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Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus

*David A. Gantz**

[E]ffective efforts at all levels to combat and avoid corruption and bribery in all countries are essential elements of an improved international business environment, . . . enhance fairness and competitiveness in international commercial transactions and form a critical part of promoting transparent and accountable governance, economic and social development and environmental protection in all countries. . . .¹

Only recently has the international community recognized that foreign bribery is a serious problem not only for international business activities but as a threat to democratic government and economic development. Until a few years ago, the United States, through legislation known as the Foreign Corrupt Practices Act ("FCPA"),² was the only major trading nation to make it a criminal offense for its own firms and individuals to make certain "corrupt" payments to foreign government officials illegal under its own law rather than illegal under the foreign law.

Bribes remain a common if unfortunate feature of international business activity in many parts of the world. Given this fact, the risk that U.S. business activities abroad will be subject to criminal penalties in the United States, while their competitors in Germany, France, Japan, Korea and other

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¹ *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*, G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex 1, U.N. Doc. A/RES/51/191 (1996), reprinted in 36 I.L.M. 1043, 1046-47 (1997).

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)).

countries operate under no similar legal constraint, has greatly complicated the participation of U.S. citizens and companies in the global economy. In addition, this inequality distorts international trade, increases the cost of economic development, and undermines democratic principles of government.

Until recently, neither developed countries nor the major capital goods importing developing countries or their citizens have shown much inclination to subject themselves to limitations similar to those incorporated in the FCPA. In fact, some major capital goods exporting nations have actively encouraged foreign bribery by their citizens by providing an income tax deduction for such foreign payments as ordinary and necessary business expenses.³ However, this situation is now changing. International financial institutions such as the World Bank and the International Monetary Fund ("IMF") are tying financial assistance to the recipient government's willingness and ability to control corruption.⁴ Private organizations such as the International Chamber of Commerce and Transparency International are encouraging their members to resist demands for corrupt payments abroad.⁵

Most significantly, in two major public international organizations, the Organization of American States ("OAS") and the Organization for Economic Cooperation and Development ("OECD"), major steps are now being taken to deal with foreign bribery on a multilateral basis. International agreements have been negotiated and signed in both organizations that create binding international legal rules which, through national implementing legislation, are designed to discourage such practices.⁶ Thus, the toleration of either the offering or acceptance of corrupt payments by capital goods exporting and capital goods importing nations alike, and their individual and corporate citizens, can no longer be taken for granted.

This article focuses on the two recently negotiated binding international agreements dealing with foreign bribery, the Inter-American Convention Against Corruption⁷ and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁸

³ See *infra* Part VI.D.

⁴ See *infra* Part III.A, and especially notes 75-79 and accompanying text. See also James P. Wesberry Jr., *International Financing Institutions Face the Corruption Eruption: If the IFIs Put Their Muscle and Money Where Their Mouth is, the Corruption Eruption May be Capped*, 18 NW. J. INT'L L. & BUS. 498 (1998).

⁵ For example, Transparency International's national chapter activities include anti-corruption programs. See Beverly Earle, *The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work Try the Money Argument*, 14 DICK. J. INT'L L. 207, 232 (1996). See also *infra* Parts IV.A & B.

⁶ See *infra* notes 7 and 8 and Parts V and VI.

⁷ See Inter-American Convention Against Corruption, Mar. 29, 1996, Organization of American States, 35 I.L.M. 724 (1996) [hereinafter Inter-American Convention].

⁸ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, Organization for Economic Cooperation and Development, 37 I.L.M. 1 (1998) [hereinafter OECD Convention].

Part I of the article begins with a review of the rationale and key legal elements of the U.S. Foreign Corrupt Practices Act. Part II describes recent efforts by the United States to convince other governments and firms of the need for binding, enforceable and universally accepted rules against corrupt payments to foreign public officials. Parts III and IV survey the activities of various governmental organizations and major private sector groups that support international efforts to effectively discourage foreign bribery, respectively. The key sections, Parts V and VI, describe, analyze and critique the two major international conventions, the Inter-American Convention Against Corruption, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Finally, Part VII discusses the further steps that must be taken to be sure that this recent progress becomes a significant and effective deterrence to foreign bribery.

I. THE RATIONALE FOR AND CONTENT OF THE FOREIGN CORRUPT PRACTICES ACT

The U.S. Congress enacted the Foreign Corrupt Practices Act in 1977 in a spirit of moral outrage against disclosures that certain large U.S. corporations had bribed foreign government officials in order to obtain business in those countries, including a series of payments by Lockheed Corporation in Japan, which resulted in the resignation and prosecution (in Japan) of the Japanese Prime Minister.⁹ One U.S. government study conducted in the 1970s, showing illegal payments voluntarily disclosed to the Securities and Exchange Commission ("SEC"), revealed questionable or clearly illegal payments by seventy-seven of ninety-seven responding companies; the payments ranged in size from \$13,349 to \$56.7 million over a period of years.¹⁰ The expanding and somewhat uncontrollable activities of multinational corporations, the post-Watergate mood in the United States, and the moral tone of the Carter Administration all put pressure on the U.S. Congress to enact the FCPA.¹¹ As one scholar has suggested, "The FCPA essentially reflects the view that corruption, and in particular, its subset bribery, is so immoral that not even the loss of business by American companies could justify it."¹²

⁹See JYOTI N. PRASAD, *IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT ON U.S. EXPORT* 35-37 (1993).

¹⁰SENATE COMM. ON BANKING, HOUSING & URBAN AFFAIRS, 94TH CONG., 2D SESS., SEC REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (Comm. Print 1976), *quoted in* PRASAD, *supra* note 9, at 35-37.

¹¹PRASAD, *supra* note 9, at 34-35; *see also* GEORGE C. GREANIS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT: ANATOMY OF A STATUTE* 17-31 (1982) (reviewing the statute's origins).

¹²Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 123 (1996). For a discussion of the moral and ethical issues of bribery in the developing world, *see* Jennifer Daehler, *Professional Versus Moral Responsibility in the Developing World*, 9 GEO. J. LEGAL ETHICS 229, 245-50 (1995).

A. Principal Elements of the FCPA

Under the FCPA, it is unlawful for a United States "domestic concern," which is defined as an individual who is a citizen, national or resident of the United States or any corporation or other business association organized under the laws of a state or with its principal place of business in the United States¹³ or an issuer of the securities thereof,¹⁴ through the use of any means of interstate commerce, including telephone, facsimile, telex, mails, and courier service, to:

(1) pay or offer to pay money or anything of value "corruptly," directly or indirectly, to

(2) a foreign government official, political party, party official, political candidate or intermediary for such person,

(3) while knowing or having reason to know — including a "high probability of knowledge" — that the purpose of the payment was to influence an official act or official decision,

(4) designed to assist in obtaining or retaining business.¹⁵

The FCPA also requires firms that are subject to reporting requirements under the U.S. securities laws to keep books and records "in reasonable detail" so as to adequately reflect corporate transactions, and to improve internal accounting controls to assure that financial transactions can be properly accounted for.¹⁶ These accounting requirements are designed to make it difficult or impossible for companies to maintain "slush funds" for illegal purposes or otherwise conceal illicit payments in legitimate accounts.

The FCPA does not effectively apply to foreign subsidiaries or affiliates of U.S. firms, although it does apply to U.S. citizens, employees or directors who meet the knowledge requirements of circumstances that suggest illicit activities, e.g., awareness of a "high probability of the existence of such circumstance. . . ."¹⁷ While the coverage of the FCPA is broad, there are exceptions. The FCPA excludes from coverage the facilitating or "grease" payments for "routine government actions" by foreign officials, such as obtaining permits, licenses and official documents, provision of basic utilities, etc.¹⁸ Two affirmative defenses to charges under the FCPA exist: first, legality of the payment under the law of the host country,¹⁹ and

¹³ See 15 U.S.C. § 78dd-2 (1994).

¹⁴ 15 U.S.C. § 78dd-1.

¹⁵ See 15 U.S.C. §§ 78dd-1(a) to -2(a).

¹⁶ 15 U.S.C. § 78m(b)(2)(B); see 17 C.F.R. § 240.13(b)(2)-(1)-(2) (1997). For a brief discussion of the provisions of the FCPA, see David A. Gantz, *The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers*, 14 ARIZ. J. INT'L & COMP. L. 97, 104-09 (1997).

¹⁷ Michael D. Nilsson, *Foreign Corrupt Practices Act*, 33 AM. CRIM. L. REV. 803, 809 n.53 (1996).

¹⁸ 15 U.S.C. § 78dd-2(h)(4)(A) (1994).

¹⁹ 15 U.S.C. § 78dd-2(c)(1).

second, payment for travel and lodging arising out of promotional activities aimed at obtaining or retaining new business.²⁰ The legal payment exception is a narrow one, however. It applies only to actions expressly permitted under local law; the failure of the foreign government to enforce local anti-bribery laws does not constitute a defense.²¹

The legal basis for the United States to exercise criminal jurisdiction outside the territory of the United States is the Commerce Clause of the Constitution.²² In the context of foreign bribery, it seems unlikely that there could be any otherwise covered illicit activity involving a U.S. concern or person that did not in some way utilize "the mails or any means or instrumentality of interstate commerce" such as the telephone, facsimile, telex, mails and/or courier service for communications, funds transfers or the like.²³

B. The FCPA as a Unilateral Approach to Foreign Bribery

The FCPA has been criticized on many occasions because today, as in 1977, the United States is the only major nation that effectively punishes its natural and corporate citizens under its *own* laws for bribing the government officials of *other* nations. The FCPA thus puts U.S. concerns and their U.S. citizen employees at a substantial disadvantage in competing abroad for the sale of goods and services in certain countries.²⁴ Studies have indicated that seventy percent of U.S. firms believe that the unilateral restrictions applicable to U.S. firms under the FCPA result in at least some decrease in overseas sales.²⁵ However, the FCPA has also been attacked for other reasons beyond the competitive disadvantage to U.S. firms. For example, the FCPA has been criticized for vagueness. Because the FCPA is a criminal statute that is imprecise, it has arguably created a "chilling effect" on U.S. firms and individuals that may not only discourage illegal bribery abroad but may also discourage legitimate transactions.²⁶ Undoubtedly, there are some U.S. firms and individuals that, because of high moral standards or excessive caution, simply refuse to do business in areas such as the Middle East or Mexico in order to avoid being exposed to questionable

²⁰ 15 U.S.C. § 78dd-2(c)(2).

²¹ H.R. CONF. REP. NO. 100-576, at 556 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1589.

²² Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

²³ 15 U.S.C. § 78dd-1(a), -2(a).

²⁴ See, e.g., Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But for How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 303-06 (1994).

²⁵ PRASAD, *supra* note 9, at 115.

²⁶ See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 230, 262-65 (1997) (asserting that the vagueness of the FCPA creates "compliance anxiety" in gray area situations); Klich, *supra* note 12, at 133 (asserting that the FCPA fails to effectively distinguish between government officials and private individuals, especially with regard to transitional economies).

business activities,²⁷ although there is a dearth of statistical evidence to quantify such assertions.

A debate over the wisdom of punishing U.S. firms for bribery of foreign officials is not particularly useful in the context of this article. While skeptics may continue to exist, insofar as the author has been able to ascertain, there is no evidence of any interest in Congress or the Executive Branch, after the 1988 efforts,²⁸ in making further attempts to eliminate ambiguities or vagueness, let alone the underlying criminalization of the targeted activity. Moreover, once the United States ratifies the Inter-American Convention and the OECD Convention, the United States will be under a binding international legal obligation to punish foreign bribery through national legislation.²⁹ Therefore, the FCPA, with some minor modifications needed to comply with the two Conventions, will probably remain a part of U.S. law for the foreseeable future.

C. Assessing the Extent and Costs of Foreign Bribery

Unfortunately, there appears to have been no significant reduction in foreign bribery, even by U.S. firms, in the nearly twenty years since the FCPA was enacted, presumably due to continued intense competition with non-U.S. firms to obtain foreign sales. Knowledgeable observers have asserted that the FCPA has "deterred corrupt practices in the conduct of international business by U.S. firms,"³⁰ but the case remains unproven. There is evidence that the legal and accounting professions have made significant efforts to ensure compliance by their U.S. firm clients.³¹ However, this does not mean that foreign bribery by U.S. firms has been eliminated or reduced to insignificant levels. Rather, bribery by U.S. firms of foreign officials "may be surfacing as a significant problem for the first time in 20 years,"

²⁷ See Gantz, *supra* note 16, at 99.

²⁸ 15 U.S.C. § 78dd-1(a), -2(a) (1994). In 1988, amendments to the FCPA were enacted in part to specify a new and clearer knowledge standard. "When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." 15 U.S.C. § 78dd-2(h)(3)(B). One may well question whether this language represents a significant improvement. The 1988 amendments serve to clarify ambiguities relating to the determination as to whether a bribe was made for the purpose of obtaining, retaining or directing business, and is thus actionable. See Salbu, *supra* note 26, at 245-46.

²⁹ See *infra* Parts V, VI.

³⁰ Jay M. Vogel, *Report of the ABA Committee on Corrupt Practices to the ABA*, 30 INT'L LAW. 194, 196 (1996).

³¹ See Vogel, *supra* note 30, at 196. The ABA's Task Force on Foreign Corrupt Practices of the ABA Section of International Law and Practice has provided the impetus for obtaining formal ABA support for ABA House of Delegates recommendations supporting national and international efforts to deter corruption, and disseminates information through publications and seminars. See, e.g., Lucinda A. Low & Claire S. Wellington, *The Foreign Corrupt Practices Act: Avoiding the Pitfalls*, PREVENTIVE L. REP., Spring 1994, at 13.

according to SEC enforcement officials describing recent investigations.³² For example, the SEC has recently reached agreement with Triton Energy Corp., which agreed to pay a \$300,000 penalty to settle allegations that a subsidiary bribed Indonesian government officials in 1989-90.³³ This is the first major prosecution since action was taken against Lockheed Corporation in 1994 for bribing an Egyptian legislator.³⁴ Other investigations by the SEC, which enforces the accounting provisions of the FCPA, and by the Justice Department, which is responsible for enforcement of the criminal bribery provisions, are continuing.³⁵ Moreover, while domestic bribery within the United States is not perceived to be a major problem, a recent survey suggests that some nations are less corrupt than the United States, although the United States still ranks among the least corrupt.³⁶

Globally, the corruption problem remains disturbingly common and socially, economically, and politically damaging. Such illicit activities are not limited to the newly emerging Asian markets such as China, Indonesia, India, Malaysia, Pakistan, the Philippines,³⁷ to key Latin American markets such as Venezuela, Brazil³⁸ and Mexico,³⁹ to African nations such as Nigeria,⁴⁰ or to Russia and other transitional economies⁴¹ where it remains an endemic concern. As recent developments in Italy⁴² and Germany⁴³ have confirmed, corruption remains a global phenomenon, as highly corrupt

³²Neil Roland, *U.S. Firm May Feel Need to Bribe Overseas*, COM. APPEAL, Mar. 6, 1997, at B4 (quoting SEC Enforcement Director William McLucas).

³³See SEC v. Triton Energy Corp., et al, Fed. Sec. L. Rep. (CCH) ¶ 74,405 (D.D.C. Feb. 27, 1997). For a discussion of the *Triton Energy Corp.* decision, see Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlement*, 18 NW. J. INT'L L. & BUS. 303 (1998).

³⁴Andy Pasztor, *Lockheed Pleads Guilty to Conspiring to Violate Anti-Bribery Regulations*, WALL ST. J., Jan. 30, 1995, at B6.

³⁵Roland, *supra* note 32, at B4; see also Salbu, *supra* note 26, at 236-37.

³⁶See Transparency International, *Corruption Perception Index 1997* (visited Dec. 12, 1997) <<http://www.transparency.de/press/1997.31.7.cpi.html>> (out of fifty-two nations, Denmark tops the list as the least corrupt nation, while the United States ranks as the sixteenth least corrupt nation).

³⁷Louis Kraar, *How Corrupt is Asia?*, FORTUNE, Aug. 21, 1995, at 26.

³⁸See John Mintz & Paul Blustein, *Raytheon's \$1.4 Billion Brazil Pact in Doubt*, WASH. POST, Nov. 22, 1995, at E-3.

³⁹See *Payments May Smooth Rout of Illicit Fruit to Mexico*, J. COM., Mar. 26, 1996, at 1A.

⁴⁰Transparency International's *Corruption Perception Index 1997*, *supra* note 36, suggests that Nigeria is perceived by Transparency International's respondents to be the most corrupt of the 52 countries surveyed.

⁴¹Klich, *supra* note 12, at 133-40.

⁴²Lawrence Ingrassia & Maureen Line, *Italy's Drive to Reform Runs Into a Problem: Corruption Lingers On*, WALL ST. J., Apr. 18, 1996, at A1.

⁴³*Say No to Competitive Bribing*, WALL ST. J. (European ed.), Apr. 15, 1996, at 6.

countries are found on all five major continents,⁴⁴ and it is worth remembering that almost two-thirds of direct foreign investment is by firms based in one developed country investing in another developed country.⁴⁵

Widespread bribery continues despite broad international recognition that such corruption causes misallocation of resources, particularly in developing nations, "where funds originally intended for schools and hospitals are siphoned off as bribes to public officials and channeled into projects of lesser importance."⁴⁶ It distorts normal market forces, depriving purchasing countries of the best products at the lowest prices, and thus adversely impacts economic development. For example, an independent consultant has estimated that corruption in China adds five percent to operating costs.⁴⁷ The World Bank estimates that if bribes equal only five percent of foreign investment into developing countries — probably a conservative figure — the bribes would total nearly \$80 billion per year.⁴⁸

International business executives reportedly consider corruption to be the major obstacle to doing business in sub-Saharan Africa, Latin America and the Caribbean.⁴⁹ The risks to a foreign company from subsequent public disclosure of an illegal payment are even more difficult to quantify, but exist regardless of whether the bribes are punishable in the foreign company's country of incorporation or principal place of business.⁵⁰ An IMF study suggests a direct (inverse) correlation between the level of corruption prevalent in a country and the level of investment as a percentage of Gross Domestic Product; for example, Singapore has a low level of corruption and a high level of investment as a percentage of GDP, and Thailand and Haiti both have a high level of corruption and a relatively low level of investment.⁵¹ Of course, many factors other than corruption affect investment

⁴⁴Transparency International, *supra* note 36. Transparency International's list identifies Nigeria, Bolivia, Colombia, Russia, Pakistan, Mexico, Indonesia, India, Venezuela, and Vietnam as the 10 most corrupt countries of the world. The 10 least corrupt are said to be Denmark, Finland, Sweden, New Zealand, Canada, the Netherlands, Norway, Australia, Singapore and Luxembourg.

⁴⁵UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1997: TRANSNATIONAL CORPORATIONS, MARKET STRUCTURE AND COMPETITION POLICY, at 11, U.N. Sales No. E.97.II.D.10 (1997) [hereinafter UNCTAD REPORT].

⁴⁶Catherine Yannaca-Small, *Battling International Bribery*, OECD OBSERVER, Feb-Mar. 1995, at 16.

⁴⁷Kraar, *supra* note 37, at 26 (quoting Political & Economic Risk Consultancy, Ltd., a Hong Kong-based firm that analyzes corruption and political stability).

⁴⁸Guy de Jonquieres & John Mason, *Goodbye to Mr. 10%*, FIN. TIMES (London), July 22, 1997.

⁴⁹*Id.*

⁵⁰Subsequent public disclosure of an illegal payment most commonly occurs after a new government decides to investigate the activities of its predecessors in an attempt to discredit or even imprison them.

⁵¹Paul Blustein, *Pssst... Here's a Little Something That Seems to Slow Growth*, WASH. POST, July 17, 1996, at D1 (referring to a study by Paolo Mauro of the IMF). The study also

levels, and some countries, such as China and Mexico, have been very successful in attracting foreign investment despite perceived high levels of corruption.⁵²

The United Nations has recognized the incompatibility of corruption, not only with fairness and competitiveness in the international business environment, but also with modern economic and social goals and effective government.⁵³ The United States, while focusing on international business and competitiveness issues, also recognizes that foreign corruption is more than just a business environment issue. As Hattie Babbitt, U.S. Ambassador to the OAS, has asserted, corruption "is also a rule of law issue. Corruption saps the strength of democratic institutions, whether it exists in old established democracies or in newly created ones struggling to demonstrate their legitimacy."⁵⁴

For these reasons, despite the potentially anti-competitive impact of the FCPA on U.S. exporters, some observers have argued that the FCPA is an excellent example of U.S. efforts to promote free trade and open competition.⁵⁵ In any event, U.S. efforts to obtain effective global mechanisms to stem foreign corruption have become a major aspect of U.S. foreign economic policy.

II. UNITED STATES EFFORTS TO GLOBALIZE SANCTIONS AGAINST FOREIGN BRIBERY

A. Articulation of U.S. Views and the U.S. Challenge

Whether wise or unwise, the FCPA has long been a political reality in the United States. Thus, for competitive as much as or more than for political and moral reasons, the U.S. government has long sought international rules criminalizing bribery of foreign officials by all capital goods-exporting countries in order to level the playing field. Mickey Kantor, former U.S. Trade Representative and Secretary of Commerce, has termed foreign bribery an unfair tariff barrier which reduces U.S. exports and costs U.S. jobs: "From April 1994 to May 1995, the U.S. government learned of almost 100 cases in which foreign bribes undercut U.S. firms' ability to win

notes that nations may do well in attracting investment notwithstanding corruption if their economies are well managed in other ways. *Id.*

⁵² See Richard Lawrence, *Emerging Nations Attract Flood of Equity Capital*, J. COM., Jan. 31, 1997, at 1A.

⁵³ *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*, *supra* note 1.

⁵⁴ Ambassador Hattie Babbitt, Remarks to the American Bar Association Conference on the Foreign Corrupt Practices Act (Feb. 21, 1997) (on file with the *Northwestern Journal of International Law & Business*).

⁵⁵ *Say No to Competitive Bribing*, *supra* note 43.

contracts valued at \$45 billion.”⁵⁶ U.S. Commerce Department officials claim that during the past three years, foreign firms paid roughly \$80 million in bribes to officials in other countries, depriving U.S. firms of an unspecified value of sales.⁵⁷ In fact, U.S. efforts to multilateralize sanctions against foreign bribery began far before the days of the Clinton Administration, with a series of discussions under United Nations auspices beginning in the late 1970s that broke down in 1981.⁵⁸ Yet, little progress has been achieved until very recently, and it remains to be seen whether the promising developments in the OAS, the OECD, and elsewhere will ultimately result in a significant reduction in bribery of foreign officials, or at least place U.S. companies in a more competitive position when doing business abroad.

The establishment of binding international legal agreements that require nations to punish foreign bribery as a crime under the home country's laws has been a daunting task for the U.S. government. It is evident that there is no customary international law or international legal practice⁵⁹ supporting the exercise of extraterritorial jurisdiction over foreign illicit payments. International custom, to the extent any exists, suggests that corruption of government officials is subject to discipline only by the country whose officials are being bribed. Moreover, as the current controversy over U.S. efforts to pressure other states to join the U.S. embargoes on Cuba (the “Helms-Burton” legislation) and Iran (Iran and Libya Sanctions Act) suggest, any new exercise of extraterritorial jurisdiction, particularly if advocated by the United States, potentially causes great concern among major U.S. trading partners and allies.⁶⁰

⁵⁶Marlise Simons, *U.S. Enlists Rich Nations in Move to End Business Bribes*, N.Y. TIMES, Apr. 12, 1996, at A10 (quoting Mickey Kantor and reporting that bribers allegedly won contracts 80% of the time).

⁵⁷Richard Lawrence, *U.S., 33 Other Nations Sign Pact Against Business Bribes*, J. COM., Dec. 18, 1997, at 2A.

⁵⁸See generally *U.N. Draft Convention on Illicit Payments* (on file with *Northwestern Journal of International Law & Business*) (requiring parties to make bribery of government officials a criminal offense in their own territories (art. 1) and to punish foreign bribery by their nationals when “any act aiding or abetting that offense, is connected with the territory of that state.” (art. 4)).

⁵⁹See, e.g., MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (2nd ed. 1993) (discussing the manner in which legal principles are established through international custom).

⁶⁰See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified as 22 U.S.C. §§ 6021-6091) [hereinafter Helms-Burton]; Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541 (1996). The European Union challenged the legality of Helms-Burton in the World Trade Organization's Dispute Settlement Body. *EU Foreign Ministers Push Ahead with Protesting U.S. Helms-Burton Law*, Int'l Trade Daily (BNA), at D3 (Oct. 2, 1996). In its annual assessment of foreign trade barriers, U.S. extraterritorial and unilateral trade measures were cited as “the most troubling features of U.S. policy.” INSIDE U.S. TRADE, Aug. 1, 1997, at 22. An interim settlement was reached between the European Union and the United States in May 1997. European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-

Progress has also been agonizingly slow in recent years partly because there remains considerable reluctance in many international groups to even discuss the problem. For example, the United States has not yet obtained the consent of western hemisphere trade ministers to discuss government corruption in the context of efforts to create a Free Trade Area of the Americas by 2005. Mexico, in particular, has opposed the inclusion of this issue on grounds that it is a political rather than a trade matter.⁶¹ Similarly, the World Trade Organization ("WTO") has declined to treat foreign corruption as a trade problem, despite strong U.S. pressure.⁶² The Ministerial Declaration of the WTO meeting of trade ministers held in Singapore on December 9-13, 1996, does not mention the corruption problem; even the section that creates a working group on investment and competition issues is silent on the subject.⁶³ In the WTO discussions, the government of the Philippines, generally considered to be one of the more corrupt nations in the world,⁶⁴ rejected the U.S. proposal outright, expressing a preference for a "simple code of conduct" among the United States, the European Union and Japan and suggested that "unique cultures and traditions . . . must be respected by individual governments . . ."⁶⁵ Nevertheless, some developing countries, which may be unable or unwilling to enforce their existing internal criminal legislation prohibiting bribery of their own officials, have at the same time denounced the laissez-faire policies of all developed nations except the United States in seeking to restrain the illegal activities abroad of their own citizens.⁶⁶ This has led some to argue that "bribery is an intransi-

Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529 (1997). However, that settlement is in question because of more recent U.S. threats to sanction French, Russian, and Malaysian firms for their alleged violations of the Iran and Libya Sanctions Act. *Brittan Warns of WTO Case if French Firm Sanctioned under Iran Law*, INSIDE U.S. TRADE, Dec. 12, 1997, at 3. Mexico and Canada have sought consultations regarding Helms-Burton under NAFTA's Chapter 20. *U.S. Agrees to Talks with Canada, Mexico on Helms-Burton Sanctions Measure*, Int'l Trade Rep. (BNA), at 476 (Mar. 20, 1996). On May 18, 1998, President Clinton announced that he would waive trade sanctions against European firms that invest in Iran. *Albright: U.S. To Waive Iran Sanctions On All E.U. Firms*, Dow Jones News Serv. (May 18, 1998), available in Westlaw, Allnewsplus database.

⁶¹ Kevin G. Hall, *Trade Leaders Take Off Their Gloves in Cartagena*, J. COM., Mar. 22, 1996, at 1A.

⁶² There has been some consideration of the issue as part of negotiations relating to government procurement. *U.S. to Raise Labor, Corruption Issues at WTO Singapore Ministerial*, Int'l Trade Daily (BNA), at D4 (Apr. 1, 1996).

⁶³ See Singapore Ministerial Declaration, Dec. 13, 1996, 36 I.L.M. 218, 226 (1997).

⁶⁴ The Philippines is ranked the fortieth most corrupt nation out of fifty-two nations. Transparency International, *supra* note 36.

⁶⁵ *Philippines Rejects U.S. Proposal for WTO Accord on Bribery, Corruption*, Int'l Trade Daily (BNA), at D3 (May 22, 1996) (quoting Undersecretary for Trade and Industry of Philippines).

⁶⁶ *Id.*

gent global reality that is unlikely to disappear anytime soon,"⁶⁷ and that effective measures to combat it are doomed to failure.

B. Critique of the FCPA Approach

Arguments have also been made that the FCPA approach, criminalizing foreign bribery by a state's own citizens, is not likely to be appropriate or effective either as national policy or as a basis for international agreements. At least one scholar has argued that "market mechanisms" coupled with private codes of conduct and local government commitments against bribery, along with the transparency that would result from the decriminalizing of foreign bribery in the national's home country, can provide an investment climate that strongly discourages corruption, without the need for severe statutes such as the FCPA or international agreements.⁶⁸ It is suggested that the elimination of the FCPA and the absence of similar legislation enacted by other capital goods exporting nations would also eliminate troublesome aspects of extraterritorial jurisdiction of U.S. laws and the implications of "moral imperialism" that are attached to efforts by capital goods exporting nations to impose their concepts of behavior on cultures in which bribery may be an accepted form of activity.⁶⁹ Therefore, it could be preferable for the United States to abandon the FCPA and its efforts to convince other nations to enact similar legislation and instead, "maintain domestic bribery laws and work in the global marketplace to persuade other nations to adopt and vigorously enforce laws that criminalize bribery within their own borders."⁷⁰

C. Can Reliance on Local Enforcement Resolve the Problem?

The problem with eliminating criminalization of bribery under the laws of the exporter/investor's home country, and relying on better enforcement of anti-bribery laws in the country where the investment/import occurs, or in public pressure in the global marketplace, is that historically this approach has not been successful. U.S. firms, after all, are the only ones who have been operating under FCPA-type constraints. While in theory, legal constraints on corruption from the "demand" side, that is the foreign official, should be effective, this has not proved to be the case. Capital goods exporting firms of other nationalities are currently regulated only by anti-corruption laws in the foreign jurisdictions in which they are doing business, and strong evidence⁷¹ suggests that many countries, not solely those in the developing world, are unwilling or unable to enforce domestic anti-bribery legislation against their own government officials. In some poorer

⁶⁷ See Salbu, *supra* note 26, at 262.

⁶⁸ *Id.* at 272-73.

⁶⁹ *Id.* at 275-77.

⁷⁰ *Id.* at 286.

⁷¹ See *supra* Part I.C.

nations, if a foreign company is prepared to offer large sums of money to secure a project, the government of the country may have a difficult time preventing key officials from being tempted.⁷² To a very great extent, therefore, abandonment of U.S.-led efforts to make foreign bribery a criminal offense in the capital goods exporting nation, for international control of the "supply" side, would be an endorsement of the status quo under which U.S. firms are legally constrained from offering bribes, but those from all other jurisdictions are limited only by voluntary undertakings, or by the (in)effectiveness of local law enforcement.

Consequently, the United States has continued its efforts, perhaps realizing that in this process of multilateralizing rules against corruption the only losers are a relatively few corrupt officials and firms whose exports in the world market are competitive only on the basis of pay-offs rather than on the basis of offering quality products at reasonable cost. Everyone else benefits, including the United States and other capital goods exporting countries and their corporate citizens, and the peoples of the developing world who have been paying a corruption "tax" for decades.

The United States, a voice in the wilderness on the issue for some years, has in recent years found support not only in the OAS and the OECD but also in an increasing number of public and private international organizations and groups.⁷³ These entities share the credit for the significant steps toward dealing with foreign bribery that have been taken by governments during the past several years.

III. THE WORLD BANK, THE UNITED NATIONS, THE COUNCIL OF EUROPE AND THE EUROPEAN UNION

A. Efforts of the World Bank and the International Monetary Fund

The concerns that have led the United States, the OAS, and now the OECD members to seek to prevent corrupt foreign payments generally apply with equal or greater force to the multilateral lending institutions, such as the International Bank for Reconstruction and Development (World Bank group).⁷⁴ The siphoning of government assistance funds channeled through international development banks is effectively the use of public money, rather than individual or corporate assets, for illicit activities. The World Bank in recent years has sought to discourage the use of bank funds for illicit foreign payments by providing that proposals for awards will be rejected and loans will be canceled if it determines that corrupt practices are

⁷² See Earle, *supra* note 5, at 223.

⁷³ See *infra* Parts V, VI.

⁷⁴ The World Bank group consists of five institutions: the International Bank for Reconstruction and Development (IBRD); the International Finance Corporation; the International Development Association; the International Centre for the Settlement of Investment Disputes (ICSID); and the Multilateral Investment Guaranty Agency. See IBRAHIM F.I. SHIHATA, 2 THE WORLD BANK IN A CHANGING WORLD 1 n. 1 (1995).

engaged in by representatives of the borrower or a beneficiary of the loan.⁷⁵ The World Bank also declared its intention to demand the right to inspect suppliers' and contractors' accounts and records relating to performance of the contract, to have World Bank-appointed auditors conduct audits, and to bar a firm from eligibility for future contracts if it is determined to have engaged in corrupt practices.⁷⁶ The World Bank's Procurement and Consultant Guidelines provide for a no-bribery pledge in the bid form, but only for foreign governments that request it and that the World Bank believes will take "robust measures to address the domestic causes of bribery".⁷⁷

The World Bank and its sister agency, the IMF, have also adopted formal procedures under which assistance to a developing country can be suspended if government corruption is found to have an adverse effect on a nation's economic development.⁷⁸ For example, in 1997, both the World Bank and the IMF suspended funding to Kenya in the amounts of \$71.6 million and \$220 million, respectively, because the World Bank and the IMF "both want to see some action on the government's part to show they are sincere in reducing corruption, improving governance and following economic reforms."⁷⁹ This unprecedented action by the international financial institutions could have a significant impact, particularly in many sub-Saharan African countries, where private financing is still scarce.⁸⁰

B. Actions by the United Nations

In 1996, the U.N. General Assembly, largely at the instigation of the United States, took a series of steps to condemn bribery of public officials. First, the General Assembly adopted the International Code of Conduct for Public Officials ("Code of Conduct").⁸¹ The Code of Conduct, while avoiding the use of terms such as "bribery" or "corruption," bars transactions that involve a conflict of interest and dictates that "public officials shall not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their du-

⁷⁵ WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS, § 1.15 (1995).

⁷⁶ *Id.*

⁷⁷ U.S. Dept. Of Commerce, *Anti-Corruption Review*, Part VI(A) (Dec. 1997) <<http://www.ita.doc.gov/legal/corr-rev.html>>.

⁷⁸ *Global Pocketbook Pressure Paying Off: World Bank and IMF Using Influence to Curb Corruption*, CHI. TRIB., Aug. 11, 1997, at 13. World Bank officials have indicated that lending decisions to countries that are delinquent with regard to curbing bribery will be made on a project-by-project basis. *Id.*

⁷⁹ *World Bank Cuts Aid to Kenya, Cites Corruption*, DALLAS MORNING NEWS, Aug. 12, 1997, at 6A.

⁸⁰ Sub-Saharan Africa receives less than five percent of the world's net private capital flows, compared with forty-five percent for East Asia and the Pacific. *World Business: (A Special Report): Fund Seekers*, WALL. ST. J., Sept. 18, 1997, at R6.

⁸¹ G.A. Res. 51/59, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/59 (1996), 36 I.L.M. 1039, 1040 (1996) (adopting a Code of Conduct for Public Officials).

ties or their judgment.”⁸² The weakness of this effort is illustrated by the operative language of the Resolution which “recommends” the Code to the Member states “as a tool to guide their efforts against corruption.”⁸³

The same General Assembly also adopted by consensus a much broader and more detailed United Nations Declaration Against Corruption in International Commercial Transactions (“Declaration”).⁸⁴ In the Declaration, United Nations members commit themselves, *inter alia*:

To take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions, in particular to pursue effective enforcement of existing laws prohibiting bribery in international commercial transactions, to encourage the adoption of laws for those purposes where they do not exist, and to call upon private and public corporations, including transnational corporations, and individuals within their jurisdiction engaged in international commercial transactions to promote the objectives of the present Declaration;

To criminalize such bribery of foreign officials in an effective and coordinated manner, but without in any way precluding, impeding or delaying regional or national actions to further the implementation of the present Declaration.⁸⁵

Bribery is defined to include both the offering and the solicitation of payments, gifts, and other advantages. The Declaration calls for the elimination of the tax deductibility of bribes, and the enactment of effective accounting standards to encourage companies to avoid corruption.⁸⁶

While the Declaration reflects the usual U.N. General Assembly concerns over national sovereignty and territorial jurisdiction, and the need to ensure that governmental actions to combat bribery are “consistent with the principles of international law regarding the extraterritorial applications of a State’s laws,”⁸⁷ on balance it is clearly a step forward in obtaining broad international recognition and condemnation of the problem of foreign corruption. In further debates in other regional and global organizations, the United Nations resolution may be useful in countering arguments from Asian and other governments that multilateralization of bribery represents cultural imperialism on the part of the United States.⁸⁸ Moreover, a follow-up General Assembly resolution in 1997 urged members, *inter alia*, to ratify

⁸² *Id.* Annex 1, ¶ 4, 35 I.L.M. at 1041-42.

⁸³ *Id.* ¶ 2, 35 I.L.M. at 1040.

⁸⁴ *United Nations Declaration Against Corruption and Bribery in International Commercial Transactions*, *supra* note 1, ¶¶ 1, 2, 36 I.L.M. at 1046-47.

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 4, 36 I.L.M. at 1047.

⁸⁷ *Id.*

⁸⁸ Telephone interview with knowledgeable U.S. government official (Aug. 22, 1997). The author spoke with this official, who has requested anonymity, on three separate occasions: August 22, 1997, December 30, 1997 and April 3, 1998. Memoranda detailing the substance of the interviews are on file with the *Northwestern Journal of International Law and Business*.

"where appropriate, international instruments against corruption" and, more significantly, requested the U.N. Secretary General to seek a report from each member on its implementation of the 1996 Declaration, as a possible basis for later United Nations action.⁸⁹

C. The Council of Europe

The Council of Europe's Multi-disciplinary Group on Corruption ("GMC") analyzed possible new criminal law provisions against the corruption of public officials, gaps in substantive and procedural law, and proposals for remedying them in 1995.⁹⁰ The rapporteur of the GMC suggested, *inter alia*, that the Council of Europe adopt an international corruption convention along the lines of a draft prepared by the rapporteur.⁹¹ The draft would not only have criminalized foreign corruption and required cooperation and mutual assistance among the parties to the convention, but would have required the parties to adopt national legislation which would treat as null and void "any contract made in order to facilitate the receiving of illicit payments or other illicit advantages, and create in each country a 'National Authority Against Corruption.'"⁹² More recently, the Council of Europe's Justice Ministers recommended the creation of a "process" to effectively prevent and combat organized crime and corruption; a draft penal convention would apparently cover foreign bribery as well as organized crime.⁹³

D. The European Union

In May 1997, the European Union ("EU") concluded a draft convention against corruption.⁹⁴ This convention is designed to criminalize the offer or receipt of corrupt payments with regard to public officials of EU member countries and EU officials.⁹⁵ However, the EU Convention is more limited in scope than the Inter-American or OECD Conventions in that the EU Convention would apply only within the EU. Moreover, it is subject to ratification by the Member States (including new members) of the EU, but is not open to non-members.⁹⁶ For example, bribery of a Brazilian govern-

⁸⁹ G.A. Res. 52/87, U.N. GAOR, 52d Sess., at 2, 4, U.N. Doc. A/RES/52/87 (1997).

⁹⁰ *New Criminal Law Provisions Against the Corruption of Public Officials*, Council of Europe: Multidisciplinary Group on Corruption (GMC), 14th Sess. 1 (1995).

⁹¹ *Id.* at 18.

⁹² Paolo Bernasconi, *About the Necessity of an International Convention Preventing and Combating the Corruption of Public Officials* (Draft Summary), arts. 2, 6, 8, 10 (Nov. 1993).

⁹³ U.S. Dept. Of Commerce, *supra* note 77, at Part III.B.

⁹⁴ 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) [hereinafter EU Convention].

⁹⁵ *Id.* arts. 1-3, 37 I.L.M. at 15-16.

⁹⁶ *Id.* arts. 13, 14, 37 I.L.M. at 18-19.

ment official by a French citizen would not be covered by the EU Convention,⁹⁷ and neither Brazil nor other countries whose citizens or companies are doing business in the European Union are eligible to accede to the EU Convention. It is likely to be some time before the EU Convention enters into force, since it will not be effective until *all* Member States have provided notice of ratification.⁹⁸ Arguably, the European Union's actions will have been superseded by the OECD Convention if that convention promptly enters into force, and all current EU Member States become parties.

The Council of the European Union has also discussed a "Draft Joint Action" to make corruption in the private sector of EU nations a criminal offense and to increase judicial cooperation.⁹⁹

IV. EFFORTS OF PRIVATE NON-GOVERNMENTAL ORGANIZATIONS TO DISCOURAGE FOREIGN BRIBERY

While many believe that only actions of governments and public institutions can effectively respond to the problem of foreign bribery,¹⁰⁰ the problem in the first instance rests with transnational corporations and other private businesses and individuals that offer bribes to or are asked for bribes by government officials. After all, private businesses, not governments or international organizations, are responsible, directly or indirectly, for an enormous investment component of international production, an estimated \$1.4 trillion-worth in 1996.¹⁰¹ In response to the concerns of the private sector, several non-governmental organizations are now active in dealing with the problem. Two major non-governmental agencies should share, along with the U.S. government, much of the credit for increasing awareness among the private sector, governments, and the public of the problems created by foreign corruption. This awareness has caused major governments to finally take effective action against corruption.

A. The International Chamber of Commerce Code of Conduct

The International Chamber of Commerce ("ICC"), a private organization with members in most major nations of the world, has been actively engaged in dealing with extortion and bribery in business transactions since

⁹⁷The definition of "official" is "any Community or national official, including any national official of another Member State." *Id.* art. 1, para. (a), 37 I.L.M. at 15. Jurisdiction is similarly limited. *Id.* art. 7, 37 I.L.M. at 16-17.

⁹⁸*Id.* art. 13, paras. 2-3, 37 I.L.M. at 18.

⁹⁹U.S. Dept. Of Commerce, *supra* note 77.

¹⁰⁰*See supra* Part II.A.

¹⁰¹UNCTAD REPORT, *supra* note 45, at xvi. This figure includes foreign direct investment of \$350 billion, along with loans by commercial banks, equity markets, public organizations and internal sources.

1977.¹⁰² Recently, the ICC has intensified its efforts with a review of its 1977 report that began in 1994 and was concluded in 1996.¹⁰³ The ICC has recognized that continuing scandals involving bribery and extortion

could undermine the most promising development of the post Cold-war era, *i.e.*, the spread of democratic governments and of market economies world-wide. It is all the more unacceptable in view of the liberalisation of world trade in goods and services achieved through the Uruguay Round: freer trade must be matched by fair competition, failing which trading relations will be increasingly strained to the common detriment of governments and enterprises. In addition to being a crime, offering or giving bribes may constitute acts of unfair competition, which could give rise to actions for damages.¹⁰⁴

As a non-governmental organization representing private enterprises which may be faced with competitive pressures to pay bribes, the ICC takes a somewhat different view of the bribery problem, reflecting the concern with "extortion" (the request) as well as "bribery" (the payment) and with the "unfair competition" that the offering or soliciting of bribes may create.¹⁰⁵

The ICC's 1996 revisions consist of two main parts, "Recommendations to Governments and International Organizations," ("Recommendations") and "Rules of Conduct to Combat Extortion and Bribery" ("Rules of Conduct"). The Recommendations encourage international cooperation among governments and the enactment of national preventive and enforcement measures.¹⁰⁶ The Recommendations are directed primarily at dealing with bribery and extortion within the jurisdiction in which the corrupt payments are solicited or paid. While there is a recommendation for "international cooperation", there is no explicit mention of criminalization of *foreign* bribery, nor specific recommendations to the OECD which the ICC notes "with approval . . . has urged governments to re-examine their legislation against extortion and bribery."¹⁰⁷ The ICC also urges the World Trade Organization to "involve itself with these issues."¹⁰⁸

The Rules of Conduct, in contrast, are directed to and designed solely for adoption by private enterprises.¹⁰⁹ The ICC "urged companies around

¹⁰²International Chamber of Commerce Commission on Ethical Practices Recommendations to Combat Extortion and Bribery in Business Transactions, Nov. 29, 1977, 17 I.L.M. 417 (1978).

¹⁰³Ad Hoc Committee on Extortion and Bribery in International Business Transactions, Extortion and Bribery in International Business Transactions (Revisions to the 1977 Report and Rules of Conduct to Combat Extortion and Bribery), ICC Doc. No. 193/15, Mar. 26, 1996, at 1, 35 I.L.M. 1306, 1307 (1996) [hereinafter ICC Ad Hoc Committee Revisions].

¹⁰⁴*Id.* at 6, 35 I.L.M. at 1307.

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 8-11, 35 I.L.M. at 1308-09.

¹⁰⁷*Id.* at 8, 35 I.L.M. at 1308.

¹⁰⁸*Id.*

¹⁰⁹*Id.* at 11 (Part II - Rules of Conduct to Combat Extortion and Bribery), 35 I.L.M. at 1309 [hereinafter ICC Rules].

the world to adopt Rules of Conduct which are designed to combat extortion and bribery in international trade.”¹¹⁰ The Rules of Conduct call for conformance with the “relevant laws and regulations of the countries in which they are established and in which they operate” as well as with the letter and spirit of the Rules of Conduct.¹¹¹ They prohibit demanding or accepting a bribe (“extortion”),¹¹² or offering a bribe or accepting a demand (“bribery and ‘kickbacks’”).¹¹³ These prohibitions apply for any purpose, not just for “obtaining or retaining business,” as provided in the ICC’s 1977 rules¹¹⁴ and in the FCPA.¹¹⁵

Recognizing the difficulties in dealing with agents, the Rules of Conduct provide that enterprises are to take measures to assure that payments made to agents represent no more than appropriate remuneration, that no part of such payments are used as bribes, and that appropriate records are maintained.¹¹⁶ All financial transactions should be “properly and fairly recorded”; secret accounts are prohibited and independent systems of auditing should be established.¹¹⁷ Boards of directors are to take “reasonable steps including the establishment and maintenance of proper systems of control” to prevent illicit payments, review compliance and punish violations by directors or employees.¹¹⁸ Political contributions, which have become quite sensitive in the United States,¹¹⁹ are to be made only in compliance with applicable laws, including requirements for disclosure.¹²⁰ Finally, individual enterprises are encouraged to draw up their own internal codes, including internal reporting requirements, policies, guidelines and training programs.¹²¹

The ICC has also created a standing committee of business executives, and lawyers to mobilize support for this exercise in “business self-regulation”; this committee is to report on progress every two years.¹²² It is

¹¹⁰ *ICC Announces New Rules of Conduct to Fight Extortion and Bribery in Trade*, Int’l Trade Daily (BNA), at D3 (Mar. 28, 1996). The ICC will create a standing committee of business executives, lawyers and academics to promote the new rules; the committee will render a report on progress to the ICC biennially. *Id.*

¹¹¹ ICC Rules, *supra* note 109, Basic Principle, 35 I.L.M. at 1309.

¹¹² *Id.* art. 1, 35 I.L.M. at 1309.

¹¹³ *Id.* art. 2, para (a), 35 I.L.M. at 1309.

¹¹⁴ ICC Ad Hoc Committee Revisions, *supra* note 103, at 1, 35 I.L.M. at 1307.

¹¹⁵ See 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

¹¹⁶ ICC Rules, *supra* note 109, art. 3, 35 I.L.M. at 1309.

¹¹⁷ *Id.* art. 4, 35 I.L.M. at 1309.

¹¹⁸ *Id.* art. 5, 35 I.L.M. at 1310.

¹¹⁹ See, e.g., Jeffrey Taylor et al., *Democrats to Return More Murky Money*, WALL ST. J., Mar. 7, 1997, at A10; *Step Right Up: Bill Clinton Wants to Stay Aloof From the Excesses of Democratic Fund Raising*, TIME, Mar. 10, 1997, at 30.

¹²⁰ ICC Rules, *supra* note 109, art. 6, 35 I.L.M. at 1310.

¹²¹ *Id.* art. 7, 35 I.L.M. at 1310.

¹²² ICC Press Release, *Business Adopts Its Own Rules Against Extortion and Bribery*, (Mar. 27, 1996).

an open question whether the ICC's actions can achieve significant success in regulating private business behavior unless all or most of the capital goods exporting countries outlaw foreign bribery. The United States's unilateral experience with the FCPA does not inspire confidence.

B. Transparency International's Efforts to Highlight the Perception of Corruption

A relatively new (1993) not-for-profit, non-governmental organization, Transparency International, has been established to

curb corruption through international and national coalitions encouraging governments to establish and implement effective laws, policies and anti-corruption programs, . . . strengthen public support and understanding for anti-corruption programs and enhance public transparency and accountability in international business transactions and in the administration of public procurement [and] encourage all parties to international business transactions to operate at the highest levels of integrity¹²³

Transparency International has established offices in more than fifty countries and has gained the support of major international corporations and government agencies, including the U.S. Agency for International Development.¹²⁴ Transparency International promises to become a significant player in private sector efforts to combat corruption through its annual publication of a "corruption index" listing countries in the order of their perceived level of corruption in business dealings, and through its encouragement of national chapter activities that foster anti-corruption programs.¹²⁵

Certainly, Transparency International's efforts have contributed to the heightened awareness of the pernicious nature of foreign bribery and the new willingness of governments to address the problem through international conventions at the OAS and the OECD.

V. THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

The first, historic, binding international agreement dealing with foreign corruption is the Inter-American Convention Against Corruption.¹²⁶ Twenty-two OAS member nations, including the United States, signed the Inter-American Convention within a few months of its completion on March 29, 1996.¹²⁷ The Inter-American Convention entered into force on

¹²³ Transparency International, *Our Mission and Strategy* (visited Aug. 22, 1997) <http://www.transparency.de/introducing_ti/mission.html>.

¹²⁴ *On the Path to Honesty International Corruption Finds an Important Ally in a New Organization*, FRESNO BEE, July 15, 1996, at B4.

¹²⁵ See Earle, *supra* note 5, at 232.

¹²⁶ Inter-American Convention, *supra* note 7.

¹²⁷ Telephone interview with John Bowen, U.S. Delegation to the Organization of American States (Apr. 29, 1996); Telephone interview with Paulo Dirosa, Office of the Legal Adviser, U.S. Dep't of State (May 29, 1996).

March 6, 1997, after the deposit of the second instrument of ratification.¹²⁸ As of April 1, 1998, the Inter-American Convention had been ratified by and is in force for Argentina, Bolivia, Costa Rica, Ecuador, Mexico, Paraguay, Peru and Venezuela.¹²⁹ As it becomes more widely adopted in the western hemisphere, the Inter-American Convention should stand as increasingly significant evidence of multilateral recognition of the corrosive effect of foreign bribery, particularly by the capital goods importing nations that form the vast majority of western hemisphere nations, and their willingness to seek, or at least espouse, effective remedies.

A. A Latin American Initiative Against Corruption

Given the United States' long-term interest in international agreements that would require nations to criminalize foreign corruption, it is perhaps surprising that the Inter-American Convention was not a U.S. initiative at the outset. Rather, it was a group of Latin American governments, led by Venezuela, that first proposed the concept at the Meeting of Western Hemisphere Presidents in Miami in December 1994.¹³⁰ The United States gave its strong support to the proposal and encouraged the OAS, at a conference in Caracas in March 1996, to adopt the Inter-American Convention, which applies to both the "supply" and the "demand" aspects of the problem by requiring criminalization of both domestic and foreign corruption.¹³¹

In retrospect, it seems evident that the Inter-American Convention is, most of all, a manifestation of the spread of popularly-elected government in Latin America, which in turn has led to much less patience with, and in some instances a rejection of, corruption, at least in public.¹³² This is reflected in the fact that the Convention is not grounded principally on trade or economic development concerns, but on morality and the need to preserve and protect democratic institutions:

¹²⁸ Inter-American Convention, *supra* note 7, art. XXV, 35 I.L.M. at 734; electronic mail message from Edwin Choy, Secretary for Legal Affairs, Department of International Law, Organization of American States (July 31, 1997) [hereinafter E-mail from Choy] (on file with the *Northwestern Journal of International Law & Business*).

¹²⁹ E-mail from Choy, *supra* note 128; Telephone interview with Edwin Choy, Secretary for Legal Affairs, Department of International Law, Organization of American States (Apr. 2, 1998) (confirming the countries ratifying the Inter-American Convention).

¹³⁰ Telephone interview with knowledgeable U.S. government official (Aug. 22, 1997), *supra* note 88.

¹³¹ Inter-American Convention, *supra* note 7, arts. VI, VII, VIII, 35 I.L.M. at 729-30.

¹³² For example, the recent political crisis in Ecuador, which was brought on at least in significant part by widespread corruption on the part of the Bucaram government, ultimately led to the president's ouster. Thomas T. Vogel, Jr., *Bribes and Customs Delays Lead to Call for Reforms; Political Crisis is Easing*, WALL ST. J., Feb. 10, 1997, at A14. The President's cousin, Rene Bucaram, had publicly suggested that the state telephone company was charging 10% to 15% of the value of each contract for bribes, and that non-U.S. companies had obtained 90% of the new business in telecommunications because U.S. firms would not pay bribes. *Id.*

[R]epresentative democracy, an essential condition for stability, peace and development of the region, requires, by its nature, the combating of every form of corruption in the performance of public functions . . . fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration and damage to a society's moral fiber. . . .¹³³

However, the Convention comes at a time when trade within the region, and foreign investment, are growing at rapid rates; direct foreign investment flows to Latin America increased by fifty-two percent in 1996 over the prior year.¹³⁴

B. Scope and Major Features of the Inter-American Convention

When the Inter-American Convention was concluded in March 1996, it went much further than any other actual or proposed international agreement in seeking not only to make bribery of foreign officials a crime in the country of the exporting firm or individuals, but also in encouraging local governments to deal more effectively with the problem of domestic corruption. The latter aim appears particularly important given that only two major capital goods exporting countries, the United States and Canada, are members of the OAS, although foreign investment by firms headquartered in other western hemisphere states, particularly Argentina, Brazil, Mexico, and Venezuela, is increasing.¹³⁵

The Inter-American Convention requires the Parties to establish as criminal offenses, under their domestic laws: the solicitation or acceptance of illicit payments; the offering of illicit payments; acts or omissions by government officials for the purpose of obtaining a bribe; fraudulent use of property derived from such activities; and participation as a principal, accomplice, accessory after the fact, etc., in a conspiracy to commit the enumerated acts.¹³⁶ The Parties also "agree to consider the applicability of measures within their own institutional systems" to "create, maintain and strengthen" standards of conduct for their own government officials, define

¹³³ Inter-American Convention, *supra* note 7, pmb., 35 I.L.M. at 727.

¹³⁴ UNCTAD REPORT, *supra* note 45, at xxi, 71.

¹³⁵ Of the approximately 44,500 transnational corporations operating world-wide, approximately 8,000 or 18%, are headquartered in developing countries, and over one thousand of these are in Latin America. *Id.* at 6-7, 32. Of the twenty-five largest transnational corporations based in developing countries (ranked by foreign assets in 1995), nine are located in Latin American countries that are signatories to the Inter-American Convention: Mexico (4), Brazil (3), Argentina (1) and Venezuela (1). *Id.* at 9.

¹³⁶ Inter-American Convention, *supra* note 7, arts. VI, VII, 35 I.L.M. at 729-30. One possible weakness in the Convention is its definition of "public official" as "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." *Id.* art. I, 35 I.L.M. at 728. It may be that this clause is intended to cover state or provincial as well as federal government officials in a federal system, or that the language simply may be intended to cover all federal officials, regardless of rank.

acts of corruption, and provide for methods to enforce the standards of conduct.¹³⁷ Among other preventive measures is a requirement that the Parties "consider the applicability of measures to create, maintain and strengthen . . . [l]aws that deny favorable tax treatment for any individual or corporation for expenditures made in violation of the anticorruption laws of the States Parties."¹³⁸

The Inter-American Convention also provides for the establishment of the criminal offense of "illicit enrichment," under which an inexplicable significant increase in the assets of a government official is to be considered an act of corruption under the Convention in jurisdictions where this is constitutionally permissible.¹³⁹ In civil law jurisdictions, if an official is discovered with great wealth that is otherwise inexplicable, there may be a presumption of criminal guilt. While such an approach would be questionable in the United States, the concept is important to many Latin American jurisdictions where investigatory institutions are not always capable of complex investigations. Moreover, even in the United States, a form of unjust enrichment is addressed in the "net worth" method of proof used in prosecuting certain U.S. tax evasion actions.¹⁴⁰

Most significantly in light of the need to control foreign ("transnational") bribery, the Inter-American Convention also requires each state party, "subject to its Constitution and the fundamental principles of its legal system," to

prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.¹⁴¹

This provision is clearly intended to require and facilitate extraterritorial application of the Parties' laws to foreign bribery because "[t]he Convention is applicable provided that the alleged act of corruption as been committed *or has effects in* a State Party."¹⁴² Also, the offenses covered by the Convention must be treated as extraditable offenses under any existing extradition treaties that are in force between or among the Parties.¹⁴³ The Parties are obligated to provide mutual assistance and technical cooperation

¹³⁷ *Id.* arts. III, VI, 35 I.L.M. at 728-9. The United States, when it ratifies the convention, may take reservations to certain provisions, such as the crime of "illicit enrichment," since that crime is not generally recognized under U.S. law.

¹³⁸ *Id.* art. IV(7), 35 I.L.M. at 729.

¹³⁹ *Id.* art. IX, 35 I.L.M. at 730.

¹⁴⁰ See 26 U.S.C. § 7201; *Inter-American Convention Against Corruption*, A.B.A. SEC. INT'L L. & PRAC. REP., Aug. 1997, at 5, reprinted in 31 INT'L L. 1121, 1126 (1997) [hereinafter ABA Recommendation].

¹⁴¹ *Inter-American Convention*, *supra* note 7, art. VIII, 35 I.L.M. at 730.

¹⁴² *Id.* art. IV, 35 I.L.M. at 729 (emphasis added).

¹⁴³ *Id.* art. XIII(2), 35 I.L.M. at 731.

to each other in investigating and prosecuting offenses under the Inter-American Convention, including the furnishing of technical cooperation.¹⁴⁴

In a departure from the FCPA, there is no explicit exception for facilitating or "grease" payments.¹⁴⁵ However, it can be argued that facilitating payments are not designed to elicit an improper "act or omission" by a government official, but rather to encourage that official to perform a ministerial duty that is a part of his or her normal responsibilities, and therefore are not covered offenses.

The Inter-American Convention thus follows a multi-pronged approach that seeks to control both the supply of and demand for bribery. The Parties accept binding international legal obligations: to criminalize domestic bribery within their own jurisdictions; to strengthen domestic prevention and detection methodology; to punish foreign bribery by their own officials; and to improve methods of cooperation among the nations that are parties to the convention. As one senior U.S. official has suggested, corruption is like adultery: ninety percent of it is a matter of opportunity. If you eliminate the opportunities, you eliminate the crime.¹⁴⁶ Even if the Inter-American Convention only assists in reducing the opportunities for foreign bribery, it would have achieved a significant benefit.

C. Preliminary Assessment of the Inter-American Convention

Whether broad and effective compliance can be achieved, even if the Inter-American Convention is widely ratified, is necessarily uncertain, as full implementation and enforcement cannot be guaranteed. Moreover, the Convention faces some significant shortcomings, including its limited geographical coverage. Perhaps most significantly, it lacks any mechanism for resolving disputes among the parties, including a claim by one party that another is failing to properly carry out its obligations. Nor is there a specific mechanism under either the Inter-American Convention or within the OAS framework for monitoring (or creating pressure for) compliance. When parties adopt the national legislation necessary to implement the Inter-American Convention, they are to advise the OAS Secretary General of that fact.¹⁴⁷ However, there is no time limit for such essential implementation. There is thus a risk that even if the Inter-American Convention is

¹⁴⁴ *Id.* art. XIV, 35 I.L.M. at 732.

¹⁴⁵ Grease payments are payments to government officials that are designed to "expedite or secure the performance of a routine governmental action," such as obtaining permits and licensing, release of goods from the customs authorities, processing governmental papers such as visas or work permits, providing police protection, mail delivery, utilities hook-ups and the like. See ABA Recommendation, *supra* note 140, at 4 (quoting 15 U.S.C. § 78dd-2(b) (1988)).

¹⁴⁶ Ambassador Hattie Babbitt, Remarks at the A.B.A. Conference (Feb. 21, 1997) (attributing the remarks to Jim Cheek, former U.S. Ambassador to Argentina).

¹⁴⁷ Inter-American Convention, *supra* note 7, art. X., 35 I.L.M. at 730.

widely ratified and the majority of American nations become parties, efforts to ensure national enforcement will prove elusive.

Arguably, one of the most significant benefits of the Inter-American Convention is its very existence; once it was concluded, it could be, and was, used as a tool to prod the members of the OECD to take similar action.¹⁴⁸ However, even that benefit has been somewhat reduced in significance by the fact that some key members of the OAS, including the United States, Canada and Brazil, have not promptly ratified the Inter-American Convention. Despite the Venezuelan initiative behind the Inter-American Convention, the United States retains a leadership role in the hemisphere, and it seems evident that some other members of the OAS have not and will not become parties to the Inter-American Convention unless and until the United States acts.¹⁴⁹ Unfortunately, the U.S. ratification process has been delayed, apparently for technical rather than substantive reasons.¹⁵⁰ The Clinton Administration finally submitted the Convention to the U.S. Senate for advice and consent to ratification as a treaty on April 1, 1998.¹⁵¹ While Senate Foreign Relations Committee action is always difficult to predict, there appears to be no significant opposition to the Inter-American Convention.¹⁵² An American Bar Association resolution calling for early ratification of the Inter-American Convention by the United States and other signatories may have some positive effect in stimulating prompt Senate action once the Convention has been submitted.¹⁵³ Yet, given the fact that the OECD Convention was concluded in November 1997 and signed by the United States and other OECD members in December 1997,¹⁵⁴ it may well

¹⁴⁸Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

¹⁴⁹*See id.*

¹⁵⁰In reviewing the texts prepared by the OAS Secretariat, the United States discovered differences among the four official versions of the Convention (Spanish, English, Portuguese and French), which took some time to resolve. Telephone interview with Paulo Dirosa, Office of the Legal Adviser, U.S. Department of State (Jan. 15, 1997).

¹⁵¹Letter from President William J. Clinton to the U.S. Senate, (Apr. 1, 1998) (transmitting the Inter-American Convention Against Corruption, for advice and consent of the U.S. Senate to ratification) *available at* <<http://library.whitehouse.gov/cgi-bin>>.

¹⁵²U.S. obligations under the Convention appear to be met by existing U.S. law, principally the FCPA, so that implementing legislation would not be required. The obligation to make "illicit enrichment" a crime of corruption is required only of those states that have "established illicit enrichment as a defense." Inter-American Convention, *supra* note 7, art. IX, 35 I.L.M. at 730. Reservations are also generally permitted for specific provisions, allowing the United States to reserve on "grease payments" should it determine this to be advisable. *See id.* art. XXIV, 35 I.L.M. at 733. Moreover, even those members of the Foreign Relations Committee who are generally unenthusiastic about international treaties may feel that an international accord that outlaws "corruption" is a good idea, particularly when it is a step toward creating a more level playing field for U.S. businesses.

¹⁵³*See* ABA Recommendation, *supra* note 140.

¹⁵⁴Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88. Australia, which must resolve certain federal-state issues, was the only member to fail to sign the agreement. *Id.*

be that the U.S. Senate will ultimately wish to consider the two conventions simultaneously, which may result in further delays to U.S. ratification of the Inter-American Convention.

The position of Canada, as the only other developed, capital goods exporting country in the hemisphere, is also important in terms of obtaining broad hemispheric accession. Canada appears to support the Inter-American Convention generally, and has announced that it will sign the Inter-American Convention, but will not do so until an internal review is completed.¹⁵⁵

Other major weaknesses of the Inter-American Convention, albeit ones that are no fault of the agreement itself, are geography and coverage. The European Union nations, Japan, Korea and other major non-western hemispheric capital goods exporting nations have no strong incentive to cooperate in the OAS scheme, even though the Inter-American Convention is explicitly made open to accession by any state, not simply by members of the OAS.¹⁵⁶ Prior to the conclusion of the OECD Convention, the U.S. government might have pressured capital goods exporting states from outside the western hemisphere to become bound by the Inter-American Convention's obligations. The adherence of such nations to the Inter-American Convention's disciplines, at least for their individual and corporate citizens' activities in Latin America, would increase the value of the instrument, particularly for the majority of Latin American states, which cannot be expected to adhere to the OECD Convention in the immediate future. However, the United States can be expected to focus on seeking broad, prompt ratification of the OECD Convention, which if in force, will cover most of the world's major capital goods exporting nations. Perhaps Argentina, Mexico, Venezuela and the other major capital goods importing countries in the hemisphere who have become parties to the Inter-American Convention will be able to exert pressure on non-hemispheric investors. Such pressure would be in these nations' interests because accession to the Inter-American Convention would facilitate internal efforts to control corruption, and further demonstrate to the world the seriousness of the efforts of the Latin American democracies.

In the end, the critical issues relating to the Inter-American Convention will be ratification by the OAS members who have not yet done so, enactment of implementing legislation, and enforcement. It is too soon to tell whether these essential stages will be addressed effectively by the region's nations. It may be that the Inter-American Convention's long-term significance will lie in its importance as a statement by democratic capital goods

¹⁵⁵Telephone interview with Douglas Breithaupt, Esq., Canadian Ministry of Justice (Jan. 17, 1997). Apparently, no significant progress has been made toward Canadian ratification in the past year.

¹⁵⁶Inter-American Convention, *supra* note 7, art. XXIII, 35 I.L.M. at 733 (stating that "this Convention shall remain open for accession by any other State" although initial signature was reserved for OAS members under article XXI).

importing nations of their concern over bribery and their willingness to move in the direction of effective measures to deal with the problem. For those nations, the Inter-American Convention is an important interim step and a useful tool in convincing the members of the OECD and non-member adherents that multilateral approaches are feasible and that they should take similar action.¹⁵⁷

VI. THE ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the OECD on November 21, 1997 ("OECD Convention"),¹⁵⁸ represents the most significant effort to date of the world community to deal on a multilateral basis with the problem of foreign corruption, mainly because the OECD members are home to most of the multinational corporations.¹⁵⁹ Moreover, while the developed members of the OECD are the major capital goods *exporting* nations of the world, they are also the major capital goods *importing* nations. Of total global foreign direct investment flows of \$350 billion in 1996, only thirty-four percent went to developing nations;¹⁶⁰ the rest went to developed nations, essentially all of whom are members of the OECD. However, the OECD Convention did not develop in isolation. Rather, its development can be traced in part to the efforts of the United States, actions of other public and private institutions, and the impetus provided by the Inter-American Convention. The OECD Convention represents a significant step toward the globalization of the foreign bribery problem, although much remains to be done within the OECD "club," including the elimination of the tax deduction in the capital goods exporting country for foreign bribery payments.

A. Antecedents of the OECD Convention

The OECD, an organization of twenty-nine primarily highly developed nations,¹⁶¹ has been engaged in multilateral efforts to deal with foreign corruption since at least 1994. In May 1994, it adopted the Recommendations

¹⁵⁷Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

¹⁵⁸OECD Convention, *supra* note 8.

¹⁵⁹Of the 44,508 multinational corporations (as defined by UNCTAD), 33,548, or 75%, are located in Western Europe, Japan and the United States. UNCTAD REPORT, *supra* note 45, at 3.

¹⁶⁰*Id.* at 5.

¹⁶¹The current OECD membership consists of Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. See *About OECD: Member Countries* (last modified Dec. 11, 1997)

<<http://www.oecd.org/about/member-countries.html>>.

on Bribery in International Business Transactions ("Recommendations on Bribery") which call upon member countries "to take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions."¹⁶² Among the approaches to be considered in the ensuing three and a half years were a convention on foreign bribery,¹⁶³ eliminating income tax deductions for corrupt payments made overseas,¹⁶⁴ and steps to discourage corruption as a part of bilateral development assistance funding.¹⁶⁵ However, until 1997, concrete progress had been agonizingly slow despite a multitude of reports and recommendations, and there had been only limited movement toward most of these goals.

An OECD Working Group on Bribery in International Business Transactions ("OECD Working Group"), under strong U.S. government pressure, has been involved in OECD efforts to promote multilateral actions against foreign corruption. Created in 1994, the OECD Working Group had for some time been considering an agreement which would require OECD member countries to criminalize foreign bribery.¹⁶⁶ The OECD Working Group originated the terms of reference adopted by the OECD ministers in May 1997 that ultimately became the basis of the OECD Convention.¹⁶⁷ The non-binding Recommendations on Bribery began the process under which the OECD inched closer to requiring the governments of countries whose firms compete in the international marketplace to rein in the use of corrupt payments as a tool of obtaining foreign business. At its May 1997 ministerial meeting, the OECD ministers condemned foreign bribery in clear and unequivocal terms by stating:

Bribery in international business is another key issue in an increasingly interdependent world economy. Bribery hinders competition, distorts trade and harms consumers, taxpayers and the efficient honest traders who lose con-

¹⁶² *Organization for Economic Cooperation and Development: Council Recommendation on Bribery in International Business Transactions*, May 27, 1994, 33 I.L.M. 1389, 1390 (1994) [hereinafter *1994 Recommendation on Bribery in International Business Transactions*].

¹⁶³ OECD Convention, *supra* note 8.

¹⁶⁴ *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Officials*, Apr. 11, 1996, 35 I.L.M. 1311 (1996).

¹⁶⁵ See *Note by the Secretary General to the OECD Council at Ministerial Level, OECD Actions to Fight Corruption*, Part II: Bribery in Aid-Funded Procurement May 26, 1997, <<http://www.oecd.org/DAF/CMIS/bribery.htm#I>>.

¹⁶⁶ *Some Developing Countries Urge Criminalizing Bribery of Officials*, Int'l Trade Daily (BNA), at D7 (Mar. 22, 1995).

¹⁶⁷ See *Organization for Economic Cooperation and Development: Revised Recommendation of the Council on Combating Bribery in International Business Transactions* May 23, 1997, 36 I.L.M. 1016 (1997) [hereinafter *Revised Recommendation on Combating Bribery*].

tracts, production and profits. It can also undermine public support for government.¹⁶⁸

After several delays, and under the unrelenting pressure of the United States,¹⁶⁹ the Council of the OECD at the Ministerial level also committed its members to conclude the negotiation of a convention to criminalize foreign bribery by the end of 1997, as an appropriate means of assuring "multilateral co-operation, monitoring and follow-up."¹⁷⁰ This action was far more than a simple hortatory declaration. It reflected the adoption of a detailed and highly specific Council recommendation, which included an annexed list of Agreed Common Elements of Criminal Legislation and Related Action¹⁷¹ ("Common Elements") to serve as a basis for negotiation of an international convention. These Common Elements included definitions of such terms as foreign public official, limitations on defenses, a plea for a broad territorial base for the exercise of jurisdiction by the home country of the bribing company, and the use of effective criminal penalties as sanctions.¹⁷² They called for establishment of jurisdiction over bribery "when the offense is committed in whole or in part in the prosecuting state's territory."¹⁷³ This language appeared to cover the situation in which a foreigner bribes another nation's official while in the United States, a situation not currently covered by the FCPA or by U.S. statutes punishing bribery of U.S. government officials. Nations which exercise criminal jurisdiction on the basis of nationality were urged to do so for foreign bribery as well; those which do not prosecute on the basis of nationality are urged to extradite nationals who bribe foreign public officials.¹⁷⁴ The Common Elements also recommended criminal penalties, effective and independent enforcement, punishment of related accounting or money laundering violations, and international cooperation.¹⁷⁵

¹⁶⁸ OECD, *Meeting of the Council at Ministerial Level, Communiqué*, ¶ 29 (May 26-27, 1997) <<http://www.oecdwash.org/PRESS/PRESRELS/news9745.htm>> [hereinafter *OECD Ministerial Communiqué*].

¹⁶⁹ Nicholas Bray, *OECD Ministers Agree to Ban Bribery as a Means for Companies to Win Business*, WALL ST. J., May 27, 1997, at A2.

¹⁷⁰ *OECD Ministerial Communiqué*, *supra* note 168; see also *Revised Recommendation on Combating Bribery*, *supra* note 167, at 1019.

¹⁷¹ *Organization for Economic Cooperation and Development Council, Agreed Common Elements of Criminal Legislation and Related Action*, May 29, 1997, 36 I.L.M. 1016, 1023-24 (1997) annexed to *Revised Recommendation on Combating Bribery*, *supra* note 167 [hereinafter *Common Elements*].

¹⁷² *Id.* ¶ 1, 36 I.L.M. at 1023.

¹⁷³ *Id.* ¶ 4, 36 I.L.M. at 1023.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶¶ 5-8, 36 I.L.M. at 1023-24.

B. Scope and Coverage of the OECD Convention

Negotiation of the OECD Convention began in July 1997 and was completed that November.¹⁷⁶ The resulting text, which was signed in December 1997 and now awaits ratification,¹⁷⁷ is, despite some relatively minor shortcomings, a major achievement in efforts to establish binding international obligations requiring the punishment of foreign bribery.¹⁷⁸

The OECD Convention, as its name suggests, deals only with "combating bribery of foreign public officials."¹⁷⁹ Unlike the Inter-American Convention, the OECD Convention does not purport to require the parties to criminalize bribery of their own public officials, although presumably all or most OECD members already do so. Its principal operative obligation, clearly reflecting the influence of the FCPA, is:

Each Party shall 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.¹⁸⁰

Complicity, aiding and abetting are to be criminal offenses; attempt and conspiracy are crimes to the same extent as under a Party's domestic law.¹⁸¹

The term "foreign public official" includes "any person holding a legislative, administrative or judicial office of a foreign country" or "exercising a public function" and extends to officials of public international organizations.¹⁸² Significantly, the definition, despite all efforts by the United States,¹⁸³ does not include political party officials. This exclusion was a major disappointment to U.S. officials,¹⁸⁴ who believed that excluding political party officials would create a huge loophole for foreign countries, which could then channel illicit payments to party officials rather than government officials. However, other governments apparently wished to

¹⁷⁶U.S. Departments of Commerce, State, and Justice, *Summary of OECD Anti-Bribery Convention*, INT'L LAW. NEWS, Winter 1998, at 10 [hereinafter *Summary*] (on file with the *Northwestern Journal of International Law & Business*).

¹⁷⁷Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

¹⁷⁸"The convention is a historic achievement in the fight against bribery." *Summary, supra* note 176, at 10.

¹⁷⁹OECD Convention, *supra* note 8, art. 1, 37 I.L.M. at 4.

¹⁸⁰*Id.* art. 1(1), 37 I.L.M. at 4.

¹⁸¹*Id.* art. 1(2), 37 I.L.M. at 4.

¹⁸²*Id.* art. 1(4), 37 I.L.M. at 4.

¹⁸³Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

¹⁸⁴*Id.*

avoid an agreement that seeks broadly to cover "trading in influence."¹⁸⁵ Whether this exclusion significantly weakens the OECD Convention is open to question.¹⁸⁶ In any event, the OECD Council has adopted an accelerated "work plan" to analyze various means of dealing with political party officials and political candidates.¹⁸⁷

Each Party to the OECD Convention is required to impose "effective, proportionate and dissuasive" criminal penalties for foreign bribery, including the deprivation of liberty, comparable to those applicable to bribery of a Party's own officials under national law.¹⁸⁸ If legal persons are not subject to criminal penalties under national law, "effective, proportionate and dissuasive" non-criminal sanctions must be imposed.¹⁸⁹ The bribe and the proceeds are to be subject to seizure and confiscation.¹⁹⁰

Jurisdiction is one of the more complex aspects of any convention requiring its parties to impose criminal liability on an extraterritorial basis.¹⁹¹ The United States, as noted earlier, exercises extraterritorial jurisdiction under the FCPA based on a nexus with the United States, *i.e.*, utilization of "the mails or any means or instrumentality of interstate commerce."¹⁹² Other countries, such as France, exercise jurisdiction on the basis of nationality, meaning that the country has jurisdiction anywhere its nationals are located.¹⁹³ Consequently, the OECD Convention offers alternative bases for jurisdiction:

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offenses committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.¹⁹⁴

¹⁸⁵Telephone interview with knowledgeable U.S. government official (Aug. 22, 1997), *supra* note 88.

¹⁸⁶At least one prominent American attorney, a former member of the State Department's Office of the Legal Adviser, who has dealt with FCPA issues in his practice for several decades, indicates that he is not aware of any case in which the payment has been made to a party official rather than to an official of the foreign government. *See* Interview with O. Thomas Johnson, Esq., Covington & Burling, Washington, D.C. (Dec. 23, 1997) [hereinafter Interview with O. Thomas Johnson] (on file with the *Northwestern Journal of International Law & Business*).

¹⁸⁷*Summary*, *supra* note 176, at 10.

¹⁸⁸OECD Convention, *supra* note 8, art. 3(1), 37 I.L.M. at 5.

¹⁸⁹*Id.* art. 3(2), 37 I.L.M. at 5.

¹⁹⁰*Id.* art. 3(3), 37 I.L.M. at 5.

¹⁹¹*See* discussion of *Common Elements*, *supra* Part VI.A.

¹⁹²15 U.S.C. § 78dd-1(a), -2(a) (1994).

¹⁹³Interview with O. Thomas Johnson, *supra* note 186.

¹⁹⁴OECD Convention, *supra* note 8, art. 4(1)-(2), 37 I.L.M. at 5.

Parties agree to exercise jurisdiction without regard to "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."¹⁹⁵ In other words, the law, not politics or economics, is to be determinative.

Because the FCPA currently applies only to "domestic concerns," the FCPA must be amended to comply with the OECD Convention so that the FCPA covers all foreign persons who meet the jurisdictional requirements of U.S. law, *i.e.*, make corrupt foreign payments using instrumentalities of interstate commerce, including U.S. citizens and firms acting outside the United States.¹⁹⁶ This means, for example, that a European businessperson offering a bribe to a Venezuelan diplomat while both are present in Miami should be subject to U.S. criminal jurisdiction, as would a Mexican businessperson in Mexico offering a bribe to an Argentine government official while both are present in Mexico (or Argentina) if the funds were transferred by wire or facsimile instructions through Citibank in New York,¹⁹⁷ even though U.S. persons or "domestic concerns" are not involved in those transactions.

The OECD Convention, unlike the Inter-American Convention which is silent on the subject, contains FCPA-like provisions to address accounting mechanisms that can be used to combat the concealment of foreign payments. Each Party

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

The limitation "within the framework of its laws and regulations" presumably allows countries such as the United States to continue to apply the accounting restrictions of the FCPA only to companies subject to regulation by the SEC.

The OECD Convention provides that bribery is to be an extraditable offence, as under the Inter-American Convention, and the OECD Convention may serve as the basis for extradition if a treaty is required.¹⁹⁹ If a

¹⁹⁵ *Id.* art. 5, 37 I.L.M. at 5.

¹⁹⁶ 15 U.S.C. § 78dd-2. Implementing legislation reflecting these and other changes was sent to Congress on May 4, 1998. *OECD: To Comply with OECD Pact, Clinton Seeks to Amend Foreign Corrupt Practices Act*, Int'l Trade Daily (BNA) at D3 (May 15, 1998).

¹⁹⁷ See Interview with O. Thomas Johnson, *supra* note 186.

¹⁹⁸ OECD Convention, *supra* note 8, art. 8(1), 37 I.L.M. at 5. Appropriate penalties are also required. *Id.* art. 8(2), 37 I.L.M. at 5.

¹⁹⁹ *Id.* art. 10(1)-(2), 37 I.L.M. at 6; Inter-American Convention, *supra* note 7, art. XIII(2)-(3), 35 I.L.M. at 731.

party does not extradite its own nationals, it must be able to prosecute its nationals for offenses committed by them abroad.²⁰⁰

Among the most significant aspects of the OECD Convention are the mechanisms for facilitating monitoring and compliance. The OECD Working Group²⁰¹ is to be the vehicle for "a programme of systematic follow-up to monitor and promote the full implementation of this Convention."²⁰² Mutual legal assistance is obligatory.²⁰³ For example, one party's law enforcement officials, when provided with information suggesting a violation of another party's foreign bribery laws, would be required to cooperate in an investigation, including providing "the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance."²⁰⁴

While any monitoring mechanism is only as effective as the will of the participants to make it work, there should be a strong incentive for the parties, driven by their firms and competitive circumstances, to pressure other parties to comply with the OECD Convention's requirements so as to establish a level playing field. In the author's view, one may reasonably expect that when national firms learn of illicit activities by their private sector competitors abroad, they will advise their own governments, which can then invoke the mutual assistance provisions or demand discussions in the OECD Working Group. The combination of institutionalized monitoring and mutual legal assistance is potentially a powerful set of tools to assure that once the OECD Convention is implemented through ratification and enactment of national legislation, the parties will comply with their obligations.

The OECD members' concern with competitive pressures has led to an unusual, if not unique, mechanism for ratification and entry into force. While the OECD currently numbers twenty-nine Party States, the OECD Convention is not intended to enter into force until sixty days after five of the ten OECD countries with the greatest volume of exports, who represent at least sixty percent of the total exports of the ten countries, have deposited their instruments of ratification.²⁰⁵ This means that regardless of the actions

²⁰⁰ OECD Convention, *supra* note 8, art. 10(3), 37 I.L.M. at 6.

²⁰¹ See *supra* text accompanying note 166.

²⁰² *Id.* art. 12. Operating costs have been provided through the normal OECD budget process. See OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Nov. 21, 1997, 37 I.L.M. 8, 11 (1997).

²⁰³ OECD Convention, *supra* note 8, art. 9(1), 37 I.L.M. at 6.

²⁰⁴ *Id.*

²⁰⁵ OECD Convention, *supra* note 8, art. 15(1) (Annex), 37 I.L.M. at 7. According to the Annex, the ten leading exporters, in order of total export volume are: United States (15.9%); Germany (14.1%); Japan (11.8%); France (7.7%); United Kingdom (6.7%); Italy (6.2%); Canada (5.1%); Korea (4.5%); Netherlands (4.5%); Belgium-Luxembourg (4.4%). Based on the 1996 Annex data, these ten countries account for 81.0% of OECD exports.

of the remaining OECD countries, the OECD Convention will not go into force until at least half of the major capital goods exporting countries, the United States, Germany, Japan, France, United Kingdom, Italy, Canada, Korea, Netherlands, and Belgium-Luxembourg, have deposited their ratifications. If the top three exporting countries, the United States, Germany, and Japan, ratify the OECD Convention then any two of the remaining seven will provide sufficient export volume to meet the sixty percent requirement. However, if Germany, Japan, and France all fail to act, the OECD Convention could not enter into force, since these three countries account for more than forty percent of the total exports of the ten countries.²⁰⁶

Notwithstanding this mechanism, if the OECD Convention has not entered into force by December 31, 1998, then it will enter into force when at least two signatories have deposited their instruments of ratification and declared their willingness to be bound by the OECD Convention's provisions.²⁰⁷ Given the competitive concerns among major OECD members, it seems unlikely that any of the major exporting nations would opt for this approach to ratification and entry into force, although the United States has nothing to lose by doing so since its nationals are already bound by the strictures of the FCPA.

This somewhat unwieldy ratification mechanism makes it unlikely that any of the major capital goods exporting countries, except the United States with the existing FCPA, will be bound by the OECD Convention's strictures against foreign bribery unless most of their major competitors in foreign markets are also bound. It is entirely possible that the major OECD members, once they have completed their respective constitutional processes, will make arrangements to deposit their instruments of ratifications simultaneously with the OECD secretariat.²⁰⁸ The Convention is open to signature by OECD members and by non-members who are participants in the OECD Working Group.²⁰⁹

The OECD Convention was promptly signed by all OECD members except Australia at a ceremony on December 17, 1997.²¹⁰ Five non-OECD members, Brazil, Argentina, Chile, Slovakia and Bulgaria, who had been members of the OECD Working Group and participated fully in the negotiation of the OECD Convention, also signed on that date.²¹¹ The involvement of non-OECD nations as full Parties, particularly major capital goods importing nations such as Brazil, is crucial if the OECD Convention is to be

²⁰⁶ *Id.*

²⁰⁷ *Id.* art. 15(2), 37 I.L.M. at 7.

²⁰⁸ Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

²⁰⁹ OECD Convention, *supra* note 8, art. 13(1), 37 I.L.M. at 6.

²¹⁰ Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

²¹¹ *Id.*

accepted as a truly global accord. Discussions regarding possible signature and accession have reportedly taken place between OECD members and South Africa as well as with several Asian nations.²¹²

While in most cases involving international treaties, at least several years would likely pass before a significant number of signatory nations would ratify the agreement and become obligated by its provisions, the OECD Convention may be an exception. The OECD ministers in May 1997, in anticipation of the negotiation of the Convention, recommended to the member governments that each "should criminalize the bribery of foreign public officials by submitting legislative proposals" to its respective congress or parliament by April 1, 1998, and seek enactment of the legislation by the end of 1998.²¹³ This resolution relating to domestic legislation offers a pressure point for strong proponents of the OECD Convention, such as the United States, to encourage the other signatories to ratify it promptly, assuming of course that the United States itself is able to complete its own constitutional requirements more quickly than has been the case with the Inter-American Convention. President Clinton submitted the OECD Convention to the Senate on May 1, 1998.²¹⁴ If the U.S. Senate acts promptly, other OECD member nations are also likely to act promptly. If ratification by the United States is delayed for any reason, other OECD members will defer their ratifications as well, even though the United States has already implemented most of its OECD Convention obligations through the FCPA.²¹⁵

C. Preliminary Assessment of the OECD Convention

The OECD Convention shows great promise as an effective international instrument for reducing foreign bribery. It can be expected to obligate all major capital goods exporting countries to punish foreign bribery among persons within their national jurisdictions, and to include many major capital goods importing countries as well. Obligations under the OECD Convention are generally clear and unequivocal.²¹⁶ Monitoring of compli-

²¹² *Id.*

²¹³ OECD, *Ministerial Communiqué*, *supra* note 168, ¶ 29; see *Revised Recommendation on Combating Bribery*, *supra* note 167, Part III, 36 I.L.M. at 1019. The April 1 date was intentionally chosen to encourage initial action on the national front before the OECD ministerial meeting traditionally held in May. Telephone interview with knowledgeable U.S. government official (Aug. 22, 1997), *supra* note 88.

²¹⁴ Letter from President William J. Clinton to the U.S. Senate, (May 1, 1998) (transmitting the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, for advice and consent of the U.S. Senate to ratification) available at <<http://library.whitehouse.gov/cgi-bin>>.

²¹⁵ Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

²¹⁶ For example, "[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties." OECD Convention, *supra* note 8, art. 3(1), 37 I.L.M. at 5.

ance will be facilitated by the existing OECD Working Group,²¹⁷ and mutual legal assistance provisions²¹⁸ should make it easier for one party to pressure another to cooperate when likely instances of bribery by one party are discovered by another party.

The OECD Convention also has its shortcomings. For example, it does not establish obligations relating to laws punishing domestic bribery. Because the nations who become parties are all capital goods importing nations, it might have been more significant if the demand side as well as the supply side of foreign bribery were covered by the OECD Convention. This was, at a minimum, a lost opportunity to make domestic bribery subject to the monitoring and mutual assistance mechanisms established in the OECD Convention, unless the domestic bribery for one party is foreign bribery by another. There remains a loophole for payments to foreign political parties and party officials,²¹⁹ although this may be cured in time if the current work plan²²⁰ to deal with that issue is successful. It is also regrettable that the OECD Convention does not obligate the parties to eliminate the deduction under national tax laws for foreign bribery payments, particularly in light of earlier and current OECD efforts to deal with the problem.²²¹

D. Eliminating Government Subsidization of Foreign Bribery

It is notable that in a significant number of OECD member nations, foreign bribes are deductible as ordinary and necessary business expenses on a company or individual's income tax returns.²²² The outrageousness of this tax deduction has perhaps not received the attention it deserves. By providing firms that bribe with a tax subsidy, the affected OECD governments have effectively been encouraging, aiding and abetting foreign bribery, and their taxpayers are paying the cost. For example, in a situation where the corporate tax rate is thirty-five percent and foreign bribes are deductible from taxable income as a business expense, thirty-five out of every one hundred marks or francs used for foreign bribes is effectively supplied by the respective governments. Government support of criminal activity by its citizens abroad is tolerated in few other areas, except in wartime; why should it be acceptable in the name of furthering exports?

For obvious reasons, such tax policies have long been criticized. For example, a former president of Costa Rica, Oscar Arias, has suggested that

²¹⁷ *Id.* art. 13, 37 I.L.M. at 6.

²¹⁸ *Id.* art. 9, 37 I.L.M. at 6.

²¹⁹ "[T]he text does not specifically cover political parties. . . ." *Summary, supra* note 176, at 10.

²²⁰ *Id.*

²²¹ *See infra* Part VI.D.

²²² These members include: Australia, Austria, Belgium, France, Germany, Ireland, Luxembourg, Netherlands, Portugal, New Zealand and Switzerland. *See Report by the OECD Committee on International Investment and Multinational Enterprises (CIME)* May 26, 1997, <<http://www.oecd.org/daf/cmisi/bribery/briminrp.htm>>.

by permitting their firms to deduct foreign bribes, home governments are essentially "taking no notice of developing countries' anti-corruption laws."²²³ The members of the OECD finally agreed in 1996 that they would rewrite their tax laws to eliminate the current tax deductions for payments made to bribe foreign officials, although no time limit for such action was set.²²⁴ The OECD Ministers in May 1997 again urged "prompt implementation" of this recommendation.²²⁵ At a June 1997 meeting, the Group of Seven nations, consisting of the United States, Canada, France, Germany, Italy, Japan, and the United Kingdom, with the European Commission and Russia also participating, endorsed in principle the OECD proposals to eliminate the tax deduction for foreign bribery and to conclude a convention on the tax subject.²²⁶ Still, as of May 1997, eleven OECD members continued to provide a tax deduction for foreign payments.²²⁷ More recently, two of the major holdouts, France and Germany, have introduced to their respective parliaments the legislation necessary to eliminate the tax deduction for foreign bribery payments; this legislation will take effect when each nation becomes a party to the OECD Convention.²²⁸ Norway, Belgium, Denmark and Australia have also enacted or proposed legislation to deny the tax deductibility of foreign bribes.²²⁹ While it seems likely that the vast majority of OECD members will soon have laws that prevent the tax deductibility of foreign bribes, the effectiveness of such legislation remains uncertain. For example, questions arise as to whether the prohibitions will be limited to taxpayers who have been charged or convicted of foreign bribes, or if they will be linked to the accounting provisions of the OECD Convention. Thus, it may be some time before this generous government subsidy to foreign corruption can be eliminated or at least substantially reduced.

E. Foreign Corruption Associated with Assistance Contracts

While maintenance of tax deductibility for foreign bribery constitutes a government contribution to foreign corrupt payments, the situation with procurement in assistance contracts goes one step further. If a government tolerates the use by its contractors of government funds to bribe foreign officials, the home government is supplying *all* rather than just *some* of the

²²³ *Some Developing Countries Urge Criminalizing Bribery of Officials*, *supra* note 166, at D7.

²²⁴ *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Officials*, *supra* note 164.

²²⁵ *OECD Ministerial Communiqué*, *supra* note 168.

²²⁶ *Bribery Pact, Investment in Africa to Figure in Talks at Denver Summit*, Int'l Trade Daily (BNA), at D2 (June 12, 1997).

²²⁷ *See supra* note 222.

²²⁸ Telephone interview with knowledgeable U.S. government official (Dec. 30, 1997), *supra* note 88.

²²⁹ *1994 Recommendation on Bribery in International Business Transactions*, *supra* note 162, at 2.

illicit funds. The OECD recommended to its members in May 1996 that each nation include anti-corruption provisions in contracts providing for bilateral economic assistance.²³⁰ According to the OECD's Development Assistance Committee, since 1996, with the exception of France and Germany, all OECD members that did not already include such provisions either have, or are about to introduce such language.²³¹ Australia, for example, is now including the following language in its anti-corruption provisions:

The contractor will not make or cause to be made any offer, gift or payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt practice, either directly or indirectly to any party, as an inducement or reward in relation to the execution of this contract. Any such practice will be grounds for termination of this contract.²³²

The existence of such language in assistance contracts does not in itself assure that corrupt payments will be discouraged. Only enforcement by the national governments of the governments' rights of termination are likely to cause a change in company practice. However, the willingness of most OECD governments to eliminate the tax deduction for foreign bribes, and their support, through national legislation and enforcement, of the provisions of an international convention against bribery, may increase the likelihood that national firms will respect such contract language.

VII. THE FUTURE

As suggested in the Introduction to this article, the process of globalizing sanctions against foreign bribery, which may ultimately lead to a reduction in the incidence of such bribery, is a multi-step process. Most key governments and private business groups appear to have been convinced that the issue needs to be effectively addressed by the international community. The need for binding international agreements that deal with foreign bribery on a multilateral basis, has largely been met with the conclusion of the Inter-American and OECD Conventions. While both Conventions have their shortcomings,²³³ any reasonable observer would agree that the current prospects for effectively attacking foreign corruption are far improved from even two years ago. However, much remains to be done if the Conventions are to have a real and lasting impact on discouraging foreign bribery. The

²³⁰ *Organization for Economic Cooperation and Development: Development Assistance Committee Recommendation on Anti-Corruption Proposals for Aid-Funded Procurement*, at 2, (May 1997),

<<http://www.oecd.org/DAF/CMIS/bribdac.htm#Annex 1>>.

²³¹ *Id.*

²³² *Id.* at 4.

²³³ The shortcomings of the Inter-American Convention include limited coverage and the absence of any monitoring mechanism. *See supra* Part V.C. The shortcomings of the OECD Convention include the failure to require implementation and enforcement of local anti-bribery statutes, and the failure to include coverage of corrupt payments to political party officials. *See supra* Part VI.C.

will of the United States and the world community, in both public and private sectors, to address the problem will be tested by what remains to be accomplished: obtaining broad ratification of the two Conventions by the Latin American and OECD governments; enactment of national implementing legislation criminalizing foreign bribery; and securing enforcement through effective international monitoring, cooperation among law enforcement agencies, peer pressure, and other means. Unless and until this occurs, U.S. companies will remain at the same competitive disadvantage as in the twenty years since enactment of the FCPA, and the adverse impact of corruption on economic development and democratic government will continue.

In this area, as in so many others, the conclusion and ratification of international agreements and the enactment of national legislation punishing domestic and foreign bribery do not in themselves guarantee any degree of success. After all, even the most corrupt nations in the world have national legislation purporting to punish the offering or soliciting of bribes, and with the exception of recent United Nations General Assembly resolutions,²³⁴ developing nations in Africa and Asia have shown little enthusiasm for international efforts to deal with the problem of corruption.

The progress toward effective multilateral approaches to foreign bribery has been spearheaded by the United States, and future progress is likely to require equal or stronger persuasion. The most significant step the U.S. government can take to further its campaign against foreign bribery, now that both the Inter-American Convention and the OECD Convention have been submitted to the Senate for its advice and consent to ratification, is to work for prompt Senate action. Until the United States is a party to the Inter-American Convention, it is unlikely that the other major nations in the hemisphere will adhere to the Convention. Because of the trade-weighted ratification process for the OECD Convention and competitive concerns among capital goods exporting OECD members, the OECD Convention is unlikely to enter into force until the United States has deposited or is prepared to deposit its own instrument of ratification. The delay in ratifying the Inter-American Convention has undermined U.S. credibility among western hemisphere nations.²³⁵ A delay in ratifying the OECD Convention can be expected to have an even more serious impact among the United States' capital goods exporting competitors.

Adherence to the OECD Convention by major non-OECD members, particularly the significant capital goods importing nations in Latin America and Asia that have not already participated, should be strongly encouraged. Hopefully, the Latin American nations will take the lead, with U.S. support, in encouraging non-western hemisphere capital goods exporting countries to become parties to the Inter-American Convention. This would help to

²³⁴ See *supra* Part III.B.

²³⁵ See *supra* Part V.C.

ensure that, at least in Latin America, developed "supply" nations as well as developing "demand" nations, would be bound to work together to combat corruption. Also, if adherence to one of the conventions is not deemed appropriate, the United States could urge such governments to enact national legislation similar to the FCPA.

Beyond assuring that both the Inter-American and OECD Conventions are widely adhered to, and that national implementation is promptly enacted, there are clearly a number of other steps the United States and other like-minded governments can take to increase the likelihood that the new conventions will have an impact on foreign bribery. Once both conventions have been broadly ratified, emphasis should shift to the monitoring and enforcement process. The OECD Working Group is responsible for monitoring and enforcement under the OECD Convention;²³⁶ it would be desirable to create a similar working group at the OAS to perform oversight and monitoring functions. It seems likely that once a majority of the world's capital goods exporting nations have criminalized foreign bribery through national legislation consistent with the OECD and Inter-American Conventions, the competitive pressures of the marketplace are likely to cause the members of the private sector to inform their governments when a foreign competitor is suspected of offering or paying a bribe. Both Conventions contain mutual assistance provisions.²³⁷ These should be used aggressively from the outset. Once it becomes clear that the risk of detection and prosecution has increased, bribery by private firms may become less common.

The United States should also keep in mind that its success in convincing other nations in the western hemisphere or in the OECD to enact legislation that is extraterritorial in nature may be affected by other U.S. trade policies and legal initiatives. The willingness of such key nations as Canada, Japan and the European Union nations to apply their criminal laws in an extraterritorial manner, even voluntarily, may be compromised by U.S. efforts under the Helms-Burton legislation to expand the extraterritorial application of its laws to non-U.S. companies investing in Cuba, or by threats — recently ameliorated — to punish non-U.S. firms that trade with Iran.²³⁸

The World Bank and other international financial institutions should consider conditioning further lending on adherence by debtor governments to one or other of the Conventions, and condition participation in overseas development projects by firms on their governments' adherence to the Conventions and enactment of national enforcement legislation. If it becomes apparent in a few years that significant numbers of capital goods importing nations outside the Americas and Europe are not adhering to either Con-

²³⁶ OECD Convention, *supra* note 8, art. 12, 37 I.L.M. at 6.

²³⁷ *Id.* art. 937, I.L.M. at 6; Inter-American Convention, *supra* note 7, art. XIV, 35 I.L.M. at 732.

²³⁸ See discussion *supra* note 60.

vention, a supplemental convention covering both foreign and domestic bribery should be negotiated, perhaps under United Nations auspices.

Even with broad acceptance of the Inter-American and OECD Conventions by major capital goods exporting and capital goods importing nations, there will inevitably be governments and private entities that will refuse to cooperate. However, broad acceptance and enforcement of the Conventions' principles by the international community, including the international financial institutions, can be expected to make the tacit refusal of some governments to enforce domestic bribery laws more difficult. Ultimately, the sheer variety and intensity of international initiatives to deal with the problem, both among governments and within the private sector, and a growing understanding among the peoples of the world that the costs to everyone except the recipients are simply too great to tolerate, will have a positive impact, in creating

[A]n environment in which a new generation of political and business leadership can believe that it is possible to do business and to govern without taking bribes, where politicians know they will be held accountable for their honesty, and where business executives believe in integrity as passionately as they believe in profits. This is not some missionary's dream but a hard-nosed recognition that our ambitions for global growth and prosperity depend upon it.²³⁹

²³⁹R. Michael Gadbaw, *International Anticorruption Initiatives: Today's Fad or Tomorrow's New World?*, AM. SOC. INT'L L. PROCEEDINGS 111, 115 (1997).