUPTION AND THE GLOBAL ECONOMY*, *supra* note 88, at 7, 20.

136. See *Hearings Before the Senate Foreign Relations Comm.*, FEDERAL NEWS SERVICE, June 9, 1998, available in LEXIS, World Library, Allwld File (statement by Stuart E. Eizenstat, Under-Secretary of State for Economic, Business and Agricultural Affairs).

137. The bribery scandals, coupled with media activism, created and sustained an “embarrassment factor” as the European governments did not want to appear on record against anti-corruption initiatives. Accordingly, the 1906 English law shifted the British approach toward the U.S. model and undermined others’ concerns that the FCPA was a uniquely American creation. See Glynn et al., *supra* note 135, at 7, 21.

early 1990s and Britain's 1995 revival of its 1906 Prevention on Corruption Act further developed the case for anti-corruption measures at the OECD.¹³⁸

On May 27, 1994, the first material step was taken with the adoption of the OECD Recommendation on Bribery in International Business Transactions ("1994 OECD Recommendation").¹³⁹ The 1994 OECD Recommendation called upon member countries to take effective measures to deter and combat bribery of foreign public officials in international business transactions.¹⁴⁰ It also instructed the OECD's Committee on International Investment and Multilateral Enterprises (CIME) to follow-up and review the 1994 OECD Recommendation and report back to the Council within three years.¹⁴¹

One of the issues addressed by the 1994 OECD Recommendation was the tax deductibility of foreign payments.¹⁴² The CIME Working Group on Bribery in International Business Transactions and the Committee on Fiscal Affairs embarked on the review of the contentious matter. Though the United States had raised the issue of tax deductibility, many OECD countries were reluctant to address the matter.¹⁴³ Germany, in particular, had resisted in large measure due to its philosophy that tax matters and morality should be kept strictly separate.¹⁴⁴

138. *See id.* The authors highlighted the investigations of French and German politicians, other scandals in Asia and international media coverage. For example, the number of articles in *The Economist* and *The Financial Times* mentioning the word "corruption" rose from an average of 502 per year from 1988 to 1992 to more than 1000 per year from 1993 to 1995. In addition, in 1995 Britain resurrected the Prevention of Corruption Act of 1906, which regulates bribery in ways similar to the FCPA. The unearthing of the 1906 Act undermined European arguments that the FCPA was a uniquely American extraterritorial mechanism. The British also shifted their position to side with the United States at the OECD negotiations. *See id.*

139. *OECD Council Recommendation C(94) 75/Final on Bribery in International Business Transactions*, May 27, 1994, 33 I.L.M. 1389 (1994) [hereinafter *OECD Council Recommendation on Bribery*]; *see also Report by the OECD Committee on International Investment and Multinational Enterprises (CIME) to the OECD Council at Ministerial level in May 1997* (available at <<http://www.oecd.org/daf/cmib/bribery/briminrp.htm>>) [hereinafter *OECD Report on International Investment*]; Stuart H. Deming, *Foreign Corrupt Practices*, 31 INT'L LAW. 695 (1997).

140. *See OECD Council Recommendation on Bribery*, *supra* note 139.

141. *See id.*; *see also OECD Report on International Investment*, *supra* note 139.

142. *See id.*

143. According to the State Department, as of July 1988, the following countries continued to allow deductions of bribes paid to foreign officials: Australia, Austria, Belgium, France, Germany, Luxembourg, New Zealand, Sweden, and Switzerland. *See Hearings on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, S. EXEC. REP 105-19, at 12 (1998).

144. For example, Germany would tax prostitution notwithstanding the fact that the activity is prohibited. *See Glynn et al.*, *supra* note 135, at 22-23.

The catalyst for change was provided by tax experts of the Committee of Fiscal Affairs, who concluded that that deductibility of questionable foreign payments was of negative economic utility.¹⁴⁵ Finally, in 1996, the OECD Council adopted the Recommendation on the Tax Deductibility of Bribes of Foreign Officials, which called upon members countries to modify their tax codes to deny the deductibility of payments made to foreign officials for the purposes of securing or retaining business. Since then, all OECD countries have implemented or taken steps to implement the recommendation.¹⁴⁶

The Working Group on Bribery in International Transactions continued its work on the criminalization of foreign payments. At the May 1997 ministerial level meeting of the OECD, the CIME submitted a Revised Recommendation on Bribery in International Business Transactions (“1997 Revised Recommendation”). The 1997 Revised Recommendation was adopted on May 23, 1997,¹⁴⁷ and it included the OECD’s resolution to pursue treaty negotiations¹⁴⁸ and an annex of agreed common elements that paved the way to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹⁴⁹

Treaty negotiation is an unorthodox role for the OECD, which traditionally works upon recommendations that can be implemented flexibly according to the intricacies of its members’ legal and political

145. *See id.* at 21.

146. The following countries did not permit tax deductions for bribes prior to the 1996 Recommendation: Canada, the Czech Republic, Finland, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Poland, Turkey, the United Kingdom, and the United States. The following countries have repealed tax deductibility since the 1996 Recommendations: Austria, Belgium, Denmark, France, Germany, Iceland, Netherlands, Norway, and Portugal. As of July 30, 1999, the following countries had drafted legislation or taken a comparable step to bar the deductibility of questionable foreign payments: Australia, Luxembourg, New Zealand, Sweden, and Switzerland. *See Organisation for Economic Cooperation and Development, Tax Treatment of Bribes in OECD Member Countries* <<http://www.oecd.org/daf/nocorruption/taxstatus.htm>> (visited May 1, 2000).

147. *OECD Council, Recommendation of the Council adopted on 23 May 1997*, 36 I.L.M. 1016 (1997).

148. The 1997 Recommendation states that the Organisation:

RECOMMENDS that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter”

Id.

149. *See id.*

systems. Actual and effective implementation of the recommendations is secured through periodic monitoring, reviews, detail reporting, and, ultimately, peer pressure. For example, as late as April 1997 one commentator noted that while only Germany and France advocated the treaty approach, most other members supported direct implementation by national legislature.¹⁵⁰ The treaty approach was favored because it creates binding obligations under international law, leaves open the possibility of building a broader regime through accession, and still reaches a balanced result. For example, the obligation to criminalize foreign bribery is sufficiently flexible so that parties can implement it in accordance with their unique legal traditions, as will be pointed out in the following section.

On November 21, 1997, only six months after the Council adopted the 1997 Revised Recommendation, OECD member countries and five non-member states adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").¹⁵¹ The convention entered into force on February 15, 1999 and is open to signature by any country.¹⁵²

As noted earlier, the United States has approved and ratified the OECD Convention and implemented its provisions into law.¹⁵³ Although the Convention was generally modeled after the FCPA, the

150. Nancy Zucker Boswell, *Dealing with Corruption: Effectiveness of Existing Regimes on Doing Business*, 91 AM. SOC'Y INT'L L. PROC 99, 105 (1997).

151. See OECD Convention, *supra* note 2. The Convention was adopted at Paris on November 21, 1997, and it was signed by the United States in Paris on December 17, 1997. See *Hearings on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *supra* note 143, at 1.

152. Article 15 of the OECD Convention provides that the Convention will enter into force sixty days after five of the ten largest exporting countries deposit their instruments of acceptance, approval, or ratification; these five countries must additionally account for at least 60% of the total exports of the top ten countries. The ten largest exporting countries are the United States, Germany, Japan, France, the United Kingdom, Italy, Canada, Korea, the Netherlands, and Belgium-Luxembourg. However, the United States, Germany, and Japan alone amount to 41.8% of the total OECD export shares and to 51.8% of the total export shares of the ten largest countries. See *id.*

153. The Clinton administration urged Congress to strengthen the country's leadership by rapidly ratifying the Convention. See, e.g., *Hearings on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Treaty Doc 105-43) before the Senate Comm. On Foreign Relations*, 105th Cong. 30 (1998) (statement of Stuart E. Eizenstat). The Senate approved the Convention on July 31, 1998, and the instrument of ratification was deposited in the OECD on December 8, 1998. The implementing legislation was signed by President Clinton on November 10, 1998 and the ratification instrument on November 20, 1998. See Organisation for Economic Cooperation and Development, *Steps Taken and Planned Future Actions by Each Participating Country to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, <<http://www.oecd.org/daf/nocorruption/annex2.htm>> (visited May 1, 2000).

United States had to amend the FCPA to reflect some of the new commitments reached at the OECD.¹⁵⁴

Interestingly, during the consideration of the OECD Convention, the Senate Committee on Foreign Relations expressed concern that implementation delays and lack of enforcement by other signatories could postpone the Convention's entry into force or render it futile.¹⁵⁵ Congress thus made the Commerce Department responsible for monitoring and reporting the implementation and enforcement of the OECD Convention.¹⁵⁶

The Foreign Relations Committee also noted two important shortcomings of the OECD Convention. First, unlike the FCPA, the Convention does not address illegal contributions and payments to foreign political parties and candidates.¹⁵⁷ Second, the Convention is not clear as to whether it applies to the bribery of family members of foreign public officials.¹⁵⁸ Through these significant loopholes, signatory countries can escape the limitations of the Convention.

154. The implementing legislation, the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302, amended the FCPA in four pertinent respects. (1) The FCPA is no longer limited to issuers and domestic concerns, as defined by the Act, but will reach any person in the territory of the United States who violates the Act. In other words, all foreign natural and legal persons are now subject to the Act. (2) An alternative jurisdictional ground was included so that the FCPA can be triggered by the territoriality jurisdictional principle. (3) The definition of foreign bribery was expanded to include the purpose of "securing any improper advantage." *Id.* (4) The definition of foreign official was modified to include officials of public international organizations. *Id.* at 3303.

155. See *Hearings on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions supra* note 143, at 8.

156. The Secretary of Commerce is entrusted with reporting on both the implementation status of the Convention and the measures taken by member countries to enforce it. The Secretary also reports on the progress made by international organizations covered by the Act to combat bribery. Congress has noted the importance of transparency via the private sector's participation in monitoring the implementation of the Convention. In this regard, the Secretary of Commerce is also charged with describing "the steps taken to ensure full involvement of United States private sector participants and representatives of non-governmental organization in the monitoring and implementation of the Convention." International Anti-Bribery and Fair Competition Act of 1988 § 6.

157. The Administration explained that some countries could not define political parties and candidates as public officials under their laws, and these countries could therefore not agree to a convention encompassing these categories of recipients. The OECD Council agreed to work on this and other pending issues, such as the role of foreign subsidiaries and offshore money centers. See *Hearings on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions supra* note 143, at 10.

158. According to the State Department, the Convention would cover family members of a foreign official to the extent that the payment is effectively passed to the foreign public official. See *id.* at 11.

The OECD has continued to play an active role in this area, following up the implementation and enforcement of the Convention and the non-deductibility of questionable foreign payments. In keeping up with similar developments at the United Nations and other organizations, it has also addressed the issue of the proper conduct of public officials. On April 23, 1998, the OECD adopted the Recommendation on Improving Ethical Conduct in the Public Service.¹⁵⁹

2. *The Work at the Organization of American States.* Another relevant international development starting in 1994 was the decision of the Organization of American States (OAS) to address corruption and bribery. The Miami Summit is well known as the starting point for negotiations leading to the Free Trade Agreement of the Americas (FTAA), and for the commitment to democracy, trade, and sustainable development made by attending countries. The nations of the Western hemisphere collectively acknowledged the challenge posed by corruption and committed themselves to combating a problem frequently described as an endemic predicament of Latin America.

The Declaration of Principles and Plan of Action signed at the Miami Summit on December 11, 1994 clearly signaled that the issue of corruption extended further than bribery of foreign officials; OAS countries considered linked corruption with the region's broader economic and political aspirations: development and democracy.¹⁶⁰ The Plan of Action included specific commitments whereby the signatories agreed on a hemispheric approach to acts of corruption through a

159. See Organisation for Economic Cooperation and Development, *Improving Ethical Conduct in the Public Service: Recommendation of the OECD Council*, <<http://www.oecd.org/puma/gvrnance/ethics/pubs/rec98/rec98.htm>> (visited May 1, 2000). The recommendation states that "although governments have different cultural, political and administrative environments," they face similar public ethical challenges and should take action to promote management systems and institutions to promote high ethical standards in public conduct. *Id.* The Recommendation includes a set of principles for managing ethics in the public service.

160. The Declaration of Principles and Actions was signed by Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, The Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, The United States, Uruguay, and Venezuela. It recognized that "effective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions." Summit of the Americas: Declaration of Principles and Plan of Actions, 34 I.L.M. 808 (1995).

new agreement or new arrangement under existing international cooperation.¹⁶¹

As a result of this initiative, OAS members drafted, negotiated and adopted an international agreement within eighteen months.¹⁶² The Inter-American Convention Against Corruption¹⁶³ (“Inter-American Convention”) was adopted and opened for signature at the Specialized Conference at Caracas, Venezuela on March 29, 1996, becoming then the first international treaty of its kind.¹⁶⁴ The Convention entered into force on March 6, 1997.¹⁶⁵

3. *The OECD and the Inter-American Conventions: A Comparative Analysis.* This section undertakes a comparative analysis of the main provisions of the OECD and the Inter-American Convention and will highlight how each was tailored after the FCPA model.

The influence of the FCPA is undeniable.¹⁶⁶ The two main components of the FCPA are found in both the Inter-American and the

161. Under the heading “Preserving and Strengthening the Community of Democracies of the Americas” the signatories committed to

[d]evelop within the OAS, with due regard to applicable treaties and national legislation, a hemispheric approach to acts of corruption in both the public and private sectors that would include extradition and prosecution of individuals so charged, through negotiation of a new hemispheric agreement or new arrangements within existing frameworks for international cooperation.

Id. at 818-19.

162. The first draft for an Inter-American Convention on Corruption was submitted by Venezuela soon after the Miami Summit. See Warren Christopher, *The Summit of the Americas Action Plan: Fulfilling a Hemispheric Commitment*, DEP’T ST. DISPATCH, June 12, 1995, at 492, available in WESTLAW, 1995 WL 8643603 (transcript of Secretary of State Christopher’s remarks at a review meeting of the Summit of the Americas before the OAS General Assembly on June 4, 1995).

163. See Inter-American Convention *supra* note 1.

164. See, e.g., Richard E. Feinberg, *Summit of the Americas: First Steps*, DEP’T ST DISPATCH, Oct. 23, 1995, available in WESTLAW, 1995 WL 8643709.

165. Seventeen countries have deposited their ratification instruments. The United States has not ratified the Convention. See Organization of American States, *B-58 and B59 Inter-American Convention Against Corruption* <<http://www.oas.org/en/prog/juridico/english/Sigs/b-58.html>>.

166. For example, U.S. officials have hailed the OAS and OECD initiatives for committing its members to implement FCPA-like legislation. In his remarks at the Council of the Americas Conference, former Secretary of State Warren Christopher stated:

The nations of the hemisphere just negotiated an anti-corruption convention through the OAS. This unprecedented convention obligates all signatories to the convention to adopt laws on bribing foreign officials, laws which are the rough equivalent of our *Foreign Corrupt Practices Act here in the United States*. As you know, the United States has reached agreement with the OECD countries to prevent bribes from foreign officials being tax-deductible as a business expense, and we’re pushing hard for the next step, and that is to ensure that such bribery is treated as a crime.

OECD Conventions. Both Conventions include provisions to criminalize foreign bribery and improve corporate accounting practices. In addition, both include provisions for mutual legal assistance and extradition. However, the Inter-American Convention represents a more ambitious and comprehensive approach to corruption, because it addresses the demand side of bribery, or “passive” corruption.

a. The Transnational Bribery Offence. The very title of each Convention reveals the first major distinction. Transnational bribery, or “bribery of a foreign public official,” is central to the OECD Convention. The main objective of the OECD Convention is to address active bribing in international business transactions and deals directly with this offence in seven of its seventeen articles. To some extent this is a reflection of the OECD’s nature as an association of capital exporters.

By contrast, the Inter-American Convention set itself the broader objective of fighting corruption in governmental affairs and deals with the passive and active aspects of bribery, both internal and external. Nonetheless, the emphasis of the Inter-American Convention is on corruption within, evident from the fact that it directly treats active corruption in only one of its twenty-eight articles. This sole provision, Article VII, contains a proviso that may condition the adoption of the transnational bribery offence:

*Subject to its Constitution and the fundamental principles of its legal system, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that officials public function.*¹⁶⁷

Similar language is found only in Article IX, the commitment to establish illicit enrichment as an offence, and Article XIX, dealing with the temporal application of the Convention. It is not in Article VI, the provision covering the acts of domestic corruption covered by the Convention. Thus, read in light of Article X, the Inter-American Convention establishes a two-tiered regime: 1) active and passive

Remarks by Secretary of State Warren Christopher at the Council of the Americas Conference, State Dept. Briefing, FED. NEWS SVC., May 6, 1996, available in LEXIS, World Library, Allwld File (emphasis added).

167. Inter-American Convention, *supra* note 1, art. VII (emphasis added).

domestic bribery are considered acts of corruption as soon as the treaty enters into force; and 2) transnational bribery and domestic illicit enrichment will not be regarded as acts of corruption under the Convention, but will be illegal in those signatory countries that have incorporated these offenses into their domestic legal systems.

However, the scope of Article VII's proviso "subject to its Constitution and fundamental principles of its legal system" is not clear. Some authors have pointed out the United States requested this language for Article IX as an escape clause for the illicit enrichment offense, which raises serious American constitutional problems.¹⁶⁸ Under this reading, Articles VIII and IX give a signatory the option to refrain from adopting the transnational bribery or illicit enrichment offenses if either or both are inconsistent with the state's constitutional restrictions.

An alternative reading is possible. The language of Article VIII ("shall prohibit and punish"¹⁶⁹) is mandatory and, having been drafted immediately after the proviso, may be read to enable each signatory to attach legal consequences in accordance with its own constitution and domestic legal principles. In other words, even though the states "shall" sanction bribery of foreign officials, that treatment may differ from one country to another according to their respective legal systems.

By contrast, Article 1 of the OECD Convention establishes the parties' unqualified obligation to

take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.¹⁷⁰

The Commentaries to the OECD Convention ("OECD Commentaries") adopted at the negotiating conference clearly indicate that the implementation of the OECD Convention is subject to the differ-

168. The illicit enrichment offence appears to create a presumption of guilt on the defendant. This may shift the burden of proof in criminal proceedings and may require a defendant to declare her own process contrary to U.S. constitutional criminal principles. See Lucinda A. Low et al., *The Inter-America Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 249, 281-284 (1998).

169. Inter-American Convention, *supra* note 1, art. VIII (emphasis added).

170. OECD Convention, *supra* note 2, art. 1.

ences in the parties' legal systems.¹⁷¹ The intention of the Convention and Article 1 is to establish a lowest common denominator for the implementation or interpretation measures, if any, to be taken by the signatories.

To use the words of the Negotiating Conference Commentaries, the Convention adopts a "functional" approach in order to reach similarity of results by different means.¹⁷² Thus the commentary to Article 1 explains that the provision:

... establishes a standard to be met by [the] Parties, but does not require them to utilize its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in the paragraph.¹⁷³

With respect to the elements of illicit conduct, the first apparent difference between the Conventions is the purpose element of bribery. The OECD Convention's description of bribery states that a briber's motive is "to obtain or retain business or other improper advantage in the conduct of international business."¹⁷⁴ This wording closely follows that used by the FCPA. The Inter-American Convention's wording is broader and requires only that the bribery be "in connection with any economic or commercial transaction."¹⁷⁵

The OECD Commentaries elaborate on the scope of the offense, in particular the reach of the phrase "in order to obtain or retain business or other improper advantage." The commentaries explain that the offense is committed irrespective of whether the briber was

171. The Commentaries to the OECD Convention adopted by the Negotiating Conference constitute an explicit record of the drafters' intention to construe the scope of the Convention and are very helpful in identifying the influence of the FCPA on its development. No similar record exists for the Inter-American Convention. See Organisation for Economic Cooperation and Development, *Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions* <<http://www.oecd.org/daf/nocorruption/20nov2e.htm>> [hereinafter *Commentaries*].

172. The Commentaries state that the OECD Convention "seeks to assure a functional equivalence among the measures taken by the Parties... without requiring uniformity or changes in fundamental principles of a Party's legal system." *Id.*

173. The Commentary further illustrates that a statute need not expressly address bribery of foreign officials in particular; a statute that penalizes bribery of agents in general fully complies with Article 1. In other words, countries are not required to add a "bribery of foreign officials" crime to their criminal codes and define it in the same terms as Article 1 of the OECD Convention. A less detailed definition is sufficient to prosecute the conduct. *See id.*

174. OECD Convention, *supra* note 2, art. 1.

175. Inter-American Convention, *supra* note 1, art. VIII.

duly qualified to legally obtain or retain business. Furthermore, “other improper advantage” refers to business outside the briber’s legal authorization (such as operations in absence of a requisite permit). The Commentaries disqualify local custom, tradition, or necessity as legitimate defenses for the conduct.

However, the OECD Commentaries go on to note that signatories should not treat bribery as an offense where the advantage “was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”¹⁷⁶ Nor is it a criminal offense to make “small facilitation payments,” which the Commentaries state “do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1. . . .”¹⁷⁷ Such payments “are made to induce public officials to perform their functions, such as issuing licenses or permits.”¹⁷⁸ These two exceptions are tailored after two features of the FCPA: the legality in the host country defense and the “grease payments” exception, respectively.¹⁷⁹

The 1988 amendments to the FCPA provide that a defendant may assert as an affirmative defense that payments, gifts, offers, or promises to convey anything of value were legal under the written law of the host country.¹⁸⁰ It is relevant to note that this provision implicitly includes case law within the definition of “written law.” Because many countries do not place as much emphasis on case law as the United States, particularly those that follow the civil legal tradition, the OECD Commentaries explicitly include the term “case law.”

Some commentators have suggested that the FCPA “legality-in-the-host-country” affirmative defense could play a useful role in the international context. For example, cultural-legal embedded norms, such as the Korean custom of *ttokkap* (“rice cake expenses”), may provide a defense against liability.¹⁸¹ Although it is unclear whether this was the intention of the OECD Convention, the drafters of the Commentaries made sure to mirror the FCPA affirmative defense in almost identical language.

176. *Commentaries*, *supra* note 171, art. 1 ¶ 1.

177. *Id.*

178. *Id.*

179. *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

180. *See id.* § 78dd-2(c).

181. *See* Joongi Kimand & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL’Y J. 549, 561 (1997) (explaining origins and evolution of Korean custom of giving gifts or payments in gratitude for deeds done).

Under the FCPA, “grease payments” are payments made to a foreign public official in order to ensure the performance of customary duties. These payments are not punishable under the FCPA when made to secure an action ordinarily and commonly performed by the official.¹⁸² Such an action would not include decisions on whether, or on what terms, to award new business or continue business with a specific party.¹⁸³

The corresponding language of the Commentaries use the term “small facilitation”¹⁸⁴ payments, probably to emphasize that these payments, in addition to those made to induce the official to perform a non-discretionary duty, shall be relatively small. However, the Commentaries clearly intend to reach the issue of grease payments; the FCPA is currently the only available legislative example to understand the Commentaries.

In contrast, the Inter-American Convention is silent regarding both the “affirmative defense” and the “exception.” Regarding grease payments, the broader scope of the Inter-American Convention suggests that its signatories adopted a less tolerant stand against the practice. For example, the language used to define the scope of the offense (“in connection with *any* economic or commercial transaction”¹⁸⁵) could be read to include conduct not covered by the wording of the OECD Convention (“in order to obtain or retain business or other improper advantage”¹⁸⁶). It could be argued that grease payments are always made in connection with a commercial transaction, putting them within the purview of the Inter-American Convention, but may not be useful per se to obtain or retain business or other commercial advantages and would therefore fall outside the coverage of the OECD Convention.¹⁸⁷

182. “Routine governmental action” is defined by the Act as an

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

15 U.S.C. §§ 78dd-1, 78dd-2 (h)(4)(A).

183. *See id.* §§ 78dd-1, 78dd-2 (h)(4)(B).

184. *Commentaries*, *supra* note 171, art. 1 ¶ 9.

185. Inter-American Convention, *supra* note 1, art. VIII.

186. OECD Convention, *supra* note 2, art. 1.

187. In the specific case of the Korean *ttokkap*, it may be argued that both the Inter-American Convention and the OECD Convention would cover the Korean practice, since both

Another relevant distinction between both conventions is the OECD Convention's elaboration on the responsibility of legal persons. Article 2 of the OECD Convention establishes that each state shall take measures, in accordance with its own laws, to establish the liability of legal persons for the bribery of a foreign public official.¹⁸⁸ The OECD Commentaries further clarify that where criminal responsibility is not applicable to legal persons under a state's legal system "that [state] shall not be required to establish such criminal responsibilities."¹⁸⁹ However, the OECD Convention further states that those countries not imposing criminal liability must ensure that their legal subjects are exposed to other non-criminal consequences, such as civil liability.¹⁹⁰ By contrast, the Inter-American Convention is entirely silent regarding the treatment of legal persons.

In fact, the provisions of the OECD Convention generally provide greater detail than those of the Inter-American Convention. For example, the OECD Convention establishes certain guidelines for sanctions and calls for reasonable statutes of limitation for the offense; the Inter-American Convention provides no guidance on either of these issues.¹⁹¹ Similarly the OECD Convention contains an explicit provision that warns that, although investigations and prosecutions remain subject to the rules and principles of each party, they "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."¹⁹² The Inter-American contains no corresponding admonition.

As for similarities, both conventions cover complicity, conspiracy, and attempt to bribe a foreign public official. Both define public officials similarly, although the Inter-American Convention does not include officials of international organizations.¹⁹³ Territorial jurisdic-

conventions require that government officials fail to act in accordance with their official duties. But note that the Korean Supreme Court has construed a social courtesy exemption that includes traditional gift-giving practices such as the *tokkap* if they are not given in consideration for the official act. See Kimand & Kim, *supra* note 181.

188. See OECD Convention, *supra* note 2, art. 2.

189. See *Commentaries*, *supra* note 171, art. 2.

190. See OECD Convention, *supra* note 2, art. 3 ¶ 2.

191. The OECD Convention establishes that criminal sanctions should be effective, proportionate, dissuasive, and comparable in range to the applicable sanctions for the bribery of a party's own public officials. See *id.* art. 3(1). The Convention provides that statutes of limitation, the period should be sufficient to allow for the investigation and extradition of the offence. See *id.* art. 6.

192. *Id.* art. 5.

193. According to Article 1(4) of the OECD Convention, a foreign public official is:

tion is the preferred jurisdictional ground for both conventions, and other legal norms, such as the nationality principle, are similarly favored.¹⁹⁴ Under both conventions, bribery proceeds are seized, but the Inter-American Convention takes a notable step further by providing that all or part of the seized property or proceeds may be shared with the state that assisted in the underlying investigation or proceeding.¹⁹⁵ This provision could be a significant incentive for developing countries to actively cooperate in prosecuting transnational bribery cases..

b. Accounting Provisions. The two conventions have even more divergent practices when it comes to accounting provisions than their treatment of bribery. The Inter-American Convention devotes only one paragraph to the subject of accounting. Article III (10) establishes the obligation of states to *consider* enacting measures to create, maintain and strengthen deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.¹⁹⁶

In contrast to this hortatory language, the OECD Convention considers accounting provisions a necessary complement to its anti-bribery obligations. In doing so, it follows the approach taken by the FCPA. The OECD Convention establishes two sets of related accounting obligations. States must first enact necessary measures to prohibit accounting practices that may be used by companies to facili-

any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

OECD Convention, *supra* note 2, art. 1(4).

Article 1 of the Inter-American Convention establishes that a public official is

any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

Inter-American Convention, *supra* note 1, art. 1.

194. Further the OECD Convention provides that conflicts arising out of overlapping jurisdiction will be resolved through consultation between the Parties in order “to [determine] the most appropriate jurisdiction for prosecution.” OECD Convention, *supra* note 2, art. 4; see Inter-American Convention, *supra* note 1, art. V.

195. See Inter-American Convention, *supra* note 1, art. XV.

196. Inter-American Convention, *supra* note 1, art. III(10).

tate the payment or concealment of bribes.¹⁹⁷ Second, states must impose deterrent sanctions and penalties for violators of these measures. Thus, Article 8, paragraph 1 establishes the signatory's obligation to take all necessary measures

within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purposes of bribing foreign public officials or hiding such bribery.¹⁹⁸

The source of inspiration for this obligation is the record keeping provision of section 102 of the FCPA. This section requires every issuer to "make and keep books, records, and accounts, which in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer."¹⁹⁹ If read only as the obligation to follow good accounting practices, the FCPA provision may not be intrusive, however, the SEC has focused on the qualitative aspects of the records, rather than on its quantitative ones. It is not enough to record all transactions if they are not accurately described.

A commentator has identified certain transactions that have caused problems in the past and are subject to heightened scrutiny by the SEC. These are: (1) political contributions, whether lawful or not; (2) payoffs to government officials; (3) commercial bribes or kick-backs; (4) rebates to customers that are illegal or of questionable legality; (5) violations of laws regulating alcohol, tobacco, drugs, narcotics, or firearms; (6) violations of customs or currency control laws; (7) income tax fraud; (8) self-dealing by insiders; and (9) transactions where the primary purpose appears to be the manipulation of sales, earnings or other financial data.²⁰⁰

Regarding non-transparent accounting practices, Article 8 of the OECD Convention establishes that signatories have the obligation to provide "effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such compa-

197. See OECD Convention, *supra* note 2, art. 8.

198. *Id.*

199. DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 11 (1994).

200. See *id.* at 12.

nies.”²⁰¹ These provisions are related to section V of the 1997 OECD Recommendation.²⁰² This document identified specific principles with respect to adequate accounting requirements, independent external audits, and the use of internal company controls in preventing and detecting bribery. The principles suggested with respect to accounting principles are especially helpful in understanding Article 8 of the OECD Convention:

- i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditures take place. Companies should be prohibited from making off-the-books-transactions or keeping off-the-books-accounts.
- ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.
- iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.²⁰³

The principles regarding independent external audits and internal company controls relate to issues such as the professional responsibility of accountants, auditors, and directors of a company.²⁰⁴ These issues were not addressed directly by the OECD Convention. However, the obligation to maintain transparent accounting practices will require many states to re-examine issues of corporate governance, including the role of external accountants, auditors and legal counsel.²⁰⁵

c. International Cooperation and Extradition. Both the Inter-American Convention and the OECD Convention seek to maximize opportunities for cooperation in the investigation, prosecution, and punishment of the conducts prohibited therein. Parties to both conventions agreed to provide each other with mutual legal assistance for the investigation and prosecution of the offences.²⁰⁶ In addition, the OECD Convention expressly imposes the obligation to cooperate in non-criminal proceedings brought by a state against a legal person within the scope of the Convention.²⁰⁷ Both conventions establish that

201. OECD Convention, *supra* note 2, art. 8.

202. See *Commentaries*, *supra* note 171, art. 8.

203. Council Revised Recommendation C(97)123/Final on Combating Bribery in International Business Transactions, 36 I.L.M. 1016 (1997).

204. In the United States, the SEC has taken the position that the failure of the issuer to establish a committee to audit certain activities, such as the transfer of funds outside the country, could constitute a violation of the internal control provisions of the FCPA. See CRUVER, *supra* note 199, at 14.

205. See *Commentaries*, *supra* note 171.

a state cannot refuse a petition for assistance on the basis of bank secrecy.²⁰⁸ Possibly one of the most relevant features of both conventions is that they create a unified regime that provide no safe heavens for transnational bribers. Article 10 of the OECD Convention and Article XIII of the Inter-American Convention ensure that the Parties of the Convention will either extradite or prosecute the accused.

To facilitate extradition, both conventions are themselves alternative extradition treaties. In the event that a state requiring an extradition does not have a specific treaty in place with the particular host country, the Conventions can provide the legal basis for extradition. In other words, the OECD and the Inter-American Conventions will function as extradition treaties in the absence of agreements between two parties to any of the conventions, where one of the parties makes extradition conditional on the existence of an extradition treaty with the requesting Party.²⁰⁹ Finally, the double criminality principle will be implicitly satisfied by the sole application of the conventions.²¹⁰

d. Passive Corruption: The Demand Side of the Equation. As has been suggested, the theme that permeates the Inter-American Convention is governmental corruption. This is sometimes known as passive corruption because of its focus on the official as recipient or solicitor of the bribe.²¹¹ From an economic perspective, the governmental official constitutes the demand side of the bribery equation.

The relevance of passive corruption in the Inter-American Convention is expressly stated in its objectives. Article II establishes that the two purposes of the Convention are strengthening the signatories' methods of combating corruption and regulating state cooperation to

206. See Inter-American Convention, *supra* note 1, art. XIV; OECD Convention, *supra* note 2, art. 9.

207. See OECD Convention, *supra* note 2, art. 9.

208. The OECD Convention additionally establishes that the absence of dual criminality cannot be invoked to deny assistance. See *id.* arts 9(2), 9(3); Inter-American Convention, *supra* note 1, art. XVI.

209. See Inter-American Convention, *supra* note 1, art. XIII; OECD Convention, *supra* note 2, art. 10.

210. See Inter-American Convention, *supra* note 1, art. XIII; OECD Convention, *supra* note 2, art. 10.

211. This does not imply that the government official is a passive victim of the briber. In fact, many times it is the governmental official who plays a more active and demanding role than the briber. See, e.g., *Commentaries*, *supra* note 171, at 1.

advance this objective. “Corruption” is the operative term preferred by the Inter-American Convention over “bribery,” as used by the OECD Convention.

Article VI of the Inter-American Convention is a core provision because it establishes the acts of corruption covered. These acts include solicitation, acceptance, offer, or delivery of improper payments; the illicit use of a position of authority for the official’s own benefit; the fraudulent use or concealment of property derived from that position of authority; and participation in any of these acts as accomplice, collaborator or conspirator.²¹² This list of crimes refers to domestic acts of corruption and is to be extended to the conduct covered by the provisions of transnational bribery and illicit enrichment of Articles VII and IX, when Parties domestically adopt (or as the case may be have already adopted) this conduct as criminal. Finally, Article XI refers to other undesired conduct, such as the improper use of classified or confidential information by government officials.²¹³ Article XI also allows the signatories to add other types of conduct to the list of prohibited acts at a later date.²¹⁴ As in the case of transnational bribes and illicit enrichment, the acts described by Article XI are covered by the Convention as soon as they incorporated into the legal system of a signatory, if the conduct is not already prohibited.

When considered in context with the extradition provisions of the Inter-American Convention, the structure described above reveals, at least in theory, an interesting intention of the Inter-American Convention. The Convention has the effect of creating an “Inter-American network” for international legal cooperation in fighting corruption. In other words, the Inter-American Convention, if fully implemented, represents a commitment by governments throughout the region to remove safe havens not only for bribers (as with the OECD Convention) but also for corrupt government officials. This objective may become a significant policy goal for the future development of conventional obligations in this sphere.

212. See Inter-American Convention, *supra* note 1, art VI.

213. See *id.* art. XI.

214. See *id.*

C. Other International Initiatives

1. *The European Union*

a. Combating Fraud Against European Community Financial Interests. The European Union has focused its anti-corruption efforts on combating fraud against the financial interests of the European Community (EC). Although this fight is not new, it has gained strength in recent years and has benefited from the international anti-corruption movement. This section will briefly describe the development of anti-fraud initiatives in the EC leading to the expansion of the Community's agenda to include the current anti-corruption proposals.

By way of introduction, it is interesting to note that the development of measures to protect the EC financial interests has faced a jurisdictional conflict hurdle. Although the EC is responsible for the integrity of its overall budget, it must rely on its member states for criminal prosecution of fraud and recovery of funds where appropriate.²¹⁵ Disparities in the way in which member states construe and enforce their criminal statutes has been a matter of concern in the fight against fraud.

In the 1960s and 1970s, anti-fraud initiatives received little support, as European institutions were occupied with the task of consolidating authority.²¹⁶ Enforcement was erratic and uneven during the 1980s.²¹⁷ Late in that decade, the principle of assimilation developed by the European Court of Justice was applied to fraud in the EC, marking an important step forward in addressing the jurisdictional problem.²¹⁸ The 1989 Greek Maize Case²¹⁹ established that member states need to ensure that violations of Community law are treated, in both substance and procedure, analogously to domestic law violations of similar nature and importance. Authorities must act with the same diligence required by national standards, and penalties imposed on violators of EC law must be proportionate to the offense while deterring future violations.²²⁰ Unfortunately, the assimilation principle

215. See SIMONE WHITE, PROTECTION OF THE FINANCIAL INTERESTS OF THE EUROPEAN COMMUNITIES: THE FIGHT AGAINST FRAUD AND CORRUPTION 7 (1998).

216. See *id.* at 7-11.

217. See *id.*

218. See *id.* at 12-13.

219. See Case 68/88, *Commission v. Greece*, [1989] ECR 2965.

220. See WHITE, *supra* note 215, at 12-13.

makes monitoring difficult, since national law enforcers enjoy a great deal of discretion in the application of their domestic law.²²¹

Starting in 1988, the Commission increasingly relied upon punitive sanctions that again depend on national enforcement.²²² In the early 1990s, stricter regulations and control measures were developed.²²³ However, both these types of initiatives were merely piecemeal and sectorial responses only adding to the already complex regulatory environment.²²⁴

Since then, there has been a policy shift towards increasing cooperation.²²⁵ In 1995, Europe took two important steps. First, Council Regulation 2988/95 established a legal framework for Community administrative sanctions, including sanctions to be applied by national authorities.²²⁶ Second, the Convention on the Protection of Community Financial Interests was concluded and published in the Official Journal.²²⁷ The Convention seeks to strengthen cooperation, promote horizontal regulation, and harmonize rules and policies.²²⁸ The Convention defines fraud affecting the EC budget and obligates members to, among other duties, impose criminal penalties in cases of serious fraud to cooperate in ascertaining jurisdiction for enforcement.²²⁹

In that same year, the European Council adopted the Protocol to the Convention on the Protection of Community Financial Interests and issued a draft Anti-Corruption Convention. Both instruments deal with bribery of foreign officials and are discussed in the following subsection.

b. Current Steps to Address Corruption. The EU has recently taken steps to to include corruption within its anti-fraud agenda. Two instruments have been approved by the Council of Europe: the Protocol to the Convention on the Protection of the Communities' Financial Interests ("EC Corruption Protocol"),²³⁰ and a general

221. Nonetheless, the principle has been enshrined in Article 209 of the Maastricht Treaty. *See id.*

222. For example, agricultural regulation is one of the main components of the European Union's common policy and budget through the Common Agricultural Policy. *See id.* at 14.

223. For example, via reporting obligations and audit programs. *See id.* at 15.

224. *See id.*

225. For example, the establishment of an advisory body to coordinate Commission and Member States anti-fraud efforts. *See id.* at 17.

226. *See id.* at 18.

227. A previous draft of this Convention had been rejected by the member states in 1976. *See id.* at 10, 18-19.

228. *See id.*

229. *See id.* at 19.

convention on corruption (“EU Corruption Convention”).²³¹ Neither has been ratified by the member states as is required for them to enter into force. It has been pointed out that the ratification process is often slow to the extent that the practical effect of the instrument awaiting ratification is neutralized.²³² The OECD Convention may have helped to mitigate this ratification problem in the area of corruption: most member states of the EC have and will continue to modify their domestic laws to comply with the OECD Convention, notwithstanding the pending EC legislation. It is ironic that member states have strengthened their anti-corruption commitments abroad but not within the European system.²³³

The EC Corruption Protocol (read in conjunction with the PIF Convention) and the EU Corruption Convention are parallel documents. They share similar language but are distinguished by the scope of their application. While the EC Corruption Protocol applies to corruption affecting the financial interests of the European Communities, the EU Corruption Convention is not restricted to this area alone. This distinction is evident in the definition of active and passive corruption. The EC Corruption Protocol defines passive corruption as:

the deliberate action of an official, who directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities’ financial interests.²³⁴

Active corruption is defined as:

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

230. Council Act of 27 September 1996 Drawing up a Protocol to the Convention on the Protection of the European Communities’ Financial Interests, 1996 O.J. (C 313) 1 [hereinafter EC Corruption Protocol].

231. Convention Drawn up on the Basis of Article K.3 (2) (c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C 195) 1 [hereinafter EU Corruption Convention].

232. See WHITE, *supra* note 215, at 158.

233. The OECD Convention may also be used at both the European and international level.

234. 1996 O.J. (C 313) 1.

is likely to damage the European Communities' financial interests.²³⁵

The EU Corruption Convention defines passive and active corruption in exactly the same terms but omits the final reference to damage against the EC.²³⁶ Thus, the EU Corruption Convention covers corruption by Community or member state officials²³⁷ whether or not the fraud has an impact on the finances of the EC.

It has also been suggested that the EC Corruption Protocol and the EU Corruption Convention differ in another substantial aspect. White points out that a narrow reading of the EC Corruption Protocol in conjunction with the EU Corruption Convention suggests that cooperation is restricted to criminal matters. However, a broader interpretation of the EU Corruption Convention suggests that member states are committed to cooperate in civil and administrative proceedings as well.²³⁸ This is a relevant distinction considering the difficulties of international criminal cooperation, the fact that administrative authorities are in most instances in a better position to cooperate, and the importance of civil recovery of illicit advantages obtained from corruption.

Both instruments adopt the assimilation principle, which commits the member states to similarly apply the definitions of corruption to both national and European officials.²³⁹ The EC Corruption Protocol and the EU Corruption Convention establish that member states shall ensure that corruption is punishable by effective, proportionate, and dissuasive criminal penalties, without prejudice to the exercise of domestic disciplinary powers.²⁴⁰ They commit the member states to impose criminal liability on heads of businesses, or persons in decision-making or control positions, for the corrupt acts of persons under their control acting on behalf of the business.²⁴¹ Jurisdiction is to be exercised by the member states on the basis of the principles of

235. *Id.*

236. 1997 O.J. (C 195) 2.

237. Both instruments define official to mean any Community or national official, including any national official of another Member State.

238. See WHITE, *supra* note 215, at 158-59.

239. See EC Corruption Protocol, *supra* note 230, art. 4; EU Corruption Convention, *supra* note 231, art. 4.

240. See EC Corruption Protocol, *supra* note 230, art. 5; EU Corruption Convention, *supra* note 231, art. 5.

241. See EC Corruption Protocol, *supra* note 230, art. 7; EU Corruption Convention, *supra* note 231, art. 6.

territoriality and active and passive nationality.²⁴² Both instruments create the obligation to extradite or prosecute an offender.²⁴³ The *non bis in idem* protection, providing that a person cannot be prosecuted or punished twice for the same act, is found in both the convention and the protocol.²⁴⁴ The European Court of Justice has jurisdiction over disputes under both agreements if no compromise is reached after six months.²⁴⁵

When compared to the OECD Convention, the European instruments address only the corresponding international cooperation problems of corruption, but not its accounting aspects. In attacking corruption, the European instruments are more ambitious, covering both passive and active corruption, thus reflecting a similar approach to the OAS Convention. In addition, although the EC Corruption Protocol is limited to acts affecting the financial interests of the Community, the EU Corruption Convention—in contrast to the OECD Convention—addresses corruption plainly, without regard to the purpose of the corrupt act. These features represent the latest efforts in the fight against fraud and corruption within Europe. They also reflect the greater concern for corruption in an integrated market where the growing common purse is entrusted to both national and Community officials and where international borders for business and crime disappear faster than the borders for international cooperation.

2. *The International Bank for Reconstruction and Development Procurement Guidelines.* The World Bank and the International Monetary Fund (IMF) did not take an active role against corruption

242. Under Article 6 of the EC Corruption Protocol and Article 7 of the EU Corruption Convention, the territoriality principle applies where “the offence is committed in whole or in part within its territory” and where “the offender is a Community official working for a European Community institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member State in question.” EC Corruption Protocol, *supra* note 230, art. 6; EU Corruption Convention, *supra* note 231, art. 7. The active nationality principle applies where “the offender is one of its nationals or one of its officials” and the passive nationality principle applies where “the offence is committed against one of the persons” defined by the Convention as an official “who is one of its nationals.” EC Corruption Protocol, *supra* note 230, art. 6; EU Corruption Convention, *supra* note 231, art. 7.

243. See EC Corruption Protocol, *supra* note 230, art. 7; EU Corruption Convention, *supra* note 231, art. 8.

244. See EC Corruption Protocol, *supra* note 230, art. 7; EU Corruption Convention, *supra* note 231, art. 10.

245. See EC Corruption Protocol, *supra* note 230, art. 8; EU Corruption Convention, *supra* note 231, art. 12.

until the emergence of anti-corruption initiatives in the mid 1990s.²⁴⁶ The World Bank first focused on measures to promote transparency in projects it was funding. It then developed its own anti-corruption strategy that includes measures to strengthen internal anti-corruption controls.²⁴⁷ The IMF has focused on promoting the importance of fighting corruption as a principle of good governance.

The World Bank's corruption efforts have focused on improving the procurement processes of the Bank's funded projects.²⁴⁸ In 1997, the Bank revised its Procurement Guidelines as part of its overall initiative against corruption.²⁴⁹ As part of its procurement policy, the World Bank has also increased its specialized personnel in charge of supervising the procurement process and has initiated an independent audit program to make sure that Bank procurement guidelines are observed.²⁵⁰ The Bank has taken action in those cases where guidelines have not been followed, including canceling funds and initiating civil proceedings for the recovery of spent funds.²⁵¹

Under the leadership of President Wolfensohn, and in particular since 1997, the Bank has increased its efforts to combat corruption within the organization.²⁵² For example, there is now a 24-hour telephone hotline for callers (who may choose to remain anonymous) to report fraud and corruption. The Bank's new Oversight Committee on Fraud and Corruption reviews all allegations of fraud and corruption received by any member of the World Bank Group.²⁵³

246. This may be due to concerns that it not be construed as an interference in the internal political affairs of the lender countries, a sensitive issue during the seventies and eighties. See Kimberly Ann Elliot, *Corruption as an International Policy Problem: Overview and Recommendations*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 88, at 175, 212.

247. There are four main themes of the World Bank's anticorruption strategy: (1) preventing corruption in Bank projects; (2) helping countries reduce corruption; (3) mainstreaming anti-corruption; and (4) supporting international efforts to reduce corruption. See *Anti-Corruption Knowledge Resource Center* (visited Nov. 23, 1999) <<http://www.worldbank.org/publicsector/anticorrupt/>>.

248. See Mark Pieth, *International Cooperation to Combat Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 88, at 119, 127.

249. See *Anti-Corruption Knowledge Resource Center*, *supra* note 247. The Bank's Guidelines are addressed in more detail in Part III of this Article.

250. See *id.*

251. See *id.*

252. Wolfensohn has noted that if the Bank is going to campaign against corruption in the borrowing countries "we have to be absolutely certain that we hold ourselves to the highest standards on the inside." *Id.*

253. The Committee is composed of high level World Bank officials, including the Managing Director, the Deputy General Counsel, the Auditor-General, the Manager of the Office of Professional Ethics, and the Vice President of the Operational Core Services Network. The Com-

As noted before, the IMF has also taken some recent steps in support of the international anti-corruption efforts, in particular in how the institution promotes good governance principles among its lenders. In the words of Managing Director Michel Camdessus, the IMF traditionally concentrated “on those aspects of good governance that are most closely related to our surveillance of macroeconomic policies.”²⁵⁴ However, in recent years the IMF has expanded its approach to the concept to include combating corruption.

On September 29, 1996, the IMF Interim Committee adopted the declaration entitled “Partnership for Sustainable Growth,” in which the organization recognized that a broader range of institutional reform is necessary to lay the basis for sustained growth. These reforms include “ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption.”²⁵⁵ The IMF has thus acknowledged that fighting corruption and increasing governmental accountability are important good governance principles that can affect trust and sustainable growth, and it has committed to focus its attention on these issues.²⁵⁶

The IMF established guidelines (“IMF Guidelines”) to define its involvement in corruption issues consistent with its role as an international lending institution while remaining sensitive to national authorities.²⁵⁷ In this regard, it has underscored that it does not intend to move in the direction of becoming a financial guardian of member countries, and that “instances of corruption should be addressed on the basis of economic consideration within its mandate.”²⁵⁸ The guidelines explain that the institution should get involved in corruption issues where its impact on good governance might threaten macroeconomic efforts.²⁵⁹ While the IMF Guidelines acknowledge that governments are more receptive to corruption issues when they

mittee reports directly to the Bank’s President and has authority to direct the initiation of investigations. *See id.*

254. Michel Camdessus, IMF Managing Director, *Address to the United Nations Economic and Social Council* (July 2, 1997) <<http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm>>.

255. *Partnership for Sustainable Global Growth Interim Committee Declaration, Washington, D.C.* (Sept. 29, 1996) <<http://www.imf.org/external/np/sec/pr/1996/pr9649.htm>>.

256. *See id.*

257. *See The Role of the IMF in Governance Issues: Guidance Note (Approved by the IMF Executive Board, July 25, 1997)* <<http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm>>.

258. *Id.*

259. *See id.*

themselves initiate efforts to address the problem, they warn that lack of government interest—or even opposition—should not prevent IMF staff from bringing corruption to the attention of appropriate government officials when corruption may affect development or stabilization measures sponsored by the IMF.²⁶⁰

The Procurement Guidelines of the International Bank for Reconstruction and Development (IBRD) have been a key instrument in that institution's anti-corruption strategy. Although the member states, not the IBRD itself, conduct the procurement processes of IBRD-financed projects, the IBRD has strengthened its supervisory role through a number of measures. For one, the IBRD has established a mechanism by which a borrower may introduce into bid forms a requirement that bidders observe the country's laws against fraud and corruption.²⁶¹ The borrower can introduce the project for approval by the IBRD. This approval is subject to a number of conditions; for example, the borrower may have to produce an anti-corruption report, formulate a general corruption strategy, provide the IBRD with its fraud and corruption laws, and establish appropriate channels to investigate fraud and corruption complaints.²⁶² This mechanism seeks to promote transparency in the procurement of IBRD financed projects. The IBRD has also issued an ethical guide for its staff handling procurement matters.²⁶³

Of particular relevance is paragraph 1.15 of the IBRD Procurement Guidelines.²⁶⁴ In addition to defining corrupt and fraudulent practice, paragraph 1.15 establishes the authority of the organization to react to corrupt practices in three ways:

- a) Reject a proposal for award if found that the bidder has engaged

260. *See id.*

261. *See Preventing Corruption in Bank Projects: Procurement Guidelines* (visited Nov. 23, 1999) <<http://wbln0018.worldbank.org/prm>>.

262. *See id.*

263. *See Ethical Guide for Bank Staff Handling Procurement Matters in Bank Financed Projects* (Apr. 23, 1998) <<http://www.worldbank.org/publicsector/anticorrupt/ethicalguide.htm>>.

264. *Procurement Guidelines for Preventing Fraud and Corruption* (visited Nov. 23, 1999) <<http://www.worldbank.org/html/extdr/extme/2116.htm>>. Corrupt practice is defined as the "offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution." *Id.* Fraudulent practice is defined as

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

Id.

in corrupt or fraudulent practice and declare a firm permanently or temporary ineligible to compete for IBRD financed projects where found to have engaged in corrupt or fraudulent practice;

b) Cancel the portion of the loan allocated to a contract if at any time determines fraud or corruption was performed by representatives of the borrower or a beneficiary of the loan and the country has not take appropriate action to remedy the situation, and;

c) Require that IBRD finance projects include a contractual authorization for the Bank to inspect Suppliers and Contractors accounts and records and to have them audited by Bank appointed auditors.²⁶⁵

The IBRD reports suggest that the institution has been successfully enforcing paragraph 1.15 of the guidelines. As of November 1999, the World Bank reported that fifteen allegations of corruption and fraud had been received since the first phase of the anti-corruption initiative in 1998; two staff members had been terminated for the misuse of \$110,000 of Bank funds; and a positive civil judgment had been obtained against a former staff member. Fifty-four projects had been audited by independent firms, and forty contracts with a value of \$40 million had been declared a misprocurement.²⁶⁶

3. *The World Trade Organization.* The World Trade Organization (WTO) has not yet fulfilled the expectations of those who had wished to see the organization become the vehicle to expand the international anti-corruption agenda. Since the preparatory work for the first Ministerial Meeting at Singapore, the United States' Trade Representative has pushed the issue of bribery in international business transactions.²⁶⁷ In particular, the U.S. government urged the WTO to pursue negotiations on an agreement on transparency in government procurement, but the proposal did not find support among other trading nations.²⁶⁸ In fact, the American initiative found stern opposition from Asian governments.²⁶⁹ Notwithstanding this

265. *Id.*

266. See Anti-Corruption Knowledge Resource Center, *supra* note 247.

267. In February 1996, then-U.S. Trade Representative Mickey Kantor wrote a letter to WTO Director-General Renato Ruggiero warning that "continuing problems with bribery and corruption in the markets of WTO members may compromise the progressive elimination of trade barriers we worked so hard to achieve." *Kantor calls for WTO campaign against bribery, corruption*, Agence France Presse, Feb. 22, 1996, available in LEXIS, News Group library, All file.

268. Elliot, *supra* note 246, at 224.

269. For example, according to one news report, in response to American efforts to add corruption to the agenda of the first WTO Ministerial Meeting, the Indonesian Trade and Industry Minister declared that "any effort to link this new issue to trade will be detrimental to the func-

setback, a victory for anti-corruption initiatives was achieved at Singapore, where the WTO agreed to establish a working group “to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement.”²⁷⁰

Efforts to fully inject corruption into the WTO agenda have continued to date without much success. Though the current WTO Government Procurement Agreement can be read as an important step towards transparency in international procurement procedures, the Agreement’s scope is still limited and many questions remain in the area. The organization has continued its work to produce a global agreement on transparency in government procurement, which interestingly approaches the principle of transparency not as a vehicle to better market access but as a goal in of itself.²⁷¹ The day might not be far off when corruption issues are brought into an international dispute or when the work done at the OECD and other multinational organizations is ripe for multilateral discussion at the WTO.²⁷²

4. *International Non-Governmental Organizations.* One of the most promising developments with respect to the role of NGOs was the 1993 establishment (by a group of former executives of the World Bank) of an international non-governmental organization entirely

tioning of the WTO.” *ASEAN slams US call to include corruption on WTO agenda*, Agence France Presse, Apr. 25, 1996, at 1, available in LEXIS, News Group library, All file.

270. *Transparency in Government Procurement* (last updated November 1999) <http://www.wto.org/wto/minist1/17proc_e.htm>. See also *Battling Corruption*, J. COMMERCE, Dec. 26, 1996, available in LEXIS, News Group library, All file.

271. The WTO working group on transparency in government procurement has held nine meetings since it first met in May 1997 and is now devoted to the systematic study of issues identified as important in relation to transparency:

definition and scope of government procurement; procurement methods; publication of information on national legislation and procedures; information on procurement opportunities, tendering, and qualification procedures; time-periods; transparency of decisions on qualification; transparency of decisions on contract awards; domestic review procedures; other matters related to transparency; maintenance of records of proceedings; information technology; language; fight against bribery and corruption; information to be provided to other governments (notification); WTO dispute settlement procedures; and technical cooperation and special and differential treatment for developing countries.

Transparency in Government Procurement, supra note 270.

272. For example, in 1997, a number of American steel companies requested the U.S. government to advance a claim in the WTO against South Korean steel industry subsidies. The allegations came amidst the backdrop of the collapse of the Korean Hanbo Group and a loans for kickbacks scandal. See *US Steel group seeks WTO action on Hanbo*, Agence France-Presse, Feb. 21, 1997, available in WESTLAW, Allnews database.

committed to anti-corruption initiatives.²⁷³ Transparency International (TI) has been extremely active in this field, raising the visibility of the subject around the world, and it is steadily increasing its national chapters to carry out its objectives locally.²⁷⁴

One of the most effective tools that the organization has used to promote public and governmental corruption awareness has been its now renowned Corruption Perception Index, a poll that rates countries by their perceived tolerance of governmental corruption.²⁷⁵ TI has recently published a Bribe Payers Index, which ranks developed nations by the extent to which they are perceived to use corrupt practices in international business transactions.²⁷⁶

Another proposal developed by TI has been securing free-corruption procurement areas through a concept called “Islands of Integrity: The Integrity Pact.” TI has been promoting the Integrity Pact concept since the organization’s inception.²⁷⁷ The Integrity Pact is an joint commitment (that includes the government agency administering the procurement) to adhere to a public sector procurement process in which they will refrain from corrupt activities and will be subject to sanctions if they do not. There are five main features of the Integrity Pact.

- 1) *The companies’ formal commitment not to engage in corruption in order to obtain or secure business, as part of the signed tender document.* This commitment should be supported by an anti-corruption Code of Conduct and a compliance program clearly stating the company’s policy prohibiting all forms of bribery and collusion.²⁷⁸

273. Patrick Glynn et al., *supra* note 135, at 16.

274. See Transparency International, *Mission Statement* (Apr. 1997) <<http://www.transparency.de/mission.html>>.

275. Transparency International, *Press Release: New Poll Shows Many Leading Exporters Using Bribes*: (Oct. 26, 1999) <<http://www.transparency.de/documents/cpi/index.html>>.

276. This survey was conducted on a total of 770 senior executives of major companies, chartered accountants, chambers of commerce, major commercial banks, and law firms in fourteen emerging market countries. See *id.*

277. Transparency International, *Islands of Integrity: The Integrity Pact* (visited Nov. 30, 1999) <<http://www.transparency.de/activities/integrity-pact.html>>.

278. If a company does not have a code of conduct and compliance program in place, it can draft one for that particular contract. The code of conduct and compliance program should include at least the company’s policy regarding gifts and entertainment, internal controls, external audits and record-keeping, and applicable sanctions, including termination of employment. It should be distributed to all managers and employees, who should acknowledge receipt and be trained in the application of the policy. See *id.*

- 2) *The commitment by the government body administering the procurement that it will commit to prevent corrupt activities.* This includes the fair and full enforcement of its anti-corruption laws.
- 3) *The disclosure of past and intended payments to agents or third parties.*²⁷⁹
- 4) *Sanctions and an arbitral mechanism to enforce violations.*²⁸⁰ Sanctions should include denial or cancellation of the contract, liability for damages, and debarment of the offender from all business with the government for a period of time.²⁸¹
- 5) *Participation of civil society in the procurement process.* Additionally, the Pact recommends public disclosure of the award decision and grounds of the decision.²⁸²

The concept of the Integrity Pact is to be developed by countries through the establishment of “Islands of Integrity.” This is a gradual approach by which the Integrity Pact concept can be adopted first for a particular procurement process or procurement in a specific market. The Integrity Pact seeks to provide competitors with confidence that the procurement will be corruption-free, thus creating an incentive for appropriate behavior by all parties involved. The availability of sanctions and international arbitration provides an additional incentive.²⁸³

The Integrity Pact has only been adopted by a few countries in limited, specific projects.²⁸⁴ In 1997, some African leaders committed

279. The Integrity Pact requires that the disclosure be done at the bidding stage and be formally recorded and reported during the execution stage by the successful bidder. Certification by senior management is required to prevent senior managers and CEOs from disclaiming knowledge of the activities. *See id.*

280. In accordance with the Rules of Arbitration of the International Chamber of Commerce. *See id.*

281. Liability for damages should extend to the government as well as to the competing bidders. Damage claims by both the government and the competitors should be in the form of liquidated damages equivalent to a certain percent of the contract value, except where the claimant can prove the actual damage. *See id.*

282. *Id.*

283. However, litigating is always a risk, even in an arbitral context. Though governments may be particularly averse to arbitration, companies also perceive a risk in going after a government where they regularly conduct business or where they expect to conduct business in the future. The author is unaware of any cases so far under this mechanism. It is nonetheless an interesting idea worthy of further study and development.

284. Examples of the use of the Transparency Pact include a rehabilitation project in Ecuador in 1994, the 1996 privatization of telecommunications in Panama, and the procurement practices of the provincial government of Mendoza, Argentina for the past three years. *See* Transparency International, *supra* note 277.

to introduce the concept in their continent and the Indonesia has agreed to use the Integrity Pact in international finance projects as part of a national program to curb corruption. The concept has influenced other international initiatives in the field of government procurement and is no doubt a creative and innovative proposal to address the prisoners' dilemma in a procurement environment tainted by expectations of bribery.²⁸⁵

TI has also promoted a comprehensive governmental reform approach through the concept of national integrity systems.²⁸⁶ As part of this effort, TI publishes a Source Book to document the best anti-corruption practices, and it has organized a number of anti-corruption workshops and conferences. For example, the U.S. Agency for International Development (USAID) has been one of TI's financial and logistical supporters and also a major organizer of anti-corruption initiatives through its own programs.²⁸⁷

Motivated in large measure by the 1994 OECD Recommendation, other non-governmental organizations also joined the efforts to combat corruption. The International Chamber of Commerce (ICC) revived its interest in the issue and established a committee to review the 1977 report on illicit payments in international commercial transactions and suggest new recommendations.²⁸⁸ The ICC adopted the new report and recommendations on March 26, 1996. The new report confirmed the suitability of the three-level approach of the 1977 report, but acknowledged that international leadership in the issue had shifted from the U.N. to the OECD. The new recommendations re-drafted the code of conduct to include all types of corruption, not only that associated with obtaining or retaining business, as defined by the 1976 rules.²⁸⁹ The new code of conduct also eliminated the dispute panel proposed by the 1976 code.²⁹⁰ The ICC has since taken specific steps to promote the code of conduct, including establishing a

285. Participants in certain procurement processes might expect that notwithstanding the strength of their bid, they should bribe lest their competitors beat them to the punch. *See id.*

286. *See* Transparency International, *National Integrity Systems* (visited Nov. 30, 1999) <<http://www.transparency.de/activities/national-integrity.html>>. For a study of the role of national integrity systems in the fight against corruption see PETER LANGSETH ET. AL, *THE ROLE OF NATIONAL INTEGRITY SYSTEM IN FIGHTING CORRUPTION* (EDI Working Papers, 1997).

287. These include its programs on economic restructuring, rule of law, open and accountable governments, and free media and civil society. *See* Tamesis, *supra* note 118, at 136-37.

288. The Chairman this time was François Vincke of Belgium, General Counsel of Petrofina. *See* Heimann, *supra* note 88, at 147, 151.

289. *See id.*

290. *See id.*

Standing Committee charged with coordinating the sixty-two ICC national committees' work on corruption, and cooperating with the OECD and other international organizations working on this subject.²⁹¹

In 1995, the World Economic Forum, the largest international organization of business executives, established the Davos Group to, *inter alia*, promote the study of corruption.²⁹² The Davos Group includes chief business executives, law-enforcement officials, and other experts.²⁹³ Other policy institutions, think-tanks, and business organizations have also joined the recent efforts to promote a corruption-free political and business environment.²⁹⁴

IV. THE DEVELOPMENT OF THE STUDY OF CORRUPTION UNDER INTERNATIONAL LAW

A. Lessons and Questions

1. *Lessons.* It is unquestionable that the international movement to combat corruption and bribery has gained momentum. The multiplication of international efforts suggests that this momentum will continue in the near future. A review of the history of these developments, however, warns that it will not be free of difficulties. Corruption is and will continue to be a sensitive issue and setbacks should be expected in many fronts.

One of the key issues for the OECD and Inter-American Conventions will be implementation and enforcement. The congressional hearings on the 1976 FCPA can provide valuable lessons on this process, not only from the information provided about how corrupt practices were conducted, but because from the experience of the process itself. Governments should consider, and international efforts should support, any effort to conduct legislative or other governmental studies and inquiries about the *modus operandi* of domestic and international corruption. This should be done in an atmosphere of public participation and transparency, and there should even be incentives to provide information. The author acknowledges that the OECD Convention implementation agenda is tight, and that most

291. *See id.* at 152.

292. *See* Patrick Glynn et al., *supra* note 135, at 16.

293. For example, the Interpol Secretary General is a member of the Davos Group. *See id.*

294. *See, e.g.*, Center for International Private Enterprise, *Combating Corruption* (visited Nov. 23, 1999) <<http://www.cipe.org/efn/corruption.html>>.

countries will have enacted such legislation by the publication of this Article, but this should not preclude subsequent efforts to improve these or other legal measures on corruption.

The great strength of the FCPA is that it was a tailored response to an issue seriously investigated and studied by Congress, resulting in legislation that impressed upon the consciousness of the business sector. Nations may improve the fight against corruption if they can openly tackle the particular issues of corruption in their domestic and international context. Amnesty or measures to prevent future acts without punishing past transgressions (*vis á vis* the use of injunctive powers by the SEC in 1976) should not be disregarded.²⁹⁵ The growing amount of research done in this area, the information generated and made public on anti-corruption strategies, and the participation of non-governmental organizations to encourage public participation are valuable tools in such processes.

At least one other general lesson merits a brief comment. Corruption is not inherent to developing governments, businessmen, or citizens. Although bribery and corruption manifest themselves differently in different countries, the approach that should permeate international efforts to combat corruption and bribery must be free of prejudice. Corruption is a serious allegation and should be treated seriously, wherever it occurs.

Revisiting the development of this issue warns against a one-sided approach to the problem. The OECD Convention is a relevant development, but there is a danger that it will be perceived solely as an accommodation of the interests of the Northern/Western developed countries. Other international initiatives could be similarly tainted, reminiscent of the challenges caused by the illicit payments agreement during the eighties. There is today a renewed critical attitude in certain sectors of society against the globalization and liberalization trends of the nineties. Furthermore, many governments that have made efforts in the last decade to move towards democratic and free market regimes are being challenged by important sectors of their societies for the rampant corruption directly or indirectly provoked by their "reformist" elites.

Some international organizations, such as the OECD, the WTO, and the IBRD, have been subjected to public criticism for their lack of decision-making transparency. This cynicism could lead to resistance from developing countries to the expansion of an international

295. See discussion *supra* notes 14-16, and accompanying text.

anti-corruption regime, one which is perceived to reflect only the trading interests of developed countries and multinational corporations and does not legitimately address issues such as governmental excess and the role of the private elite in the liberalization and privatization programs. International initiatives against corruption should thus strive to strike a balanced approach, so as not to be perceived simply as the accommodations of the exporting nations to resolve a competitive problem amongst themselves. The increasing participation of civil society and non-governmental organizations in this movement offers hope.

Notwithstanding these concerns, the OECD Convention is a relevant step in the development of the treatment of bribery under international law. Leaving aside for the moment its substantive developments and the questions raised about its implementation and enforcement, this Article submits that its contribution to the development of a common language and definitions in this field is highly relevant in itself. In addition, the OECD Convention may grow in membership and eventually become the model upon which is built a more comprehensive and balanced regime.

2. *Questions*

a. Questions under International Economic Law. Though bribery and corruption initiatives have not made much progress within the WTO, the interplay between them and the WTO should be expected to continue.²⁹⁶ For example, it has been pointed out that the development of the international trade regime helps to reduce corruption because it subjects governments to commitments that are difficult to revoke and provides companies a more predictable legal environment.²⁹⁷ This proposition leads one to ask questions. What is

296. There are, however, signs of encouragement, such as the continued work of the Transparency in Procurement Working Group and the aggressive expectations of important trading nations like the United States. Note, for example, President Clinton's statement at the last WTO Ministerial Meeting in Geneva:

In an era of global financial markets, prosperity depends upon government practices that are based on the rule of law instead of bureaucratic caprice, cronyism, or corruption. . . . By next year, all Member of the WTO should agree that government purchases should be made through open and fair bidding. This single reform could open up \$3 trillion of business to competition around the world.

President Bill Clinton, Remarks at WTO Ministerial Meeting (May 18, 1998), (transcript available at <<http://www.wto.org/anniv/clinton.htm>>).

297. For example, the WTO trade rules to limit and eliminate quotas. The allocation of quotas has been cited as a source of corruption in many countries. See *10 benefits of the WTO*

the real impact of the WTO system in limiting corruption? What trade obligations are more closely related to preventing corruption? Some commentators have begun to explore whether the WTO is an appropriate forum to deal with transnational bribery and how the organization can deal effectively with it.²⁹⁸ Questions about the transparency of the decision-making process within the WTO and other international organizations and about the role of civil society are also relevant.²⁹⁹ The development of these two issues at the international level will have an impact on its development at the national level, and thus contribute to more accountable national and international regimes, a self-preventing anti-corruption measure.

But whether corruption is fully adopted within the WTO agenda, the issue of bribery of foreign officials in international business transactions is one of interest for international economic law in general, and international trade and investment law in particular. There is still room to pursue research into how international dispute systems have dealt with issues of corruption (e.g., private international commercial arbitration) or how to better adapt international arbitration, mediation, and negotiation to deal with corruption issues in the context of trade and investment law.³⁰⁰

Corruption issues under investment disciplines are still very much unexplored. The work on a multilateral agreement on investment has slowed, and the study of this issue is yet to begin. The potential for corruption is higher—and with longer effects—in foreign direct investment than in international commercial transactions.³⁰¹ There are many questions that can be addressed in this area. What is

trading system: 10. The system encourages good government (visited Jan. 24, 2000) <<http://www.wto.org/wto/10ben/10ben10.htm>>.

298. See Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 *LAW & POL'Y INT'L BUS.* 305 (1997).

299. In the last Ministerial Meeting at Seattle, Washington, a number of non-governmental organizations mobilized to demand greater transparency and civil society participation in the work and decisions of the WTO. See L. Kim Tan, *Anti-WTO Rallies Leave Mark - Participants and Observers Look to Future*, *BOSTON HERALD*, Dec. 5, 1999, available in WESTLAW, All-news Database. In the regard, President Clinton proposed an ambitious agenda at the Geneva Ministerial Meeting, including opening the dispute settlement system to public participation and scrutiny. See President Bill Clinton, Remarks at WTO Ministerial Meeting, *supra* note 296.

300. For example, the TI Integrity Pact includes the possibility of international arbitration to resolve disputes arising out of violations of the anti-corruption agreement signed by government and private parties in a procurement process. Interesting questions arise regarding what would be the applicable law and how to better deal with fact-finding rules.

301. A look into the corruption investigations that led to the FCPA in the United States reveal that the major cases of corruption—excepting defense contractors—were in the area of foreign direct investment. See discussion *supra* Part II.A and II.B.

the status of state responsibility for corruption of public officials? How can the criminalization of foreign bribery influence international investment law? How is corruption related to the duty to provide fair and equitable treatment? Or even, how can corruption issues be properly raised before international investment tribunals, and how should international adjudicators deal with them?

b. Questions under International Criminal Law. Possibly the biggest question raised by the OECD Convention relates to implementation and enforcement. The effectiveness of the Convention may rely on how signatories implement and then enforce the foreign bribery provisions.³⁰² Enforcement is ultimately dependant on political will, but it can also be related to criminal drafting technicalities, such as constitutional or legal constraints arising from the way the crime is defined in the national legal system.

One can always ask whether the FCPA has curbed foreign corrupt practices in the United States. The record is not clear. The U.S. government has argued that compliance with the Act has cost American businesses who have lost contracts to foreign competitors who did not face similar constraints. However, the studies on which these allegations are based have not been made public. In contrast, there are indications that the FCPA has not been as successful as promoted, or that it has been insufficiently enforced. In the recently published TI Bribe Payers Index, the United States scored 6.2 on a scale of 10, with 10 being the lowest level of perceived propensity to pay bribes abroad.³⁰³ This is a relatively poor result for the only country that has criminalized foreign payments for the past twenty-five years. The small number of cases brought under the FCPA and the complete lack of any criminal convictions resulting in prison sentences might also cast doubts on the political will of the OECD Convention's most active promoter.³⁰⁴

But implementation and enforcement are not the only issues still unresolved. International criminal cooperation may play a key role in the success of the OECD Convention. Serious questions remain about the current development of mutual legal assistance or even ex-

302. The OECD peer review process following the implementation and enforcement of the Convention will play a relevant role. As noted, Congress implemented its own report and review mechanism. TI is also following up the implementation of the OECD Convention by publishing comments on its web page about the legislation adopted by each country.

303. See Transparency International, *supra* note 275.

304. For a review of the cases brought under the FCPA see for example Rossbacher, *supra* note 134, at 530.

tradition. Questions regarding the proceeds of bribery, the role of off-shore financial facilities, the relationship with money-laundering, payments to political parties, and payments to friends and family of public officials are currently under review at the OECD. Even the simple question of how to promote the extension of the criminal anti-bribery jurisdiction to other nations is highly contentious. This Article finally suggests that there should be further study into the use of non-criminal legal tools to complement the work of public prosecutors, including the possible use of a private right of action.

c. Questions under Human Rights Law. The study of the relationship between corruption and human rights is in its infancy.³⁰⁵ Scholars have begun to point out the possible effects of corruption on human rights.³⁰⁶ Human rights issues can also play a role in corruption allegations, where the purpose of the allegation is to achieve an illicit political or economic purpose—for example, the initiation or threat of corruption proceedings to oblige government officials to act or refrain to act, or to stop them from pursuing anti-corruption efforts.³⁰⁷

V. CONCLUSION

After reviewing the development of international anti-corruption efforts it is possible to classify these efforts under four general trends. The strongest trend today is perhaps the move to criminalize bribery of foreign officials and strengthen accounting practices, as headed by the OECD countries. Another trend is represented by the international cooperative developments to strengthen the fight against domestic corruption and bribery by government officials. A third direc-

305. Transparency International has posted on its web a couple of working papers on this topic. See Nihal Jayawickrama, *Corruption—A Violation of Human Rights?* (June 1-2, 1998) <www.transparency.de/documents/work-papers/jayawickrama.html>.

306. The question has been raised whether the effects of corruption can prejudice the full realization of human rights, such as the right to work, to health, to a livelihood or to participate in public life, if government officials corruptly take decisions against the public interest causing jobs to be lost, public health to be poor, people to be evicted from their homes, or elections to be fraudulent. See *id.* See also Laurence Cockroft, *Corruption and Human Rights: A Crucial Link* (Oct. 19, 1998) <www.transparency.de/documents/work-papers/cockroft.html>.

307. Note, for example, the concern expressed by Transparency International regarding the criminal process recently initiated against anti-corruption reformer Agustin Jarquin Anaya, former General Comptroller of Nicaragua. See Transparency International, *Press Release: Transparency International deeply concerned over arrest of Nicaraguan Comptroller-General "Disturbing pattern of false accusations against officials who fight corruption in high places."* (Nov. 12, 1999) <<http://www.transparency.de/documents/press-releases/1999/1999.11.15.nicaragua.html>>.

tion includes the movements to strengthen government procurement processes and promote transparency. A fourth one is the promotion of comprehensive policy approaches, such as the development of good governance principles and national integrity systems. These trends have all benefited from the active contribution of international associations and non-governmental organizations.

The development of anti-corruption measures under international law raises many questions and unresolved issues. This analysis has not discussed customary international law, related customary international law, or potential customary international law in the field, nor have we explained and tested the evolving anti-corruption regime under different theoretical international law and relations frameworks. These and other issues await further study.

Recent international political conditionals have made it possible to adopt international conventional obligations to fight corruption. This emergence is significant. These international obligations will now be put to the test. Will the OECD Convention be effectively implemented? Will it be effectively enforced? Will its membership grow? Will the Inter-American Convention establish an effective continental cooperation and extradition regime? Will it be invoked? These are all pending questions in the development of anti-corruption initiatives under international law.

Finally, if conventional obligations are to strive for universality, it may be necessary to pursue a more balanced conventional instrument that uses the OECD Convention as starting point. This new agreement can draw on not only the achievements of the Inter-American Convention, but also the developments and work conducted by other international and non-governmental organizations and by the study of the anti-corruption regime under international law and other disciplines. How to pursue this is just one of many intriguing questions yet to be answered in this evolving field.