

THE FOREIGN CORRUPT PRACTICES ACT OF 1977: A SOLUTION OR A PROBLEM?

The United States Congress began hearings in 1973 on the alleged use of "illicit" payments by American multinational corporations in foreign business transactions.¹ During the hearings American multinational corporations voluntarily disclosed² that "illicit" payments had been used to obtain or retain foreign business.³ These "illicit" payments included bribes, kickbacks, political contributions, and "grease" payments,⁴ with the principal recipients being foreign officials.⁵

The public admission by American multinational corporations of their widespread use of "illicit" payments created a national and international controversy over the propriety of such practices.⁶ In an attempt to resolve the controversy, the United States enacted the Foreign Corrupt Practices Act of 1977 (FCPA).⁷ In addition, several international organizations⁸ voiced their disapproval of the use of "illicit" payments by adopting a Code of Conduct,⁹ establishing

1. PRACTICING LAW INSTITUTE, *TRANSNATIONAL CORPORATE CONDUCT, THE IMPACT OF UNITED STATES LAWS ON EUROPEAN & UNITED STATES OPERATIONS* 718 (1979).

2. The Securities and Exchange Commission initiated the investigations with the "voluntary compliance and disclosure program." See *Hearings on the Activities of American Multinational Corporations Abroad Before the Subcommittee on International Economic Policy of the House Committee on International Relations*, 94th Cong., 1st Sess. 63-64, 66 (1975) [hereinafter cited as *Hearings on Activities & American Corporations*].

3. J. KENNEDY & C.E. SIMON, *AN EXAMINATION OF QUESTIONABLE PAYMENTS AND PRACTICES* 118 (1978).

4. See text accompanying notes 14-43 *infra*.

5. See generally Y. KUGEL & G.W. GRUENBERG, *INTERNATIONAL PAYOFFS* (1977).

6. The disclosure and corporate payments caused "the removal of a Central American president, embarrassed a Philippine regime, led to a constitutional crisis in the Netherlands, caused legislative paralysis in Japan, and, left a shaken Italian government. In the United States, questions over the propriety of foreign payments recently delayed the confirmation of the chairman of the Federal Reserve Board." McLaughlin, *The Criminalization of Questionable Foreign Payments By Corporations: A Comparative Legal Systems Analysis*, 46 *FORDHAM L. REV.* 1071 (1979); see also notes 7-11 *infra*.

7. 15 U.S.C.A. §§ 78q(b), 78dd, 78ff (West Supp. 1980).

8. See text accompanying notes 120-61 *infra*. These international organizations include the United Nations General Assembly, the Organization of American States, the Organization for Economic Cooperation and Development, and the International Chamber of Commerce.

9. Declaration on International Investment and Multinational Enterprises, adopted June 21, 1976, Annex and Decisions of Council, OECD Doc. 21 (76) 04/1 (1976), 75 DEP'T STATE BULL. 83 (1976), reprinted in 15 *INT'L LEGAL MATS.* 967 (1976) [hereinafter cited as

the Commission of Transnational Corporations¹⁰ and developing a draft text on the International Agreement on Illicit Payments.¹¹

American multinational corporations¹² protested the enactment of the FCPA because of its alleged inconsistency with the practical aspects of engaging in business transactions in countries other than the United States.¹³ This comment will examine the inconsistent legal aspects of the FCPA, and contrast it with the laws of foreign countries and international resolutions. This examination will reveal that the FCPA not only is inconsistent with the legal practices of nations, but that it also disregards principles of customary international law on illicit payments.

This comment will discuss the basic types of "illicit" payments and analyze the reasons asserted for their use by multinational corporations. Three approaches to prohibiting "illicit" payments will then be examined: that of the United States, international organizations, and foreign states. The United States approach, the FCPA, will be analyzed to determine the scope and extent of the criminalization of "illicit" payments. This approach will be contrasted with the efforts of four international organizations: the Organization for Economic Cooperation and Development (OECD), the International Chamber of Commerce (ICC), the Organization of American

Declaration on International Investment]. Member countries of the Organization for Economic Cooperation and Development include Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

10. The U.N. Commission on Transnational Corporations, ECOSOC Res. 1721, 53 U.N. ESCOR, Supp. (No. 1), U.N. Doc E/5209 (1972) began as a request to the U.N. Secretary-General to establish a Group of Eminent Persons to investigate the impact of multinational corporations on world development. The report by the Group of Eminent Persons recommended a Commission to develop a comprehensive program to deal with multinational corporations. Report of the Group of Eminent Persons, *The Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. E/5500/ Rev. 1, ST/ESA/6, at 55 (1974). The committee is composed of forty-eight members, thirty-three from Latin America, Africa and Asia, ten from Western European and "other states," and five from Eastern bloc countries.

11. United Nations, Report of the Economic & Social Council Committee on an International Agreement on Illicit Payments, U.N. Doc E/1979/104 (1979), *reprinted in* 19 INT'L LEGAL MATS. 1024 (1979) [hereinafter cited as Draft Text].

12. See Butterfield, *U.S. Law Barring Bribes Blamed for Millions in Lost Sales in Asia*, N.Y. Times, June 26, 1978, at 1, col. 5. See also J. KENNEDY & C.E. SIMON, *supra* note 3.

13. McLaughlin, *supra* note 6; Comment, *Payments to Foreign Officials by Multinational Corporations: Bribery or Business Expense and the Effects of U.S. Policy*, 6 CALIF. W. INT'L L. J. 360 (1976) [hereinafter cited as *Payments to Foreign Officials*]; Lashbrooke, *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L. J. 227, 229 (1979).

States (OAS) and the United Nation's draft text on the Agreement on Illicit Payments. The criminal statutes of foreign states will then be examined to demonstrate the legal inconsistency between the United States and the rest of the world, and the United States' disregard of customary international principles on illicit payments. Finally, this Comment concludes that the inconsistent approach taken by the United States government creates difficulties for itself, for American multinational corporations, and for foreign states. The revision of the FCPA to conform with customary international principles is advised.

I. ILLICIT PAYMENTS

A. *Types of Illicit Payments*

Illicit payments encompass bribes, extortion, facilitating payments and, depending on the circumstances, political contributions and kickbacks.¹⁴ These payments and the circumstances that cause acceptable payments to become illegal will be defined to demonstrate the different types of payments and their legal construction. The following analysis becomes important when attempting to understand state practice in proscribing illicit payments.

1. *Bribes*. Bribes are the most widely recognized of the "illicit" payments by reason of their universal classification as illegal.¹⁵ A bribe is a payment voluntarily given by the payor¹⁶ to the receiver or bribee who is paid to either deviate or abstain from performing his duties, to perform an unlawful act, or to perform an act that gives a competitive advantage to the briber.¹⁷

A recent investigation by Dutch authorities demonstrates how a bribe may be used to create a competitive advantage for the briber. The investigation disclosed that McDonnell—Douglas, an American multinational corporation, made payments to the director of KLM, Royal Dutch Airlines;¹⁸ McDonnell—Douglas subsequently received a \$600 million order to furnish KLM with airplanes.¹⁹ This one example is illustrative of the fact that when corporations weigh the benefits of such practices against the poten-

14. N. JACOBY, P. NEHEMKIS, & R. ELLIS, *BRIBERY AND EXTORTION IN WORLD BUSINESS* 89 (1977).

15. Y. KUGEL & G.W. GRUENBERG, *supra* note 5, at 11.

16. W.M. REISMAN, *FOLDED LIES, BRIBERY, CRUSADES AND REFORMS* 75 (1979).

17. *Id.*

18. *Wall Street Journal*, February 12, 1979, at 6, col. 4.

19. *Id.*

tial criminal liabilities, sound business judgment often requires that the payment be made.

2. *Extortion Payments.* An extortion payment is best defined by contrasting it to a bribe. One distinctive feature of an extortion payment is the use of threats by the extortionist to obtain some benefit, whereas with a bribe the payment is voluntary.²⁰ The receiver of an extortion payment threatens to do harm to the payor, while the receiver of a bribe acts improperly to benefit the payor.²¹ A bribe is initiated by the payor, an extortion is initiated by the receiver.²²

The above legal distinctions operate to shift the focus of guilt from one party to the other.²³ Since it is the briber who "corruptly" induces another to act improperly, it is the briber who bears the guilt.²⁴ However, extortion shifts the guilt to the receiver, or extortionist.²⁵ When the parties' roles merge so that it is difficult to discern when bribery ends and extortion begins, one party will bear the penalties unless criminal codes provide that the payor and the receiver share equal blame for their actions.

Extortion may take many forms. For example, an extortion occurred when a South Korean political leader threatened to obstruct Gulf Oil operations unless a four million dollar contribution was made to his presidential election campaign.²⁷ In another case \$215,000 was extorted by foreign government officials from the Phelps Dodge Corporation to pass items through customs.²⁸ Similarly, General Foods made extortion payments to customs officials to clear goods wrongfully withheld at customs.²⁹

3. *Facilitating Payments.* The expression "facilitating" indi-

20. N. JACOBY, P. NEHEMKIS & R. ELLIS, *supra* note 14, at 90-91.

21. *Id.*

22. *Id.*

23. *Id.* In some instances it can also change what once was a bribe into an extortion payment. For instance, in Italy, American oil companies made large political contributions to secure benefits from the government. Later, when the government officials realized their power over these companies, they forced the corporations to continue the payments. Wall Street Journal, May 19, 1975, at 1, col. 6.

24. N. JACOBY, P. NEHEMKIS, & R. ELLIS, *supra* note 14, at 90-91.

25. *Id.*

26. *Hearings on Political Contributions to Foreign Governments Before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations, 94th Cong., 1st Sess. 167 (1975)* [hereinafter cited as *Senate Hearings on Political Contributions*].

27. *Id.*

28. J. KENNEDY & C.E. SIMON, *supra* note 3, at 398.

29. *Id.*

cates the payor intends that the receiver insure a smooth or accelerated performance of a particular transaction.³⁰ Facilitating payments are routinely given to secure or accelerate performance by one who is obligated to perform the services without the payment.³¹ Public officials, such as tax assessors, customs inspectors, and immigration officials, without violating their occupational duties will "take care of" or accelerate an assignment for a "tip."³² Typically, facilitating payments occur in situations where time is of recognized economic value, performances are routine, and the transaction is necessary in foreign governments.³³ Many times the corporation will establish million dollar accounts from which the subsidiary can withdraw funds to pay government employees and others "to expedite customs clearance."³⁴ Other corporations will pay a lump sum to the public official to "take care of" tax assessments and inspections for a specified period of time.³⁵

4. *Kickbacks and Political Contributions.* Although these two types of payments are different, they are discussed together since both kickbacks and political contributions may be legal under one set of circumstances and illegal under another. Thus, it becomes necessary to look to the facts and the applicable criminal statutes to determine if the payment is legal or illegal.

Bonafide discounts or rebates are legal kickbacks where the lowered price has been reached through a mutual agreement between the parties.³⁶ As soon as the bargaining position tips in favor of one party, the kickback is no longer considered a discount in price, but rather a factor designed to influence the party with the superior bargaining position.³⁷ Frequently the party in the superior bargaining position is the foreign official, since multinational corporations are often competing with each other for business.³⁸

Political contributions to foreign officials are generally designed to manipulate the political climate to the corporation's ad-

30. W.M. REISMAN, *supra* note 16, at 69-75.

31. *Id.*

32. *Id.* at 70-73 & 72 n.7.

33. *Id.*

34. Wall Street Journal, February 15, 1978, at 18, col. 3.

35. *Id.*

36. Y. KUGEL & G. GRUENBERG, *supra* note 5, at 14.

37. *Id.*

38. *Id.*

vantage.³⁹ One of the more flagrant examples was the funding by International Telephone & Telegraph Company of the presidential election in Chile to create an environment favorable to its business interests.⁴⁰ Indeed, several multinational oil corporations paid up to forty-six million dollars to various foreign political parties.⁴¹ The potentially adverse effect of these contributions in politically volatile countries has caused considerable tension between developing nations and multinational corporations.⁴² Consequently, the legality of political contributions has recently been reexamined.⁴³

B. *The History of Illicit Payments*

Corruption⁴⁴ among political leaders and business entities has existed since the earliest records of mankind,⁴⁵ and "illicit" payments have been used "in all periods of political development"⁴⁶ to further economic opportunities in foreign lands.

Ancient Greece and Rome both experienced significant growth in the use of "illicit" payments during their expansion of economic activity to overseas provinces.⁴⁷ Corruption persisted throughout the Middle Ages as payments were extorted from peasants to satisfy feudal barons.⁴⁸ The exploration and colonization in the 1500's was accompanied by blatant corruption in Peru, Mexico, and India.⁴⁹ During the 1800's illicit payments continued⁵⁰ with the

39. Herlihy & Levine, *Corporate Crisis: The Overseas Payment Problem*, 8 LAW & POL. INT'L BUS. 547, 550-53 (1976).

40. REPORT TO THE SENATE COMMITTEE ON FOREIGN RELATIONS BY THE SUBCOMMITTEE ON MULTINATIONAL CORPORATIONS. THE INTERNATIONAL TELEPHONE AND TELEGRAPH COMPANY AND CHILE 1970-71, 93d Cong., 2d Sess. 18 (1970-71).

41. Larry Martz and others, *Payoff: The Growing Scandal*, NEWSWEEK 30 (February 23, 1976).

42. A. PINELO, *THE MULTINATIONAL CORPORATION AS A FORCE IN LATIN AMERICAN POLITICS* xii (1973).

43. This is evident by the recent prohibition of political contributions under the FCPA as well as under the Code of Conduct. See text accompanying notes 133-39 *infra*.

44. In the United States "corrupt" has been defined as "an evil motive or purpose, an intent to wrongfully influence the recipient." *Senate Comm. on Banking, Housing and Urban Affairs*, S. REP. NO. 114, 95th Cong., 1st Sess. 10 (1977) [hereinafter cited as *Senate Report*]. Generally, it has been defined as acts of individuals who violate or diverge from accepted normative standards or the laws. J.C. SCOTT, *COMPARATIVE POLITICAL CORRUPTION* 10 (1972).

45. *Id.* at 3; In the Code of Hammurabi, the King of Babylon proscribed bribes. See Y. KUGEL & G.W. GRUENBERG, *supra* note 5, at 12.

46. M. HALAYYA, *EMERGENCY WAR ON CORRUPTION* 5 (1975).

47. *Id.*

48. *Id.* at 6.

49. Y. KUGEL & G.W. GRUENBERG, *supra* note 5, at 12.

50. *Id.* In England, Sir Francis Bacon admitted taking bribes to influence his granting patents and monopolies.

growth of businesses in the United States.⁵¹ Illicit payments grew significantly in amount and quantity as corporations expanded internationally.⁵²

C. *Reasons Asserted for Using Illicit Payments*

Today multinational corporations continue to use illicit payments in business transactions.⁵³ One theory suggests that these payments persist because the majority of countries transact business through governmental officials,⁵⁴ many of whom use their power and authority to extract monies from the corporations.⁵⁵

Under this theory illicit payments are considered a necessary and acceptable component of international business transactions.⁵⁶ The business marketplace renders the illicit payments necessary because of the "fierce competition among Japanese, Western European, and United States multinational corporations."⁵⁷ Further, illicit payments are deemed acceptable in foreign countries where under-paid government officials⁵⁸ solicit monies to maintain and provide for their "extended families."⁵⁹

One author contends that illicit payments are prevalent in developing nations⁶⁰ due to a traditional "gift-giving" practice which obligates wealthy individuals to "make gifts to their poorer clientele."⁶¹ In return, the "poorer clientele" must accommodate the payor.⁶² Consequently, the author argues illicit payments will con-

51. *Id.* The Credit Mobilier Union Pacific Railroad scandal of 1872 exemplifies the use of such payments to control business markets. In that scandal United States Congressman Oakes Ames, in an effort to assist his brother who was president of Union Pacific Railroad, offered bribes to other members of Congress for their assistance in pushing through federal financing for Union Pacific's railroad construction.

52. See generally *Hearings on Activities & American Corporations*, *supra* note 2. Corporations, like Merck & Co. Inc., admitted making illicit payments to employees of more than thirty foreign governments between 1968 and 1975.

53. N. JACOBY, P. NEHEMKIS, & R. ELLIS, *supra* note 14, at 4.

54. *Payments to Foreign Officials*, *supra* note 14.

55. *Id.* at 364. The author contends that these foreign officials extract monies from corporations "rather than from the country which the official represents."

56. *Id.*

57. *Id.*

58. *Id.* The author maintains that government officials are "deliberately" paid low wages which, in turn, compels the official to seek additional support from outside sources.

59. J.C. SCOTT, *supra* note 44, at 10.

60. *Id.*

61. *Id.*

62. *Id.* at 3.

tinue to exist irrespective of whether multinational corporations operate within the country.⁶³

A third analysis suggests that multinational corporations use illicit payments as a means of protection from arbitrary governmental actions.⁶⁴ For example, compared to the United States,⁶⁵ Middle Eastern nations do not provide sufficient legal protection for multinational corporations.⁶⁶ As a result, multinational corporations are forced to "pay for" their legal protection since vague laws, constitutions, and judicial guidelines make alternative actions unavailable.

In varying degrees these forces combine to influence the use of illicit payments. In the United States alone, illicit payments in commercial transactions are estimated at fifteen billion dollars annually.⁶⁷ In view of this fact, it may well be that illicit payments occur whenever there is an economic incentive to deviate from legal and ethical standards.⁶⁸

Corporations exist to make a profit.⁶⁹ They tend to view illicit payments as necessary to maintaining "the[ir] continued or future profitability."⁷⁰ This is supported by the fact that most illicit payments by multinational corporations were made "predictably, in order to induce or augment sales."⁷¹ Such payments include those to impede the nationalization or expropriation of corporate assets,⁷² to maintain favorable business climates,⁷³ to reduce tax assessments,⁷⁴

63. McLaughlin, *supra* note 6, at 1074.

64. The author asserts that "the American model places definite limits on the exercise of executive and legislative power by constitutional guarantees." *Id.* at 1019.

65. *Id.* at 1076-84. For example, the author points to the independence of the executive branch from the legislative, the transfer of power under the guise of constitutional mandates, and the limitations on the executive and legislative powers by constitutional guarantees as examples of constraints imposed by the United States upon powerful officials.

66. *Id.* On the other hand, the author points out that in Islam the legislative and executive branch are one in the same, power is transferred in an *ad hoc* manner, and there are no "legal" guarantees.

67. The Washington Post, June 1976, at 1, col. 1.

68. J.C. SCOTT, *supra* note 44, at 3.

69. This is generally thought to be the motivating factor behind corporate executives who take part in the authorization of bribes. Deutsch, *Defining the Future: Personal Influence and United States Corporate Law*, 4 J. CORP. L. 87 (1978).

70. Herlihy & Levine, *supra* note 39, at 568.

71. J. KENNEDY & C.E. SIMON, *supra* note 3, at 118.

72. See Wall Street Journal, April 9, 1975, at 1, col. 6.

73. REPORT OF THE SPECIAL REVIEW COMMITTEE OF THE BOARD OF DIRECTORS OF GULF OIL CORPORATION 218 (December 3, 1975) [hereinafter cited as GULF REPORT].

74. TIME, February 23, 1976, at 31.

and to prevent adverse legislation.⁷⁵ This economic concern of corporations causes them to deviate from the legal and ethical statutory standards⁷⁶ which either authorize or prohibit certain types of payments.⁷⁷

United States multinational corporations defended their use of "illicit payments" in international business practices by asserting they were both customary and necessary.⁷⁸ Governments and international organizations rejected these arguments and renounced the use of illicit payments.⁷⁹ Beginning with the FCPA, the following pages will examine the arguments and resulting proscription of "illicit payments" by the United States, international organizations, and foreign governments.

II. THE FOREIGN CORRUPT PRACTICES ACT

Unlike prior law,⁸⁰ the FCPA prohibits illicit payments to foreign officials, foreign political parties, and foreign political candidates.⁸¹ A corporation violating the FCPA can incur a fine of up to one million dollars.⁸² A violation by an individual acting on behalf of the corporation may result in a ten thousand dollar fine, imprisonment for up to five years, or both.⁸³

A. Liability of Persons

The FCPA narrowly defines the entities and persons affected by its criminal sanctions. By excluding particular classes of persons, the types of payments prohibited by the FCPA are, in effect, also defined.

The FCPA prohibits any "officer, director, employee, agent, or stockholder" of a corporation, as well as the corporation itself, from offering, promising or making illicit payments to foreign officials.⁸⁴ Criminal penalties apply only to the bribing party.⁸⁵

75. Wall Street Journal, May 21, 1975, at 4, col. 2.

76. See generally Y. KUGEL & G.W. GRUENBERG, *supra* note 5; M. HALAYYA, *supra* note 46, at 72.

77. J.C. SCOTT, *supra* note 44, at 4.

78. See *Senate Hearings on Political Contributions*, *supra* note 26, at 316.

79. See text accompanying notes 81-255 *infra*.

80. For a representative summary see PRACTICING LAW INSTITUTE, *supra* note 1.

81. 15 U.S.C.A. §§ 78dd-1(a)(1)-(3), 78dd-2(a)(1)-(3) (West Supp. 1980).

82. *Id.* § 78ff(c).

83. *Id.* § 78dd-2(b).

84. *Id.* §§ 78dd-1(a)(1)-(3), 78dd-2(a)(1)-(3).

85. See text accompanying notes 23-26 *supra*.

However, foreign subsidiaries of multinational corporations operating in and organized under the laws of a foreign state are exempt under the FCPA.⁸⁶ This exemption was designed to minimize the problems of jurisdiction and the resulting uncertainty affecting diplomatic relations.⁸⁷ The exemption does not extend, however, to the parent corporation which may have initiated illicit payments through their foreign subsidiary,⁸⁸ to foreign corporations required to register under section 12 of the "1934 Act,"⁸⁹ or to foreign corporations owned or controlled by United States citizens.⁹⁰ Thus, under the FCPA the United States has claimed a right to interfere in foreign countries if a corporation is either incorporated or registered in the United States.⁹¹

A person making illicit payments to foreign officials subjects a corporation to criminal liability if the person was acting on behalf of the corporation and the corporation was either actually or impliedly aware of the payments.⁹² The corporation's knowledge would depend:

on all the facts and circumstances including the position of the employee, the care with which the board of directors supervises management, the care with which management supervises employees in sensitive positions and its adherence to the strict accounting standards set forth under Section 102. The prohibitions against corrupt payments apply in this regard to payments by agents where the corporation paying them knew or had reason to know they would be passed on in whole or in part to a foreign government official for a proscribed purpose. Of course, where the corporation knows the payment will be passed on for a pro-

86. The Conference Committee eliminated a House provision which would have made foreign subsidiaries "controlled" by a United States corporation or domestic concern subject to the Act. H.R. REP. NO. 831, 95th Cong., 1st Sess. 14 (1977).

87. AD HOC COMM. ON FOREIGN PAYMENTS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS THE PROBLEM AND APPROACHES TO A SOLUTION 4 (1977) [hereinafter cited as AD HOC COMM. REPORT].

88. *Id.* As stated in the House Report, "the Conferees intend to make it clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable." H.R. REP. NO. 831, 95th Cong., 1st Sess. 14 (1977).

89. *Id.*

90. *Id.*

91. AD HOC COMM. REPORT, *supra* note 87, at 4.

92. See Note, *Accounting For Corporate Misconduct Abroad: The Foreign Corrupt Practices Act of 1977*, 12 CORNELL INT'L L.J. 293, 298 (1979) [hereinafter cited as *Accounting for Corporate Misconduct*].

scribed purpose, the violation is complete.⁹³

This test may limit the liability of multinational corporations. However, the application of such a test may range from imposing liability upon the corporation for unreasonable ignorance or acquiescence to the agents actions,⁹⁴ to providing immunity from unauthorized acts where a multinational corporation has exercised reasonable care to avoid illicit payments.⁹⁵

Although the FCPA prohibits illicit payments to foreign official "decisionmakers,"⁹⁶ it does not prohibit illicit payments to those "whose duties are essentially ministerial or clerical."⁹⁷ This exception is designed to limit the scope of payments that are considered illegal.⁹⁸ However, the exception is not found in the definition of illicit payments, but in the definition of "foreign clerks."⁹⁹ Payments to foreign clerks, for whatever purpose and for whatever amount are therefore permissible under the FCPA.¹⁰⁰

B. Kinds of Illegal Payments

Before a corporation is subject to criminal penalties for making illicit payments, a corrupt intent must be proved by the prosecution.¹⁰¹ A corporation must induce the foreign official "to misuse his official position to obtain, retain, or direct business" to the corporation.¹⁰² Should those elements be missing, a corporation can make countless bribes, kickbacks, or facilitating payments.

A corrupt intent may be inferred from the size of the bribe, past conduct of the corporation, and the duties of the foreign official.¹⁰³ These factors, however, do not resolve whether "goodwill" payments or "gifts" are considered illegal since there is a lack of the requisite corrupt intent.¹⁰⁴ Without a precise standard corporations could evade the FCPA by distributing "gifts" in place of bribes,

93. *Senate Report*, *supra* note 44, at 10.

94. Best, *The Foreign Corrupt Practices Act*, 11 REV. SEC. REG. 975, 980 (1978).

95. Note, *The Foreign Corrupt Practices Act of 1977: A Transactional Analysis*, 13 J. INT'L L. & ECON. 367, 386 (1979) [hereinafter cited as *The FCPA*].

96. 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b)(2) (West Supp. 1980).

97. *Id.*

98. *The FCPA*, *supra* note 95, at 396.

99. 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(d)(2) (West Supp. 1980).

100. Estey & Marston, *Pitfalls and Loopholes in the Foreign Bribery Law*, FORTUNE 188 (October 9, 1978).

101. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. NO. 640, 95th Cong., 1st Sess. 4 (1977).

102. *Id.*

103. See generally *The FCPA*, *supra* note 95, at 386.

104. *Accounting for Corporate Misconduct*, *supra* note 92, at 299-300.

thereby exploiting a loophole in the Act and hampering the enforcement of its criminal provisions.¹⁰⁵ In addition, corporations may be handicapped in conducting business fearing that goodwill payments will be construed as bribes.¹⁰⁶

Bribes, kickbacks and political contributions are prohibited by the FCPA,¹⁰⁷ while facilitating and extortion payments are not.¹⁰⁸ The exemption of facilitating and extortion payments can be explained by examining the economic principles associated with the different kinds of illicit payments.

Payments made to obtain business or influence legislation suggest unfair competition and economic waste.¹⁰⁹ Large, prosperous corporations which have funds available to improperly influence foreign officials upset "our capacity to compete abroad" and unfairly effect "competition for export markets among our business enterprises."¹¹⁰ Many times payments made to influence foreign officials are ineffective and wasteful since the foreign official either does not have the authority to bind the governmental agency¹¹¹ or the governmental agency has made previous commitments.¹¹²

Facilitating and extortion payments, on the other hand, are made to ensure performance of the official's job or prevent harm to a corporation's business investments.¹¹³ It is argued that corporations must be able to conduct business without continually fearing delay or destruction of goods.¹¹⁴ By permitting corporations to make facilitating and extortion payments, the United States is, in effect, attempting to protect businesses from arbitrary governmental actions.¹¹⁵

There is doubt, however, that the exemption of facilitating and

105. *Id.*

106. Estey & Marston, *supra* note 100.

107. 15 U.S.C.A. §§ 78dd-1(a)-2(a) (West Supp. 1980).

108. *Senate Report*, *supra* note 44.

109. One author contends that "bribes may result in unfair competition and misallocation of resources by allowing less efficient firms to obtain business or by encouraging firms to compete in the size of their bribes, rather than in the quality or cost of their products or services." Chu & Magraw, *The Deductibility of Questionable Foreign Payments*, 87 *YALE L. REV.* 1091, 1096 (1978).

110. *AD HOC COMM. REPORT*, *supra* note 87, at 4.

111. S. ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 110 (1978).

112. In Nigeria, several officials sought bribes before accepting contracts for cement. As a result, the Nigerian government ordered five times more cement than it needed. *New York Times*, Dec. 4, 1975, at 4, col. 1.

113. *AD HOC COMM. REPORT*, *supra* note 87, at 3.

114. *Id.*

115. *Id.*

extortion payments alone will curb discretionary action by foreign governments.¹¹⁶ In fact, the main purpose for exempting such payments was not the fear of arbitrary governmental action, but rather the apprehension by Congress that necessary evidence, witnesses, and cooperation from foreign governments would be lacking.¹¹⁷ The Senate Committee on Banking, Housing and Urban Affairs concluded that while "facilitating payments may be reprehensible, it does not appear feasible for the United States to attempt to eradicate all such payments."¹¹⁸

C. Summary of the FCPA

The United States has dealt with the problem of illicit payments through internal legislation. Nevertheless, the FCPA operates externally since criminal penalties are imposed only when payments are made in a foreign country or to foreign officials.¹¹⁹ By combining this with the FCPA's limited prohibition of certain kinds of illicit payments, a dilemma is created for multinational corporations when foreign countries impose differing proscriptions. This conflict is created when the FCPA prohibits some payments that are legal in foreign countries and excludes payments from the FCPA which are illegal in foreign countries.

III. THE INTERNATIONAL APPROACH

Initially, international organizations scrutinized multinational corporations because of their domination of capital and resources on a worldwide scale.¹²⁰ Their concern escalated during the 1970's when American multinational corporations disclosed significant payments made to government officials to retain or gain control over resources.¹²¹ International organizations were quick to respond to the problems created by illicit payments. Within a span of fifteen months the United Nations, the OECD, the OAS and the ICC, through the issuance of declarations, establishment of committees, and formulation of guidelines for multinational corpora-

116. See McLaughlin, *supra* note 6.

117. Note, *Prohibiting Foreign Bribes: Criminal Sanctions For Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 247 (1977) [hereinafter cited as *Foreign Bribes*].

118. *Senate Report*, *supra* note 44, at 3 (1977).

119. 15 U.S.C.A. §§ 78dd-1-2 (West Supp. 1980).

120. Gabriel, *Management of Public Interests by Multinational Corporations*, J. WORLD TRADE L. 15, 19-21 (1977).

121. *Id.*

tions have attempted to create an international attitude conducive to the elimination of illicit payments.

A. *United Nations General Assembly*

The United Nations General Assembly passed a resolution directing governments to take legal action against "multinational and other corporations" as well as subsidiaries "and others involved."¹²² The broad language of the resolution indicates that the members favored laws that would punish all parties involved in making the illicit payments.¹²³ This would include both international and domestic corporations,¹²⁴ the briber,¹²⁵ and the bribee.¹²⁶

B. *The Organization of American States*

The second international organization to address the issue of illicit payments was the OAS, an organization predominantly composed of developing countries.¹²⁷ On July 10, 1975, the OAS unanimously accepted a resolution condemning "any act of bribery, illegal payment, or other offer by a multinational corporation." In addition, it condemned any "demand for or acceptance of improper payments" by an official or private person.¹²⁸

Both the OAS and U.N. resolutions advise governments to prohibit illicit payments.¹²⁹ Furthermore, these sanctions are directed at both the briber and the bribee.¹³⁰

One difference between the two resolutions is the motive of the OAS in condemning illicit payment. The OAS resolution denounced multinational corporations' manipulation of developing countries through illicit payments¹³¹ by recognizing "[t]hat such illegal activities have an adverse effect on the political and economic

122. G.A. Res. 3514 (XX), 30 U.N. GAOR Supp. (no. 34) 69-70, U.N. Doc. A/10034 (1976).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. OAS CP/Res No. 154 (167/75), *reprinted in* 14 INT'L LEGAL MATS. 1326-28, 1603 (1975).

128. *Id.*

129. *Id.* See text accompanying notes 122-23 *supra*.

130. *Id.* See text accompanying notes 124-26 *supra*.

131. *Id.* Thus, the OAS approach does not provide the same protection to multinational corporations as the approaches of the OECD, the U.N. resolution and the ICC. See Note, *Legislating Business Morality: A Look At Efforts By Two International Organizations to Deal with Questionable Behavior By Transnational Corporations*, 10 VAND. J. TRANS. L. 459, 469-70 (1977).

relations between member states.”¹³²

C. *The Organization for Economic Cooperation and Development*

The Organization for Economic Cooperation and Development (OECD) established a committee to draft a code of conduct for multinational corporations in January 1975.¹³³ A year and a half later the OECD became the first international organization to formulate and adopt guidelines for multinational corporations.¹³⁴ The general policies of the guidelines state that multinational corporations should not give nor should they be requested to give bribes and other “improper benefits.”¹³⁵ Political contributions, unless legally permissible, should not be rendered.¹³⁶ Similarly, multinational corporations should refrain from “improper political activities.”¹³⁷ The Code of Conduct echoes the OAS and United Nations’ call for voluntary compliance by multinational corporations¹³⁸ and does not recommend that the member states establish laws punishing those who use illicit payments.¹³⁹

The primary distinction between the OECD Code of Conduct and the United Nations’ resolution is the OECD’s attempted establishment of a comprehensive set of guidelines for multinational corporations operating within the OECD countries.¹⁴⁰ Since the OECD members are predominately developed nations,¹⁴¹ the guidelines generally have no application in developing countries.

D. *The International Chamber of Commerce*

Following the OECD Code of Conduct, the ICC adopted the Shawcross Report in November of 1977.¹⁴² The Shawcross Report

132. *Supra* note 127.

133. Resolution on the Council Establishing a Committee on International Investment and Multinational Enterprises, *adopted* Jan. 21, 1975, OECD Doc. C(74) 247 (1975).

134. Declaration on International Investment and Multinational Enterprises, *adopted* June 21, 1976, Annex and Decisions of Council, OECD Doc. 21 (76) 04/1 (1976), 75 DEP’T STATE BULL. 83 (1976), *reprinted in* 15 INT’L LEGAL MATS. 967 (1976) [hereinafter cited as Declaration on International Investment]. *See generally* COMM. MKT. REP. (CCH) No. 295 (July 1, 1976).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. AD HOC COMM. REPORT, *supra* note 87, at 37-38.

141. *See* note 9 *supra*.

142. *Extortion and Bribery in Business Transaction*, The Shawcross Report *adopted by* 131st Sess. of the Council of the ICC, 29 November 1977, ICC Doc. No. 192/36 (March 14,

resulted from an investigation conducted by an ad hoc Commission on Ethical Practices by the ICC.¹⁴³

The Shawcross Report declared, after examining payment transactions, that illicit payments are given and taken on a reciprocal basis rather than "initiated by enterprise."¹⁴⁴ Consequently, it recommended that both government and the business community endeavor to eliminate the use of illicit payments.¹⁴⁵ To accomplish this the Shawcross Report urged governments to enact legislation prohibiting "all aspects of both the giving and taking of bribes, including promises and solicitations of bribes, as well as so-called facilitating payments."¹⁴⁶

The ICC was the first international organization to explicitly state which types of illicit payments were prohibited.¹⁴⁷ According to the ICC, illicit payments included bribes, facilitating payments, promises of bribes and extortion payments.¹⁴⁸ Furthermore, the Report recommended that both the payor and the receiver of an illicit payment be punished.¹⁴⁹

The ICC subsequently adopted the Rules of Conduct to Combat Extortion and Bribery on June 20, 1978.¹⁵⁰ The Rules of Conduct were directed toward multinational corporations, rather than governments,¹⁵¹ a distinction which the ICC found material.

The Rules of Conduct are voluntary,¹⁵² and they are designed to promote and protect "high standards of integrity in business transactions."¹⁵³ Contrary to the Shawcross Report, the Rules of Conduct do not provide guidance regarding facilitating pay-

1977), reprinted in 16 INT'L LEGAL MATS. 686 (1977) [hereinafter cited as The Shawcross Report].

143. *Id.*

144. The Shawcross Report concluded that "[n]either governments nor business can alone deal effectively with this problem. Therefore, complementary and mutually reinforcing action by both governments and business community is essential." *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Rules of Conduct to Combat Extortion and Bribery, ICC Pub. No. 315, reprinted in 17 INT'L LEGAL MATS. 417 (1977) [hereinafter cited as Rules of Conduct].

151. *Id.*

152. *Id.*

153. *Id.* The introduction to the Rules of Conduct states, ". . . [P]romot[ion of] high standards of integrity in business transactions. . . also form a valuable defensive protection to those enterprises which are subjected to attempts at extortion."

ments.¹⁵⁴ The effect of the Rules of Conduct is not to support criminalization of illicit payments, but rather to assist multinational corporations in business transactions.¹⁵⁵

E. U.N. Draft Text

The preceding analysis of U.N., OAS, OECD and ICC action demonstrates the lack of effective international steps toward eliminating illicit payments. This is partly because the guidelines, codes of conduct, and resolutions depend upon voluntary compliance by multinational corporations rather than mandatory proscription of illicit payments. A major shortcoming can also be found in the various definitions of illicit payments. Without a clear definition there can not be effective enforcement of the prohibition of illicit payments. Nevertheless, the comprehensive condemnation of illicit payments from the international community suggests a prevailing attitude against certain practices by multinational corporations.

The International Agreement on Illicit Payments (Draft Text)¹⁵⁶ rectifies the faults of the previous international attempts. Unlike the OECD, the ICC, and the OAS, whose members represent distinct economic interests, the Committee members of the Draft Text represent every geographical region.¹⁵⁷ Furthermore, the Draft Text would be legally binding on all signatories.¹⁵⁸

The Draft Text is indicative of the International community's conception of the scope and definition of illicit payments. It states:

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

- a. The offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether judicial or natural to or for the benefit of a public official as un-

154. *Id. Cf.* The Shawcross Report, *supra* note 142 which states governments should prohibit "all aspects of . . . bribes, . . . as well as so-called facilitating payments."

155. Rules of Conduct, *supra* note 150, at 419.

156. Draft Text, *supra* note 11.

157. Member countries of the Committee include: Argentina, Australia, Belgium, Brazil, Canada, Central African Empire, Denmark, Dominican Republic, Egypt, Ethiopia, France, Federal Republic of Germany, Greece, Italy, Jamaica, Japan, Kenya, Madagascar, Mali, Mexico, the Netherlands, Nigeria, Panama, Somalia, Sudan, Sweden, Switzerland, Syrian Arab Republic, Trinidad and Tobago, Turkey, Uganda, the United Kingdom, North Ireland, United Republic of Cameroon, the United States, and Venezuela.

158. Draft Text, *supra* note 11, at 1026, 1027.

due consideration for performance of his duties in connection with an international commercial transaction.

- b. The soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.¹⁵⁹

The Draft Text prohibits bribes, kickbacks, facilitating, and extortion payments by both the payor and receiver whereas political contributions are not prohibited. Approval of the Draft Text would bind the signatories¹⁶⁰ to act to prohibit bribes, kickbacks, facilitating, and extortion payments.

Should the United States ratify the treaty, some of its provisions would conflict with the criminal provisions of the FCPA. The most contradictory clause in the Draft Text is the prohibition of illicit payments to any "employee of a Government or of a public or governmental authority or agency who otherwise performs a public function."¹⁶¹ Thus, while the FCPA exempts "clerks whose duties are essentially ministerial,"¹⁶² the Draft Text imposes liability on foreign "clerks." Further, unlike the FCPA, the Draft Text does not prohibit the payment of political contributions to public officials.¹⁶³ In the event that the United States does ratify the treaty, the FCPA would be superseded, and facilitating payments would be excluded while political contributions would be permitted.

IV. FOREIGN CRIMINAL CODES

International law is not limited to the works of international organizations. Rather, international law is composed of fundamental rights and duties binding nations, derived from express treaty provisions, customary practice, and general principles of law recognized by civilized nations.¹⁶⁴ Thus, a complete analysis of the prohibition of illicit payments must also include an examination of the customary practice of States.

159. *Id.*

160. *Id.* Article 1 states: "Each contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law."

161. Draft Text, *supra* note 11, at 1027.

162. 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b)(2) (West Supp. 1980).

163. *Cf. Id.* §§ 78dd-1(a)-2(a) with the Draft Text, *supra* note 11.

164. G. SCHWARZENBERGER, INTERNATIONAL LAW 39 (1966).

A uniform practice by States creates a custom,¹⁶⁵ the evidence of which may often be found in State legislation.¹⁶⁶ It is through this incorporation of custom into legislation that States can express their preferences as to which types of conduct will or will not be tolerated.¹⁶⁷ Legislation also acts to establish the rights and duties of each state to punish those individuals whose conduct is considered unacceptable.¹⁶⁸

The following examination of a number of criminal codes from both developed and developing states suggests that certain kinds of illicit payments are universally prohibited.

A. Introduction

Since 1806 States have enacted criminal statutes prohibiting illicit payments.¹⁶⁹ Prior to the passage of the FCPA many States had enacted such statutes.¹⁷⁰ These enactments suggest a long-standing practice of States prohibiting illicit payments.

The following criminal codes are representative of States with differing social, economic and political positions. An attempt was made to study only those States which did not participate in the U.N. Draft Text.

B. Liability of Persons

In order to fall within the purview of the statutes of both developed and developing states, the receiver of an illicit payment must be a public official. The developing States of Bolivia,¹⁷¹

165. *Id.*

166. In the Serbian Loans case [1929] P.C.I.J., ser. B, No. 14 the World Court stated that "the [municipal] rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States."

167. *See generally* W.M. REISMAN, *supra* note 16, at 69-93.

168. *Id.*

169. *Senate Report, supra* note 44, at 6. *See also Foreign Bribes, supra* note 117, at 235 n.26 (1977) for a list of the penalties imposed in various countries for illicit payments.

170. John J. McCloy, Chairman of the Gulf Oil Special Review Committee investigating questionable payments, stated that the Committee "could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country." *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 6 (1976).

171. THE PENAL CODES OF BOLIVIA, Book 2, tit. 2, ch. 1, art. 147, *reprinted in* Y. KUGEL & N.P. COHEN, GOVERNMENT REGULATION OF BUSINESS ETHICS BOOK II § 2.3 (1978) [hereinafter cited as Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS].

the People's Republic of China,¹⁷² Columbia,¹⁷³ El Salvador,¹⁷⁴ Ghana,¹⁷⁵ India,¹⁷⁶ Jordan,¹⁷⁷ Paraguay,¹⁷⁸ Saudi Arabia,¹⁷⁹ Senegal,¹⁸⁰ Tanzania,¹⁸¹ Thailand,¹⁸² Zaire,¹⁸³ and Zambia,¹⁸⁴ all punish public officials or public employees for accepting illicit payments. Similarly, such developed States as France,¹⁸⁵ the Federal Republic of Germany,¹⁸⁶ The Netherlands,¹⁸⁷ Sweden,¹⁸⁸ Switzerland,¹⁸⁹ and the United Kingdom¹⁹⁰ also prohibit public of-

172. STATUTE ON PENALTIES FOR CORRUPTION IN THE CHINESE PEOPLE'S REPUBLIC, April 21, 1952, art. 7, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 3.1.

173. THE PENAL CODE OF COLUMBIA, Book 2, tit. 3, ch. 3, art. 160, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 2.7.

174. THE PENAL CODE OF EL SALVADOR, March 30, 1973, art. 444, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 2.11.

175. ACTS OF GHANA, CRIMINAL CODE OF 1960, art. 240, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 1.5.

176. INDIAN PENAL CODE, 1860, No. 45, 161, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 3.4.

177. CRIMINAL CODE OF JORDAN, *Crimes Against Official Duties*, 1960, No. 16, art. 170, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 3.9.

178. CRIMINAL CODE OF PARAGUAY, Book 2, ch. 3, art. 168, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 2.17.

179. Regulations for Combatting Bribery, Royal Decree No. 38, 22 SHAWWARD 1377 (May 11, 1958), *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 3.14.

180. PENAL CODE AND CODE OF VIOLATIONS, *Bribery of Public Officials and Employees*, 1972, art. 159, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 1.8.

181. PENAL CODE OF TANZANIA, 1945, Div. II, ch. X, art. 91, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 1.10.

182. THE CRIMINAL CODE OF THAILAND, 1956, *Act of Offences of Employees of State Organizations or Working Units*, art. 4, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 3.16.

183. CRIMINAL CODE OF ZAIRE, 1960, Bribery of Public Officials and Court-Appointed Arbitrators and Experts, art. 147, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 1.12.

184. PENAL CODE OF ZAMBIA, 1931, art. 147, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 1.13.

185. FRENCH PENAL LAW, § 4, art. 177, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 5.3.

186. CRIMINAL CODE OF GERMANY, tit. 8, Crimes Against the Public Service, § 460, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 5.4.

187. THE NETHERLANDS PENAL CODE, art. 362, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 5.9.

188. PENAL CODE OF SWEDEN, ch. 20, § 2, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 5.15.

189. PENAL CODE OF SWITZERLAND, art. 316, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 5.16.

190. PREVENTION OF CORRUPTION ACT, 1906, *reprinted in* Y. KUGEL & N.P. COHEN, REGULATION OF BUSINESS, *supra* note 171, at § 5.17.

ficials from accepting or agreeing to accept illicit payments. The difference between the developed and the developing States is that the criminal statutes of the developed States prohibit illicit payments to individuals who are not public officials.

In the Prevention of Corruption Act of 1906 the United Kingdom extended the criminal prohibition of illicit payments to include agents in business transactions.¹⁹¹ The Criminal Codes of Sweden prohibit any person from offering or accepting illicit payments,¹⁹² while the Penal Code of The Netherlands prohibits businessmen from accepting illicit payments.¹⁹³ The United States initially recognized that payments made to public officials should be prohibited,¹⁹⁴ however, this position was changed by the FCPA, which exempts those officials "whose duties are essentially ministerial or clerical."¹⁹⁵

B. Kinds of Illegal Payments

1. *Bribes.* All of the statutes examined prohibited bribes.¹⁹⁶ Some statutes, including those of Saudi Arabia,¹⁹⁷ India,¹⁹⁸ Thailand,¹⁹⁹ Columbia,²⁰⁰ Sweden,²⁰¹ the United Kingdom,²⁰² France,²⁰³ Senegal,²⁰⁴ Tanzania,²⁰⁵ the People's Republic of China,²⁰⁶ and Zambia,²⁰⁷ expressly prohibit bribes to public officials where a transaction is pending or likely to be pending before

191. *Id.*

192. PENAL CODE, ch. 9, §§ 1-12, *supra* note 188.

193. THE NETHERLANDS PENAL CODE, art. 328, *supra* note 187.

194. *See* 15 U.S.C.A. §§ 78q(b), 78dd, 78ff (West Supp. 1980).

195. *Id.*

196. The essential requirements for a bribe are that the receiver must be a public official and the payment must influence his actions.

197. Regulations for Combatting Bribery, *supra* note 179.

198. INDIAN PENAL CODE, *supra* note 176.

199. THE CRIMINAL CODE OF THAILAND, *supra* note 182.

200. THE PENAL CODE OF COLUMBIA, *supra* note 173.

201. PENAL CODE OF SWEDEN, *supra* note 188.

202. PREVENTION OF CORRUPTION ACT, *supra* note 190.

203. FRENCH PENAL LAW, *supra* note 185.

204. PENAL CODE AND CODE VIOLATIONS, *supra* note 180.

205. PENAL CODE OF TANZANIA, *supra* note 181.

206. STATUTE ON PENALTIES FOR CORRUPTION IN THE CHINESE PEOPLE'S REPUBLIC, *supra* note 172.

207. PENAL CODE OF ZAMBIA, *supra* note 184.

the public official. The statutes of Bolivia,²⁰⁸ El Salvador,²⁰⁹ Ghana,²¹⁰ Jordan,²¹¹ Paraguay,²¹² Zaire,²¹³ The Netherlands,²¹⁴ and Switzerland²¹⁵ refer generally to the prohibition of bribes to public officials and employees.

2. *Extortion Payments*. Of the developing states²¹⁶ only Saudi Arabia,²¹⁷ Ghana,²¹⁸ Senegal,²¹⁹ Zaire,²²⁰ and the People's Republic of China²²¹ prohibit threats or acts of violence to procure payments from individuals. In contrast, all the developed states prohibit extortion payments.²²² Where the extortion is considered especially corrupt, some statutes provide for a separate crime of aggravated extortion.²²³ Due to the limited number of states which expressly prohibit extortion, there is no universal consensus for the proscription of extortion payments to public officials.

3. *Facilitating Payments*. Of the developing states,²²⁴ Columbia,²²⁵ Ghana,²²⁶ India,²²⁷ Senegal,²²⁸ and Thailand²²⁹ combine facilitating payments and bribes into a single sentence. Senegal's law illustrates the combination of facilitating payments and bribes:

Whoever being an official. . .demands or agrees to accept for himself or for others, any property or benefits for doing or not doing anything in connection with his exercise of his func-

-
208. THE PENAL CODES OF BOLIVIA, *supra* note 171.
209. THE PENAL CODE OF EL SALVADOR, *supra* note 174.
210. ACTS OF GHANA, *supra* note 175.
211. CRIMINAL CODE OF JORDAN, *supra* note 177.
212. CRIMINAL CODE OF PARAGUAY, *supra* note 178.
213. CRIMINAL CODE OF ZAIRE, *supra* note 183.
214. THE NETHERLANDS PENAL CODE, *supra* note 187.
215. PENAL CODE OF SWITZERLAND, *supra* note 189.
216. An extortion requires a threat from to receiver to procure payments or benefits from the receiver.
217. Regulations for Combatting Bribery, *supra* note 179.
218. ACTS OF GHANA, *supra* note 175.
219. PENAL CODE AND CODE VIOLATIONS, *supra* note 180.
220. CRIMINAL CODE OF ZAIRE, *supra* note 183.
221. STATUTE ON PENALTIES FOR CORRUPTION, *supra* note 172.
222. *See* notes 185-210 *supra*.
223. CRIMINAL CODE OF GERMANY, sec. 259, *supra* note 186.
224. A facilitating payment consists of a public official accepting a payment for performing his duties.
225. THE COLUMBIAN PENAL CODE, *supra* note 173.
226. ACTS OF GHANA, *supra* note 175.
227. INDIAN PENAL CODE, *supra* note 176.
228. PENAL CODE AND CODE VIOLATIONS, *supra* note 180.
229. THE CRIMINAL CODE OF THAILAND, *supra* note 182.

tions, shall be punished.²³⁰

A preponderance of developing states, including Bolivia,²³¹ El Salvador,²³² Jordan,²³³ Paraguay,²³⁴ the People's Republic of China,²³⁵ Tanzania,²³⁶ Zaire,²³⁷ Saudi Arabia,²³⁸ and Zambia,²³⁹ prohibit facilitating payments. What is unique about these countries is that their statutes provide separate articles and penalties for facilitating payments.

Similarly, the developed states of France,²⁴⁰ the Federal Republic of Germany,²⁴¹ The Netherlands,²⁴² Sweden,²⁴³ Switzerland,²⁴⁴ and the United Kingdom²⁴⁵ prohibit facilitating payments. Switzerland's statute is illustrative:

Public officials. . . who, in order to do an act not contrary to their duties and within the scope of their employment who solicit, accept or have promised to accept a donation or other benefit, to which he was not entitled, will be punished.²⁴⁶

4. *Political Contributions and Kickbacks.* Political contributions, in sharp contrast to bribes and facilitating payments, are accepted and encouraged in many countries.²⁴⁷ Some developed countries, such as Canada²⁴⁸ and the United Kingdom,²⁴⁹ allow political contributions without disclosure, while others, such as Germany,²⁵⁰ provide tax deductions for such contributions.

Illegal kickbacks involve a secret return of a part of the sum

230. PENAL CODE AND CODE VIOLATIONS, *supra* note 180.

231. THE PENAL CODES OF BOLIVIA, *supra* note 171.

232. PENAL CODE OF EL SALVADOR, *supra* note 174, art. 445.

233. CRIMINAL CODE OF JORDAN, *supra* note 177, art. 171(1).

234. PENAL CODE OF PARAGUAY, *supra* note 178, art. 168.

235. STATUTES ON PENALTIES FOR CORRUPTION IN THE CHINESE PEOPLE'S REPUBLIC, *supra* note 172, art. 7.

236. THE PENAL CODE OF TANZANIA, *supra* note 181, art. 92.

237. CRIMINAL CODE OF ZAIRE, *supra* note 183, art. 147.

238. Regulations for Combatting Bribery, *supra* note 179, art. 1.

239. PENAL CODE OF ZAMBIA, *supra* note 184, art. 95.

240. THE FRENCH PENAL LAW, *supra* note 185.

241. CRIMINAL CODE OF GERMANY, *supra* note 186.

242. THE NETHERLANDS PENAL CODE, *supra* note 187.

243. PENAL CODE OF SWEDEN, *supra* note 188.

244. PENAL CODE OF SWITZERLAND, *supra* note 189.

245. PREVENTION OF CORRUPTION ACT OF 1906, *supra* note 190.

246. PENAL CODE OF SWITZERLAND, *supra* note 189.

247. *Senate Hearings on Political Contributions*, *supra* note 26, at 5-6.

248. *Id.*

249. *Id.*

250. Wall Street Journal, Mar. 18, 1976, at 28, col. 2 (Eastern ed.).

received in a business transaction. India,²⁵¹ Thailand,²⁵² Columbia,²⁵³ Senegal,²⁵⁴ Tanzania,²⁵⁵ and Zambia²⁵⁶ prohibit monies paid to public officials during, before, or after a transaction. One such statute, the India Penal Code, provides:

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned shall be punished.²⁵⁷

5. *Conclusion.* Foreign criminal codes provide a basis for determining whether certain kinds of illicit payments are consistently prohibited. The preceding analysis shows that bribes and facilitating payments are prohibited world-wide. In contrast, kickbacks are occasionally prohibited by developing and developed states, while extortion is prohibited by all developed countries and only by a few developing countries. The prohibition of political contributions appears to be a unique proscription by the United States.

Comparing the above with the United Nations Draft Text and the FCPA, it is evident that the Draft Text and the foreign criminal codes universally prohibit bribes and facilitating payments to public officials while there is not a world-wide consensus that kickbacks, political contributions and extortions should be prohibited.

The refusal by the United States to prohibit facilitating payments contradicts the universal prohibition of such payments. Furthermore, the United States proscription of political contributions is at odds with the criminal statutes of both developing and developed states.

251. INDIAN PENAL CODE, *supra* note 176.

252. CRIMINAL CODE OF THAILAND, *supra* note 182.

253. PENAL CODE OF COLUMBIA, *supra* note 173.

254. PENAL CODE AND CODE VIOLATIONS, *supra* note 180.

255. PENAL CODE OF TANZANIA, *supra* note 181.

256. PENAL CODE OF ZAMBIA, *supra* note 184.

257. INDIAN PENAL CODE, *supra* note 176.

V. UNFAIR EFFECTS OF THE FCPA

Criminal penalties under the FCPA occur when an illicit payment is made in a foreign country or to a foreign official.²⁵⁸ The extraterritorial impact of the FCPA conflicts with “concepts of sovereignty and the territorial supremacy of states.” Where a person’s conduct is subject to inconsistent proscriptions, the Restatement (Second) of Foreign Relations Laws requires the United States to take into account the laws of other States.²⁵⁹ The United States’ refusal to take into account these laws unfairly affects certain types of United States multinational corporations, both economically and criminally.²⁶⁰ This refusal also creates foreign relations problems for the United States.²⁶¹

Multinational corporations use illicit payments to obtain economic gains.²⁶² The corporation, depending upon the particular business, may use various types of illicit payments to achieve economic advantages.²⁶³ Thus, the FCPA directly affects the business of multinational corporations.²⁶⁴

There are four major classifications of American multinational corporations²⁶⁵ — the aircraft, oil, drug and food industries.²⁶⁶ Each industry, due to its unique features, uses one type of illicit payment more than others.

The aircraft industry employs foreigners as sales agents to promote their products.²⁶⁷ In some instances, countries require foreign corporations to employ local agents before the government will be-

258. 15 U.S.C.A. §§ 78dd-1(a)(1)-(3), 78dd-2(a)(1)-(3) (West Supp. 1980).

259. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 40 (1965) provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider in good faith, moderating the exercise of its enforcement jurisdiction.

260. See generally text accompanying notes 289-95 *infra*.

261. See Herlihy & Levine, *supra* note 39; J. KENNEDY & C.E. SIMON, *supra* note 3, at 118.

262. *Id.*

263. See text accompanying notes 265-93 *infra*.

264. J. KENNEDY & C.E. SIMON, *supra* note 3, at 118.

265. This is based on data compiled from the SEC’s disclosure report of corporations making illicit payments. Of the thirty-two corporations spending more than one million dollars in illicit payments, half of these were the oil, aircraft, food, and drug industries. See Y. KUGEL & G.W. GRUENBERG, *supra* note 5, at 45-54.

266. *Id.*

267. *Senate Hearings on Political Contributions*, *supra* note 26. See also TIME, February 23, 1976, at 31.

gin negotiations.²⁶⁸ By using local agents, a corporation can enhance its chances of securing a sale.²⁶⁹ An additional factor encouraging the use of foreign agents is that these corporations exist on singular billion-dollar sales.²⁷⁰ Foreign agents are generally compensated by commissions, which have been up to seven million dollars.²⁷¹ Although the payment of commissions for agent's services are not illegal,²⁷² suspicion is aroused when payments are substantial, the agent is employed by the government and the agent is instrumental in influencing the governmental entity to grant the contract.²⁷³ Payments made under these conditions are, in reality, bribes because the commission does not compensate the agent for his promotion of the product, but rather is made for the agent's influence in the government.²⁷⁴ Thus, the necessity of foreign agents in aircraft sales inclines the corporation to pay bribes disguised as commissions.²⁷⁵

The oil industry is primarily concerned with maintaining a profitable environment within the host country.²⁷⁶ This concern is caused by the corporation's investment in substantial amounts of fixed capital,²⁷⁷ such as oil rigs, tankers and pipelines.²⁷⁸ It follows that one of the fundamental inquiries of multinational corporations before investing large amounts of capital is the degree of "political risk" in a country.²⁷⁹

Oil corporations have supported political systems with contributions, particularly where they are legal and acceptable.²⁸⁰ Where the political conditions were unfavorable,²⁸¹ some corporations have attempted to upset the existing government with political con-

268. *Hearings on Activities of American Corporations*, *supra* note 2, at 100.

269. *Senate Hearings on Political Contributions*, *supra* note 26, at 115.

270. Herlihy & Levine, *supra* note 39, at 561.

271. Wall Street Journal, January 4, 1979, at 2, col. 2.

272. *See generally The FCPA*, *supra* note 95.

273. Solomon & Linville, *Corporate Foreign Payments*, 17 B.C. INDUS. & COMM. L. REV. 303, 307 (1976).

274. *See text accompanying note 84 supra*.

275. Solomon & Linville, *supra* note 273, at 307-09. The authors explain that "corporations often pay their consultants on a no-questions-asked basis, preferring not to know how the agents operate."

276. Y. KUGEL & G. GRUENBERG, *supra* note 5, at 78.

277. *Id.*

278. *Id.*

279. K. HOSSAIN, LAW AND POLICY IN PETROLEUM DEVELOPMENT: CHANGING RELATIONS BETWEEN TRANSNATIONALS AND GOVERNMENTS 36 (1979).

280. A. PINELO, *supra* note 42.

281. Solomon & Linville, *supra* note 273, at 309.

tributions. An additional pressure for political contributions occurs when the "balance of power" between the corporation and the host country shifts over time.²⁸² While the corporation may, at first, exert considerable influence over the political climate, the increased knowledge and confidence of the developing country may "shift the balance of power firmly away from the multinational corporation."²⁸³ To counter this shift, the corporation often contributes to favorable political parties whether or not they are in power.²⁸⁴

The food and drug industries are primarily concerned with import and export duties and customs inspection.²⁸⁵ Contractual obligations necessitate smooth and swift transactions among governmental employees.²⁸⁶ Furthermore, the food industry has a peculiar need to clear products through customs because spoiled goods are worthless.²⁸⁷ This dependence upon the speed and acceptance of goods encourages the use of facilitating payments to governmental officials.²⁸⁸

It is apparent that the aircraft and oil industries are unfairly affected by the FCPA. These industries, which typically use political contributions and bribes as a means of promoting their business goals, are penalized for business practices which are, by necessity, fundamental to their existence. Conversely, the food and drug industries, which characteristically resort to facilitating payments, remain relatively untouched by the FCPA. This can be seen in a number of ways. Statistics reveal that numerous multinational corporations have authorized facilitating payments.²⁸⁹ Predictably, the list does not include multinational oil and aircraft corporations.²⁹⁰ In criminal proceedings brought by the SEC alleging the use of illegal payments, no food and drug corporations were involved, only oil and aircraft industries.²⁹¹ A recent complaint filed

282. Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L L. 17, 21 (1978).

283. *Id.*

284. A. PINELO, *supra* note 42.

285. Y. KUGEL & G. GRUENBERG, *supra* note 5, at 80.

286. S. Res. 265, 94th Cong., 1st Sess., 121 CONG. REC. 16, 735 (1975). *See also* Wall Street Journal, May 9, 1975, at 1.

287. Y. KUGEL & G. GRUENBERG, *supra* note 5, at 80.

288. *Id.*

289. J. KENNEDY & C.E. SIMON, *supra* note 3, at 385.

290. *Id.*

291. *See, e.g.*, SEC v. McDonnell-Douglas Corp., 484 SEC Reg. & L. Rep. (BNA) (A-6 D.D.C. Dec. 14, 1978); SEC v. Katy Indus. Inc., 469 SEC Reg. & L. Rep. (BNA) (A-1 N.D. Ill. Aug. 30, 1978); SEC v. Page Airways Inc., (1978) Transfer Binder) Fed. Sec. L. Rep. (CCH II 96, 393 D.D.C. Apr. 12, 1978).

pursuant to section 104 of the FCPA accused the President and Vice-President of Holcar Oil Company of bribing foreign officials.²⁹² Similarly, the majority of Bi-lateral Payoff Cooperation Agreements made between the United States and foreign governments to penalize the making of illicit payments pertain to oil and aircraft multinational corporations.²⁹³

The potential economic effects of the FCPA upon American multinational corporations has been widely debated. One author contends that the "potential trade losses would be small, if not insignificant."²⁹⁴ However, a recent White House Task Force on Export Impediments estimated one billion dollars of foreign business had been lost so far due to the FCPA.²⁹⁵

Essentially there are two alternatives available to the United States to rectify the legal inconsistencies caused by the FCPA. The first would incorporate the international customary attitude into the FCPA. This would entail revising the FCPA to include facilitating payments. By deleting the phrase "such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical" the FCPA would include facilitating payments. The second alternative would encourage the acceptance of an international agreement on illicit payments which incorporates customary international law. Assuming the United States ratifies the agreement, it would supersede the FCPA. An international approach would have the added effect of equalizing the burden of guilt by prosecuting not only corporations for making payments, but receivers as well. This would create a stronger deterrent since both parties would be punished. Finally, the problems currently faced by the United States under the FCPA, such as lack of evidence and witnesses, and the conflicts of the exercise of jurisdiction over the punishment of illicit payments, would be resolved under the agreement.

292. See *United States v. Carver*, reprinted in PRACTICING LAW INSTITUTE TRANSNATIONAL CORPORATE CONDUCT, *supra* note 1, at 363.

293. See, e.g., Federal Republic of Germany, entered into force Sept. 24, 1976; Italy, signed March 23, 1976; The Netherlands, signed Mar. 29, 1976; Belgium, signed May 31, 1976; Canada, signed Mar. 1977; Columbia, signed Apr. 22, 1976; Greece, signed May 20, 1976; Mexico, signed June, 1976; Nigeria, signed Apr. 20, 1976; Spain, signed July 14, 1976; Turkey, signed July 8, 1976.

294. Lashbrooke, *supra* note 13, at 246.

295. See *Wall Street Journal*, September 21, 1979, at 12, col. 1. See also *Wall Street Journal*, September 8, 1978, at 1, col. 5.

VI. CONCLUSION

The FCPA does not adequately deal with the problem of illicit payments. The FCPA's vague language, the exemption of facilitating payments and the extraterritorial application of the Act have stifled many United States multinational corporations. As a result, approximately one billion dollars has been lost by multinational corporations in foreign business. Furthermore, the food and drug corporations which rely on facilitating payments remain untouched, while the oil and aircraft corporations which use bribes and political contributions in business transactions are subject to increased criminal liability.

In light of these problems, a unified consistent solution is needed. International organizations have not been able to find the answer. The OECD's Code of Conduct and the ICC's Rules of Conduct both fail to clearly define prohibited payments, and do not provide criminal penalties for those who violate the guidelines. Although the Draft Text rectifies these faults, it has not yet been ratified.

The important aspect emerging from the Draft Text is that it prohibits facilitating payments. Similarly, an examination of foreign criminal codes shows that facilitating payments are customarily prohibited. Since the United States is willing to take the first step toward solving this problem, it should recognize and incorporate customary international law into domestic legislation. By revising the FCPA to include facilitating payments, or encouraging an international agreement, much can be done towards providing a uniform and impartial system for dealing with illicit payments.

Jefferi Joan Hamilton