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Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy

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"Corruption wins not more than Honesty."[1]
—Shakespeare

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[1] WILLIAM SHAKESPEARE, KING HENRY THE EIGHTH, act 3, sc. 2.

I. Introduction

A. Free Trade and Fair Dealing in International Business Transactions

The driving force behind the New Global Economy is international competitiveness. As multinational enterprises struggle to meet the challenges of today's freewheeling, 24-hour-a-day, truly global marketplace, governments and businessmen alike are re-examining and re-evaluating virtually every aspect of international business practices. The drive to achieve and sustain international competitiveness is producing important and dramatic changes in the way international business is done.

One clear trend is the movement toward open markets and free trade. A consensus is emerging among economists that free trade benefits all who practice it, even though there remain many who do not. Free trade, its advocates relentlessly drum home, is best under all circumstances.[2] Another recent trend—slower to develop, but potentially as powerful—concerns the darker, sometimes seamy underside of international business. As competition intensifies and margins shrink, governments and businessmen around the world are paying closer attention to the risks, costs, and consequences of bribery, graft, and other forms of corruption in international business.

It is increasingly clear that these two trends are interrelated and interdependent. A truly open, free, and competitive world marketplace requires a trading system characterized by honesty, transparency, and fair dealing. As Robert S. Leiken has testified, "reducing bribery, smuggling and kickbacks is part and parcel of free trade; anti-corruption is part and parcel of democracy. Today's decisive battles for free trade, development and democracy may well be fought on the terrain of corrupt practices."[3]

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[2] "The discipline's most devoutly held belief is that free trade is a good thing." *Economics Focus: How to Beggar Your Neighbor,* ECONOMIST, Feb. 3, 1996, at 68.

[3] *Hearings of the Senate Caucus on Int'l Narcotics Control & the Senate Finance Comm. Subcomm. on Int'l Crime,* 104th Cong. (1996), *available in* LEXIS, Nexis

Yet there remains a general unease. Manifestly, some competitors who do not play by the rules still gain a competitive advantage over those who do. In the United States, measures such as the Foreign Corrupt Practices Act[4] are regarded by many as well-meaning attempts to force American business to comply with unrealistic ethical ideals, which the rest of the world ignores. Fair dealing, like free trade, looks like a trap for the unwary or the naive. But as this Article will discuss, pressures are at work in the New Global Economy to establish and enforce higher standards of honesty in international commerce.

As "survival of the fittest" capitalism spreads, transparency will be increasingly demanded.[5] This is a dynamic which is clearly observable in international relations today.[6] As a consequence, private businessmen can be expected to not only conform, but also to move beyond mere compliance as the economic benefits of honesty and transparency increasingly manifest themselves.[7] This process is already well underway.[8] In large part due to pressure from governments and multinational organizations, corruption is slowly being squeezed out of the global economy. Ultimately, corruption will be contained

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Library, Curnws File (testimony of Robert S. Leiken, President of New Moment, a non-profit organization which works on issues of international democracy) [hereinafter *Hearings on Int'l Crime*].

[4] 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78ff (1988) (originally enacted as Pub. L. No 95-213, 91 Stat. 1494 (1977), and amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25).

[5] *See infra* notes 69-74 and accompanying text.

[6] *See* G. Pascal Zachary, *Anticorruption Drive Starts to Show Results*, WALL ST. J., Jan. 27, 1997, at A1. "Now, freer markets and more democracy have made business bribery less acceptable." *Id.*

[7] *See id.*

[8] *See* Deepak Gopinath, *Rules of the Game,* INFRASTRUCTURE FIN., Oct. 1996, at 49, *available in* LEXIS, Nexis Library, Curnws File. "[I]ncreasing democratization and market transparency are bringing [bribery] into the media glare. Even at the highest levels, officials are now finding that prosecutors are examining what goes on under the table as well as on top." *Id.* According to Frank Vogl, Vice-Chair of Transparency International, "[w]ith the opening of more and more countries to multiparty politics, coupled with greater press freedom and efforts by public prosecutors, many incidents of corruption have come to the fore." *Id.*; *see also* Barbara Ettorre, *Why Overseas Bribery Won't Last,* MGMT. REV., June 1994, at 20. For further discussion of the changing attitudes regarding corruption in international business, see *infra* notes 257-60 and accompanying text.

because, quite simply, it is bad for business.

B. The Foreign Corrupt Practices Act

The movement in the United States towards a more transparent global economy began with the enactment of the Foreign Corrupt Practices Act (FCPA) in 1977.[9] Generally, the FCPA prohibits payments by Americans to foreign officials in order to obtain or retain business.[10] The FCPA today is recognized worldwide as the

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[9] For a general survey of the FCPA see DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT (1995); RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 311-38 (1995) [hereinafter INTERNATIONAL BUSINESS TRANSACTIONS].

The FCPA (and its 1988 amendments) amended the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll* (1982), making it unlawful for any issuer of securities registered under Section 12 of that Act, 15 U.S.C. § 78*l*; or an issuer required to file reports according to Section 15(d) of the 1934 Act, 15 U.S.C. §§ 78o(d), to make (with some exceptions) payments to foreign officials in order to obtain or retain business. *See* 15 U.S.C. § 78dd-1(a); *see also* INTERNATIONAL BUSINESS TRANSACTIONS, *supra*, at 317.

There is an FCPA exception for so-called "grease payments" that are intended to facilitate "routine government action." 15 U.S.C. §§ 78dd-1(b). "Routine government action" is defined at 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), as:

1. obtaining permits, licenses or other official documents which are part of the process of qualifying to do business in the country;
2. processing such papers as visas and work orders;
3. providing police protection, mail pick-ups and delivery, or scheduling inspections which are associated with the performance of a contract or related to transit of goods across country, and;
4. providing telephone service, power and water supply, loading and unloading cargo, or protecting perishables from deteriorating.

Id. A fifth class encompasses "actions of a similar nature." *Id.*; *see also* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* at 325.

[10] INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 316. The FCPA prohibits direct payments to foreign officials, or payments by third persons, when these payments are used to influence any act or decision of the foreign official in his official capacity. *See* 15 U.S.C. § 78dd-1(a)(1)(A)(i); *see also* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 316. The FCPA also prohibits direct payments used to induce a foreign official to act or refrain from acting in violation of the official's duty. *See* 15 U.S.C. § 78dd-1(a)(1)(A)(ii); *see also* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 316-17. Finally, the FCPA prohibits payments used to induce a foreign official to use his or her influence with a foreign government or agency to influence its decision making. *See* 15 U.S.C. § 78dd-1(a)(1)(B); *see also* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 317.

The Act also requires accurate financial record keeping in order to enable

most aggressive effort by any government to enforce international standards of honesty in international business transactions. Indeed, the FCPA remains unique; it is the only such domestic law with extraterritorial reach prohibiting one nation's nationals from engaging in bribery abroad.[11]

In simplest terms, the FCPA was originally an effort by the U.S. government to regulate the behavior of American enterprises engaged in international business.[12] It was designed to send the message that illicit payments abroad by Americans would no longer be tolerated. Enacted in the wake of Watergate, the FCPA embodied a growing sentiment in the United States that bribery, even when committed abroad, is ethically unacceptable, economically anti-competitive, and simply bad business.[13]

Violations of the FCPA are punished severely.[14] Bribery under the FCPA is a criminal offense carrying a maximum fine of $3 million per violation.[15] Violations by individuals carry maximum fines of $250,000 or up to twice the amount of the gross gain or loss that any person derived from the offense. One found guilty of

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detection of illicit payments. INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 317; *see also* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 11-15 (1994) (discussing the accounting standards required by the FCPA).

[11] *See* ZARIN, *supra* note 9, at 1-2. Swedish law "arguably deal[s] with the bribery of foreign officials, although there has not been any prosecution of foreign bribery by Swedish authorities." *Id.* at 1-3 n.8. *See* Swedish Penal Code, SFS 1977: 103 (entered into force Jan. 1, 1978), *cited in* ZARIN, *supra* note 9, at 1-3 n.8. Similarly, "[t]he British Government has also indicated that the 1906 Prevention of Corruption Act may apply to a British Company which bribes a foreign official." *Id.* Nonetheless, the United States "[stands] nearly alone in responding to the general condemnation of payments to foreign officials by [having] enact[ed] legislation." INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 314.

[12] *See* Glenn A. Pitman & James P. Sanford, *The Foreign Corrupt Practices Act Revisited: Attempting to Regulate 'Ethical Bribes' in Global Business,* INT'L. J. PURCHASING & MATERIALS MGMT., Summer 1994, at 15. See INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 312-13 for a discussion of the political goals and legislative history of the FCPA.

[13] *See* ZARIN, *supra* note 9, at 1-1, 1-2, 1-3.

[14] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 326 (noting that "[t]he severity of penalties for violations of the FCPA mandate close consideration of its provisions by all persons doing business abroad"). The Securities and Exchange Commission monitors compliance with the record keeping provisions of the FCPA while the Department of Justice enforces the provisions against foreign bribery. *See id.*

[15] *See* U.S.C. §§ 78dd-2(g)(1)A, 78ff(c)(1)(A).

a violation may also face imprisonment for not more than five years.[16]

Since the FCPA came into effect, Americans operating abroad have realized that the risks are too great and the sanctions too severe to skirt the rules. For example, in 1995 Lockheed Martin Corporation admitted to conspiring to violate the FCPA.[17] The case involved bribery of an Egyptian member of Parliament[18] to secure the purchase of three C-130 military cargo planes.[19] The company was fined approximately $25 million[20] and one executive was sentenced to 18 months in jail.[21] Similarly, General Electric's out-of-court settlement for its involvement in an affair involving the Israeli military provided for an $8 million dollar fine and $52 million in restitution.[22] The Baxter International Health Care group, after pleading guilty to federal charges of bribing Arab officials, paid $6.5 million in civil and criminal fines.[23] Thereafter, the New York City Comptroller called for a ban on Baxter's bidding on any New York City health-care contracts.[24]

The FCPA has been roundly criticized since its inception.[25] Many American businessmen complain about the hassle, red tape,

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[16] *See id.*

[17] *See* Wendy C. Schmidt & Jonny J. Frank, *FCPA Demands Due Diligence in Global Dealings*, NAT. L.J., Mar. 3, 1997, at B16.

[18] *See* Gopinath, *supra* note 8, at 49; Arthur F. Mathews & Ronald C. Machen, *1994 and Early 1995 Securities Enforcement Review: Part III*, INSIGHTS, Sept. 1995, at 15.

[19] *See* Schmidt & Frank, *supra* note 17, at B16.

[20] Lockheed incurred a criminal fine of $21.8 million and entered a civil settlement of $3 million. *See* United States v. Lockheed, 1:94-CR-226-01 (N.D. Ga., plea agreement filed Jan. 30, 1995); United States v. Nassar, 1:94-CR-226-MH5 (N.D. Ga., plea agreement entered July 31, 1995); *see also* Schmidt & Frank, *supra* note 17, at B16.

[21] Schmidt & Frank, *supra* note 17, at B16.

[22] *See* P. K. Semler, *U.S. Firms Shift Strategy, Push for Anti-Corruption Laws Abroad*, J. COM., Apr. 18, 1994.

[23] *See id.*

[24] *See id.*

[25] *See, e.g.*, John L. Graham, *Don't Dilute Law Curbing Bribery Overseas by American Companies*, L.A. TIMES, June 15, 1986, at 3. For a discussion of the reaction to the FCPA and criticisms of it see ZARIN, *supra* note 9, at 1-3, 1-4.

and costs of compliance with the FCPA.[26] American firms, some argue, operate at a competitive disadvantage to European or Asian firms unburdened by such Pollyanna concerns.[27] If U.S. firms were only freed from these bonds of legislative morality, this argument goes, they would be able to compete more effectively for international business.

These criticisms have never been convincing. While bribery and corruption unfortunately remain a fact of life in international business, there is no compelling evidence that the FCPA itself puts American firms generally at a competitive disadvantage to their European or Asian counterparts.[28] The evidence that exists to show a negative FCPA impact is mostly anecdotal.[29] There are certainly instances where business has been lost to corruption, such as in the case of *Environmental Tectonics v. W.S. Kirkpatrick*

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[26] For a discussion of the economic harm argument and the reasons it is unpersuasive, see Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include A Private Right of Action,* 82 CALIF. L. REV. 185, 207 n.142 (1994). *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 314 (pointing out that the proposed and then enacted law was "criticized severely by many in the business community"). One report by the Heritage Foundation found measures such as the FCPA reduced exports by adding to production costs. Peter G. Germanis, *Getting Rid of U.S. Barriers to U.S. Exports,* HERITAGE FOUNDATION REPORTS, Apr. 22, 1982, *available in* LEXIS, Nexis Library, Arcnews File. The report criticized, "overlapping or contradictory regulations . . . [and the] paperwork and administrative costs associated with attaining given standards." *Id.*

[27] "Executives involved in international business call [the FCPA] 'stupid legislation'—and worse." Graham, *supra* note 25, at 3; *see also* Pitman & Sanford, *supra* note 12, at 15; ZARIN, *supra* note 9, at 1-3, 1-4. "Foreign competitors, not subject to an FCPA-type law, are therefore less constrained than U.S. companies and can more easily resort to illicit payments to foreign officials to obtain business. This places U.S. companies at a competitive disadvantage vis-à-vis their foreign competitors." ZARIN, *supra* note 9, at 1-3, 1-4.

[28] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 314-15. "[T]here is little significant evidence that the law has harmed United States business to any substantial degree." *Id.; see* RICHARD T. DE GEORGE, COMPETING WITH INTEGRITY IN INTERNATIONAL BUSINESS 105 (1993). As Raymond V. Gilmartin, Chairman, President and CEO of Becton Dickinson and Company and board chairman of the Ethics Resource Center put it, "I've never heard a manager say, 'We can't do business because we're limited by the Foreign Corrupt Practices Act.' We are not at a competitive disadvantage at all." Ettorre, *supra* note 8, at 20; *see also* Franklin Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality,* 42 U. MIAMI L. REV. 365-67 (1987).

[29] *See* Gevurtz, *supra* note 28, at 365-67.

& Co.[30] Yet a GAO survey indicated that less than 1% of the 250 American corporations surveyed claimed any loss of business due to the FCPA.[31] More recent studies show that U.S. exports have not declined due to the law, nor has American business been made less competitive.[32] All indicators, in fact, are to the contrary.

The only surveys which support FCPA critics primarily reflect businesses' anxieties and perceptions about the Act, not actual business expenses.[33] A House Report on an early draft of the Act noted that most illicit payments by American corporations were made not to compete with foreign corporations, but rather to gain an edge over other American competitors.[34] In sum, as one commentator has stated, "the claim that U.S. companies have lost exports because of the FCPA is often made and never substantiated."[35]

This is not to deny that corruption exists or that business is lost because of it. Corruption, like tariffs and other restraints, is a burden on global markets. But just as the world community is moving towards more free trade, it is also making more aggressive efforts worldwide to uncover, attack, and punish economic corruption.[36]

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[30] 847 F.2d 1052 (3d Cir. 1988); *see* discussion *infra* notes 83-85, 93-100 and accompanying text.

[31] *See* DE GEORGE, *supra* note 28, at 105.

[32] *See id.*

[33] *See* Pines, *supra* note 26, at 185, 208.

> These surveys, however, are not determinative of whether the FCPA actually affected U.S. businesses. For example, a closer examination of the GAO study reveals that the results were not quite as dire as critics of the FCPA would like to purport. The 30% figure, representing the percentage of respondents who believe that the Act led to a decrease in American business, includes the almost 20% of respondents who found that the Act had effectuated only '[s]omewhat of a decrease in business' as opposed to a 'moderate' or 'great decrease in business.' Furthermore, 67% of those surveyed reported that the Act had little or no effect on business.

Id. at 208-09 (citations omitted).

[34] *See* H.R. REP. No. 640 at 5 (1977), *quoted in* United States v. Castle, 925 F.2d 831, 834 (5th Cir. 1991).

[35] Pines, *supra* note 26, at 209 (citations omitted).

[36] *See Hearings on Int'l Crime, supra* note 3; Kimberley Music, *Proposal Being Readied to Help Firms Compete Overseas,* OIL DAILY, Sept. 10, 1996, at 1, *available in*

More importantly, criticisms such as these have become irrelevant. The end of the Cold War has propelled economic issues such as trade and corruption to the forefront of American foreign policy. The FCPA can now be regarded as a harbinger of things to come, rather than an aberration of the 1970s. Yet while the FCPA remains the most visible, it is by no means the only weapon used to combat bribery in international business transactions. Numerous other federal[37] and state[38] laws, as well as private causes of action,[39] are being used to fight corruption in international business transactions.

Part II of this article will describe how corruption has emerged as an issue of international economic foreign policy since the end of the Cold War.[40] Part III will discuss non-FCPA measures to combat bribery in international business transactions, as well as recent U.S. initiatives to combat corruption.[41] Part IV will describe and assess similar efforts by foreign nations and multinational institutions.[42] These government initiatives have not gone unnoticed by the private sector. Part V highlights the response by the private sector in the international business community.[43] Finally, Part VI resurrects the classical link between markets and morals, and applies this insight to the New Global Economy.[44]

II. Corruption as an Issue of International Economic Foreign Policy

A. Foreign Policy in the Post-Cold War World

The FCPA was originally conceived in a Cold War context, when U.S. foreign policy was dominated by issues of peace,

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LEXIS, Nexis Library, Curnws File (quoting one Clinton Administration official as saying, "the tide is turning" in the global fight against corruption).

[37] *See infra* notes 75-152 and accompanying text.

[38] *See infra* notes 200-15 and accompanying text.

[39] *See infra* notes 153-99 and accompanying text.

[40] *See infra* notes 45-74 and accompanying text.

[41] *See infra* notes 75-239 and accompanying text.

[42] *See infra* notes 240-333 and accompanying text.

[43] *See infra* notes 334-55 and accompanying text.

[44] *See infra* notes 356-62 and accompanying text.

defense, and national security.[45] Nation-states were the primary actors, and the instruments of foreign policy were in their hands. Armies and navies, their troops and equipment, embassies and ambassadors, as well as strategic alliances and foreign aid were all nation-state pawns in a chess match between two dominant and mutually exclusive ideologies. The importance of containment relegated "soft" foreign policy concerns such as economics, trade, and investment to the back burner.

All that has changed. Liberal democracy and free markets now stand alone as the preferred social model; and even where they have not yet been implemented, they remain aspirational.[46] Most observers agree, there is no preferable or even feasible alternative. We are all Jeffersonians, all Smithians now.[47] "[T]he growth of liberal democracy, together with its companion, economic liberalism, has been the most remarkable macropolitical phenomenon of the last four hundred years."[48] In 1790 there were three nations that could be described by contemporary standards as "liberal democracies."[49] In 1900 there were thirteen; in 1960, thirty-six; but by 1990, there were sixty-one.[50] According to Freedom House, 114 countries had a political system that could be described as democratic in 1995.[51]

The end of the Cold War, the collapse of Communism, the shift to Western-style democracy and market economies have all moved issues of international economic policy to the forefront of U.S. foreign policy concerns.[52] Early in his Presidency, Bill

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[45] *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

[46] *See id.* at 48-50.

[47] *See id.*

[48] *Id.* at 48.

[49] *Id.*

[50] *See id.*

[51] *See* Moisés Naím & Norman Gall, *Corruption and Democracy,* BRAUDEL PAPERS (Ferdinand Braudel Institute of World Economics, Brazil) Nov. 13, 1996, at 4.

[52] *See Hearings on Int'l Crime, supra* note 3. "For the first time in six decades there is no international threat of tyranny. U.S. security and prosperity are threatened more immediately today by the unconventional dangers of international crime cartels, arms and drug smuggling, transnational bribery, the spread of pestilent viruses—all of which entail corrupt government officials." *Id.* As former Secretary of State Warren Christopher put it, "[t]he Clinton Administration defines American security not only in

Clinton stated that national security encompassed "economic security."[53] Increasingly, the business of American foreign policy is business.[54] Accordingly, the FCPA is getting a new lease on life: the values and principles manifested by the Act are plainly emerging as important issues of U.S. economic foreign policy.

As issues of international economic policy increasingly dominate foreign policy, two important things have occurred. First, the importance of the nation-state as a primary actor has decreased.[55] Nations and governmental agencies have had to readjust their roles and their prerogatives.[56] Size and power are

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political or military terms, but also in terms of economic strength." *America's Partnership with the European Community*, DEP'T ST. DISPATCH, June 21, 1993, at 447 (remarks of Warren Christopher). The Clinton Administration moved away from the concept of a collective security system based solely on security concerns to one based on other, non-military issues, such as economic and humanitarian aid. *Building a Collective Security System*, DEP'T ST. DISPATCH, May 10, 1993, at 332 (remarks of Madelaine Albright). "[C]ollective security has broadened in theory and practice to encompass far more than military remedies to keep the peace." *Id.* at 333-34. Collective security now takes the form of preventive diplomacy, humanitarian relief, state-building operations, protecting human rights, and engaging Russia. *See id.*

[53] Charles Lane, *National Insecurity: Why Spy?*, NEW REPUBLIC, Mar. 27, 1995, at 10.

[54] *See id.* To that end, the Clinton Administration ordered American embassies to promote exports and investment aggressively. *See id.* Similarly, the Central Intelligence Agency has begun investigations into economic research and investigations, where once it was involved only in "harder" issues such as defense and terrorism. *Id.*; *see also* Greg Steinmetz & Robert S. Greenberger, *Open for Business: U.S. Embassies Give American Companies More Help Overseas*, WALL ST. J., Jan. 21, 1997, at A1. "U.S. diplomats used to spend most of their time digging into bigger matters, such as possible threats to national security and trying to avert wars. Now, they spend about as much time going to economic conferences, lobbying on trade issues, and opening shopping malls." *Id.*

[55] *See* KENICHI OHMAE, THE END OF THE NATION STATE (1995). "The nation state has become an unnatural, even dysfunctional, unit for organizing human activity and managing economic endeavor in a borderless world." Kenichi Ohmae, *The Rise of the Region State*, FOREIGN AFFAIRS, Spring 1993, at 78. For a slightly different view see *The Nation-state is Dead. Long Live the Nation-state*, ECONOMIST, Dec. 23, 1995, at 15 [hereinafter *The Nation-state is Dead*]. "Neither the age of superstates, nor the end of all states, is about to happen." *Id.*

[56] *See* Ohmae, FOREIGN AFFAIRS, *supra* note 55, at 82-86; *see also* Jessica T. Mathews, *Power Shift*, FOREIGN AFFAIRS, Jan./Feb. 1997, at 50. "The end of the Cold War has brought . . . . a novel redistribution of power among states, markets, and civil society." *Id.* In the New Global Economy the nation-state is "sharing powers—including political, social, and security roles at the core of security—with businesses, with international organizations, and with a multitude of citizens groups . . . ." *Id.* The

measured less in kilotons or throw weight, and more in speed, technology, and efficiency.[57] One observer has noted that "[t]he bigger the world economy, the more powerful its smallest players."[58] Another believes "[r]egion-states have . . . become the primary units of economic activity . . . . The primary linkages of these natural economic zones are not to their 'host' countries but to the global economy."[59]

Second, the instrumentalities shaping and controlling foreign affairs are more and more in private hands, to an astounding degree independent of and technologically emancipated from direct governmental supervision, regulation, and competence.[60] For example, various supra-national financial forces ejected Britain from the Exchange Rate Mechanism in September 1992,[61] caused the bond market to crash in some industrial nations in 1994,[62] and nearly destroyed the Mexican economy.[63] Nations are not powerless, but they are subject to supra-national economic forces as never before in history.[64] As Democratic Presidential advisor James Carville put it, "I used to think that if there was reincarnation, I wanted to come back as the president or the pope.

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author believes that, "the steady concentration of power in the hands of states that began in 1648 with the Peace of Westphalia is over, at least for a while." *Id.*

[57] *See The Nation-state is Dead, supra* note 55, at 15.

[58] JOHN NAISBITT, GLOBAL PARADOX: THE BIGGER THE WORLD ECONOMY, THE MORE POWERFUL ITS SMALLEST PLAYERS 12 (1994).

[59] Kenichi Ohmae, *New World Order: The Rise of the Region-State,* WALL ST. J., Aug. 16, 1994, at 12; *see* Ohmae, FOREIGN AFFAIRS, supra note 55, at 78.

[60] *See Who's in the Driving Seat?,* ECONOMIST, Oct. 7, 1995, at 3.

[61] On September 16, 1992 financial markets forced the British pound to lower levels than were allowed under the European Exchange Rate Mechanism (ERM). *See* Richard W. Stevenson, *New Reasons for Doubt About Monetary Union,* N.Y. TIMES, July 31, 1993, at 47. Despite attempts to strengthen sterling by an unprecedented two-stage rise in base rates from 10 to 15 percent, the British Government was forced to suspend the pound from the ERM. *See id.*; *see also Correction Appended,* ECONOMIST, Sept. 26, 1992, at 16.

[62] In the fall of 1994 rising interest rates helped trigger a crash of the bond market in the United States. *Wall Street: Red Braces, Pink Slips,* ECONOMIST, Feb. 18, 1995, at 73. *See, Who's In the Driving Seat?, supra* note 60, at 3.

[63] *See Under the Volcano,* ECONOMIST, Jan. 7, 1995 at 14; *Suddenly There's a Hole,* ECONOMIST, Jan. 14, 1995, at 63; *Rescuing the Sombrero,* ECONOMIST, Jan. 21 1995, at 18.

[64] *See Who's in the Driving Seat?, supra* note 60, at 3.

But now I want to be the bond market: you can intimidate everybody."[65] Another observer notes, "[g]overnments know they have lost control of the national economy."[66] Even where the nation-state retains an appropriate role in policy-making, implementation of such policies depends less upon national or global institutions and more upon private enterprises and individual entrepreneurs.[67]

Nation-states do not trade with one another; enterprises do. This means that governments, which by definition are responsible for providing the "public goods"[68] that the market needs, have a great interest in the values, norms, and standards of conduct and behavior of international investors, traders, financiers, and executives. More global attention to business ethics in the world market should be expected.

B. "Public Goods" and the Honest Market

Global competition continues to become more intense and unforgiving. As a result, the masters of efficiency among the world's competitors will come to demand honesty in business. Fair dealing rewards precisely what competitors do best and what world markets favor most—the production of better quality products at lower cost.

Companies will come to demand an honest marketplace in the basket of "public goods" essential to the efficient operation of the global economy. Economists define "public goods" as those things which the market needs and demands, but which can best be produced (or in some cases will only be produced) by governmental actions or institutions, or by international agencies acting with the consent and encouragement of nation-states.[69] In

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[65] *Id.*

[66] R. C. Longworth, *Boom, Bust or What?*, CHI. TRIB., Oct. 30, 1994.

[67] *See Who's In the Driving Seat?, supra* note 60, at 3.

[68] *See infra* notes 69-73 and accompanying text.

[69] *See* STEVEN E. RHODES, THE ECONOMIST'S VIEW OF THE WORLD 66 (1990). According to Rhodes, a public good, or "collective consumption good," is one, "where consumption is nonrival (i.e., a number of people may simultaneously consume the same good) and where it is either prohibitively expensive or impossible to confine the benefits of the good to selected individuals." *Id.* To maximize economic efficiency, public goods should be provided only if consumers are collectively willing to pay more than

this sense, an honest market will prove as important to world commerce as an interstate highway system, air traffic controllers, or a reliable and politically independent judiciary which recognizes and enforces private property rights.[70] One economist correctly points out that "[c]apitalism cannot work in a society dominated by theft. It needs a legal system guaranteeing the existence of private property and the enforcement of contracts."[71] Corruption is fundamentally incompatible with international competitiveness; it distorts proper functioning of the market and drains confidence in a worldwide economic system dependent on tough, but fair competition.[72] According to one democracy advocate, "[t]ransnational bribery represents a hazard to free trade and investment, a threat to democracy and development, and, in collusion with international crime, a danger to national security and public health and safety. No foreign policy issue affects Americans more, yet few get less attention from the foreign policy community."[73]

This attitude is changing. The FCPA, originally an expression

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the opportunity cost of provision. *See id.* The externalities of corruption in the international system, however, more than justify the provision of a transparent market. *See infra* notes 271-83 and accompanying text, referring to the economic and political costs of corruption in the international system.

[70] The "public good" of a transparent market can be contrasted with the "public bads" caused by corruption. *Hearings on Int'l Crime, supra* note 3. "The 'public bads' which corruption creates include not only bad policy and bad and unsafe buildings, bridges, roads, water, air, etc., but also bad attitudes. Corruption produces negligent, cynical government and inept officials who owe their jobs to nepotism and patronage." *Id.* See *infra* notes 275-83 and accompanying text for discussion of the economic costs of bribery.

[71] LESTER C. THUROW, THE FUTURE OF CAPITALISM 274 (1996). Thurow points out that

> it is possible to protect private property rights with locks, burglar alarms, and privately hired guards. But it is costly to do so. It is far more efficient to inculcate social values that lead people not to steal. With such values private property is protected at zero cost. The aggressive individual is socially tamed rather than physically constrained. Societies don't function very well unless most of their members voluntarily behave most of the time.

Id. at 275.

[72] *See infra* notes 275-83 and accompanying text.

[73] *Hearings on Int'l Crime, supra* note 3 (testimony of Robert S. Leiken, President of New Moment, a non-profit organization which works on issues of international democracy).

of Yankee idealism, has been reborn and revitalized as an instrument of new economic pragmatism.[74] The FCPA today is more than an anti-bribery statute; it is also an expression of the world market's new stand against corruption.

III. The Global Fight Against Corruption—U.S. Efforts at Compliance

The United States has historically been in the forefront of the global fight against corruption. The power of American leadership in issues of foreign policy should not be underestimated. Even if the FCPA did not exist, the U.S. stand against corruption would be clear. Numerous other legal mechanisms are in place or under development to fight corruption in international business.

A. Federal Civil and Criminal Statutes

1. Mail and Wire Fraud

Prior to enactment of the FCPA in 1977, federal mail and wire fraud statutes[75] were used to prosecute American corporations engaged in bribing foreign officials.[76] Both statutes have been broadly interpreted to encompass any scheme or artifice that involves deception contrary to public policy[77] or deprives the public of "the intangible right of honest services."[78]

Application of the mail and wire fraud statutes is not limited,

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[74] *See id.* "[T]he solution to trans-national bribery lies not in a futile attempt to repeal the Foreign Corrupt Practices Act *but in universalizing it* and supporting reforms in emerging countries." *Id.* (emphasis added).

[75] 18 U.S.C. § 1341 (mail fraud) (1988); 18 U.S.C. § 1343 (wire fraud) (1988).

[76] *See* ZARIN, *supra* note 9, at 11-6.

[77] *See id.*; United States v. Mandel, 541 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

[78] 18 U.S.C. § 1346 (1988) ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."). This expansive definition was enacted in the statute despite an earlier Supreme Court ruling limiting liability for such conduct to that involving the deprivation of money or property. *See* ZARIN, *supra* note 9, at 11-6 (citing McNally v. United States, 483 U.S. 350 (1987)). Accordingly, "[a] scheme to defraud which involves bribery would come within the purview of the statute." *See* ZARIN, *supra* note 9, at 11-6; United States v. Brown, 540 F.2d 364 (8th Cir. 1974); United States v. Dixon, 536 F.2d 1388 (2d. Cir. 1976).

in theory, to bribery of American government officials;[79] rather, coverage may extend to cases where bribery of foreign officials deprives the American public of the intangible right of honest services.[80] More speculative is the idea that bribery of *foreign* officials could deprive *foreign* nations of the right to honesty and faithful service.[81] In fact, no case holds that bribery abroad so deprives the foreign nation.[82] The Third Circuit in *Environmental Tectonics v. W.S. Kirkpatrick & Co.*,[83] however, noted in dicta that "[b]y illegally influencing the decisions of [Nigerian] public officials,"[84] the defendants had created two classes of victims: the citizens of Nigeria, who suffered from a corrupt civil service, and the American taxpayers, because "bribery of foreign officials by American businessmen diminishes [U.S.] stature and influence abroad."[85] Similarly, the grand jury considered but did not charge mail fraud in *United States v. Crawford*,[86] a case where defendants Crawford Enterprises and its CEO allegedly obtained multi-million dollar purchases of gas compression equipment from a Mexican corporation through bribery.[87] As a practical matter, mail and wire fraud charges are generally brought only as an additional count to charges of conspiracy to violate the FCPA.[88] They remain useful, however, because they can serve as a basis for federal racketeering charges.[89]

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[79] *See* ZARIN, *supra* note 9, at 11-7.

[80] *See, e.g.*, *supra* notes 76-78.

[81] *See* ZARIN, *supra* note 9, at 11-7.

[82] *See id.*

[83] 847 F.2d. 1052, 1063 (3d Cir. 1988). *Environmental Tectonics* featured plaintiff's use of RICO charges against a competitor engaged in bribery of foreign officials. *See infra* notes 93-100 and accompanying text.

[84] *Environmental Tectonics*, 847 F.2d at 1063.

[85] *Id.* at 1063-64. For the indictment and disposition of the case, *see* 2 FOREIGN CORRUPT PRACTICES ACT REPORTER 696.53-696.71 (July 31, 1985).

[86] No. H82224 (S.D. Tex., Oct. 2, 1982) (indictment), *reprinted in* 2 FOREIGN CORRUPT PRACTICES ACT REPORTER 696.53 (July 31, 1985). For a discussion of the *Crawford* case see ZARIN, *supra* note 9, at 11-7 n.29.

[87] *See* United States v. Crawford, 643 F. Supp. 370, 372 (S.D. Tex. 1986) (describing the procedural history of the case).

[88] *See* ZARIN, *supra* note 9, at 11-7.

[89] *See id.*; *see also infra* notes 90-106 and accompanying text.

2. *Racketeer Influenced and Corrupt Organization Act*

A second method of attacking illicit payments is through the Racketeer Influenced and Corrupt Organization (RICO) Act.[90] RICO civil liability confers standing on "[a]ny person injured in his business or property by reason of a violation of section 1962."[91] More precisely, to acquire standing under RICO a plaintiff must prove three elements: (1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation.[92]

Recently, RICO charges were successfully used to combat international bribery in *Environmental Tectonics Corp., Int'l v. W. S. Kirkpatrick & Co., Inc.*[93] Plaintiff Environmental Tectonics Corporation International (ETC) sued W. S. Kirkpatrick & Company for antitrust and RICO violations.[94] Both ETC and Kirkpatrick were New Jersey corporations in the business of selling equipment and parts to foreign countries.[95] In order to secure contracts with the Nigerian government, Kirkpatrick's Chairman and CEO permitted Kirkpatrick to pay out "commissions" totaling over $1.7 million to various Nigerian officials.[96] After its lower bid on the same project was rejected, ETC investigated, discovered what had transpired, and brought a number of complaints against Kirkpatrick, its CEO, and its two

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[90] 18 U.S.C. §§ 1961-1968 (1988).

[91] 18 U.S.C. § 1964(c).

[92] *See* O'Malley v. O'Neill, 887 F.2d 1557, 1561 (11th Cir. 1989).

[93] 847 F.2d 1052, 1063 (3d Cir. 1988), *aff'd sub nom*, W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990). The case is well known for the U.S. Supreme Court ruling on the Act of State doctrine, but of equal interest are the Third Circuit's earlier remarks on the case's RICO implications. *See Environmental Tectonics,* 847 F.2d at 1063-64. After the Supreme Court's ruling on appeal, "[RICO] may be an effective method for private suits involving violations of the FCPA, unless RICO is amended to diminish its scope." INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 332.

[94] *See Environmental Tectonics,* 847 F.2d at 1054. Plaintiff sued under a New Jersey Anti-Racketeering statute, RICO, and Section 13(c) of the Robinson-Patman Antitrust Act. 15 U.S.C. §§ 13-13b, 21a (1996); *see Environmental Tectonics*, 847 F.2d at 1054.

[95] *See id.* at 1055.

[96] *Id.*

parent corporations—one in Delaware and the other in Luxembourg.[97]

The CEO and his company were both convicted under the FCPA and fined substantially.[98] Additionally, the court held that allegations of bribes paid to foreign government officials in order to obtain military contracts are sufficient to allege a pattern of racketeering under RICO.[99] The court found that a European conglomerate, two American corporations, and a consultant with Nigerian connections had "developed a sophisticated and outwardly legal front for the payments," accounting for "numerous violations of federal law."[100]

RICO charges have been used in other contexts as well. For example, bribes to influence officials of the Jamaica Tourist Board to retain the Young & Rubicam advertising agency led to several RICO indictments in *United States v. Young & Rubicam, Inc.*[101]

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[97] *See id.* at 1056.

[98] *See id.*

[99] *See id.* at 1063. The court stated,

> One could view these payments as a single illegal payment separated into installments, and thus as a one-time affair, rather than as 'criminal activity that, because of its organization, duration, and objectives poses, or during its existence posed, a threat of a series of injuries over a significant period of time.' But, to focus only on the series of payments—i.e., one bribe divided into four parts—is to ignore the complexity of Kirkpatrick's scheme.

Id. (citations omitted).

[100] *Id.* For a RICO violation, there must be a "pattern" of racketeering activity. *Id.* In *Environmental Tectonics,* in order to determine whether such a pattern existed, the Third Circuit looked to a combination of factors: "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity." *Id.* The court found that ETC's factual allegations in its amended complaint more than satisfied the pattern requirement. *Id.*

[101] 741 F. Supp. 334, 337 (D.Conn. 1990). In *Young & Rubicam*, a series of related payments over a substantial period of time sufficed to create a "racket," despite defendant's claim that there was only a single bribe to obtain a single contract, and that the kickbacks paid to Jamaican officials were not installments on that bribe, but separate payments in amounts related to advertising. *Id.* at 340-41. On February 9, 1990 Young & Rubicam pleaded guilty to one count of conspiracy to bribe foreign officials. *Abrahams v. Young & Rubicam,* 793 F. Supp. 404, 405 n. 1 (D. Conn. 1992). In return, all bribery and RICO charges were dropped. *See id.*

In the related case of *Abrahams v. Young & Rubicam,* 793 F. Supp. 404 (D. Conn. 1992), *aff'd in part and rev'd in part, remanded, question certified,* 79 F.3d 234

RICO charges have also been used to snare foreign violators engaging in fraud in the United States.[102] In another case, British defendants transacting business in the District of Columbia—sending and receiving mail, faxes, and phone calls—were held subject to personal jurisdiction under state long-arm provisions[103] in a RICO suit over attempts to defraud the United States government in connection with the sale and maintenance of helicopters.[104] Application of the Travel Act[105] in the context of international bribery has also been used as a basis for RICO claims.[106]

3. Arms Export Control and False Statements Acts

Further restrictions against illicit payments apply to specific businesses, such as contractors or suppliers obtaining U.S. government financing or those making defense-related sales under

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(2d Cir. 1996), the former Minister of Tourism & Information of Jamaica, a defendant in the original case, sued for negligent infliction of emotional distress, intentional infliction of emotional distress, libel, and slander. *See* 793 F. Supp. at 405. The indicted bribee failed to establish RICO claims against the bribers. *See id.* at 407. Eventually, all counts, except for individual defamation charges against one Moore, were dropped. *See id.* The Second Circuit again disallowed plaintiff's RICO cause of action. *See id.* at 240.

[102] *See* Dooley v. United Technologies Corp., 803 F. Supp. 428, 434 (D.D.C. 1992).

[103] *See id.* at 435-36. RICO provides for nation-wide service of process, but not for service of process in foreign countries. *See id.* at 433. In *Dooley,* service of process was authorized under the District of Columbia's long-arm statute. *See id.* at 436.

[104] *See id.* at 428-30. There is, however, a "government contacts exception" which "precludes the assertion of personal jurisdiction over a non-resident whose only contacts with the District of Columbia are for purposes of dealing with a federal agency or Congress." *Id.* at 434; *see also* Cellutech, Inc. v. Centennial Cellular Corp., 871 F. Supp. 46, 50 (D.D.C. 1994) (stating that FCC and SEC filings standing alone are insufficient to establish personal jurisdiction due to the government contacts exception).

[105] 18 U.S.C. § 1952 (1994) (prohibiting interstate and foreign travel in aid of racketeering enterprises).

[106] "The Travel Act prohibits travel in interstate or foreign commerce or the use of the mail or any facility in interstate or foreign commerce, with intent to promote, manage, establish, or carry on any 'unlawful activity.'" ZARIN, *supra* note 9, at 11-7. "Unlawful activity" was originally targeted at organized crime. *See id.* Since then, a violation of the FCPA can provide a basis for violation of the Travel Act. *See id.* at 11-8.

the Arms Export Control Act (AECA).[107] Military "[c]ontractors and suppliers providing goods or services pursuant to [AECA] financing must provide a certification to the Defense Security Assistance Agency, . . . which is responsible for administering the loans."[108] The certification requires an attestation that organizations receiving financing under the act are not engaging in any illicit payments abroad.[109] Enterprises so engaged face criminal sanctions under the False Statements Act,[110] which prohibits knowing or willful falsification, concealment, or cover-up of a material fact to a U.S. government agency.[111]

These federal registration and certification requirements have been used to prosecute Americans engaged in illicit payments abroad. In *U.S. v. Dale,*[112] defendant Ashton challenged her convictions for fraud in connection with four forms submitted to government agencies,[113] where she and other corporate officers of Automated Data Management, Inc. (ADM) were engaged in illegal

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[107] International Security Assistance and Arms Export Control Act, 22 U.S.C. §§ 2778-2779 (1988); *see* CONTRACTOR CERTIFICATION AND AGREEMENT WITH DEFENSE SECURITY ASSISTANCE AGENCY, DOD SECURITY ASSISTANCE MANAGEMENT MANUAL, DOD DIRECTIVE, 5108.38-M, ch. 9; *see also* THE GOVERNMENT CONTRACT COMPLIANCE HANDBOOK, ch. 20 (Federal Publications, Inc., 2d ed. 1991); ZARIN, *supra* note 9, at 11-10 n.43 "The Foreign Military Sales Program provides loans to foreign governments to finance the purchase of defense articles or defense services of U.S. origin." *Id.* at 11-9 through 11-10.

[108] ZARIN, *supra* note 9, at 11-10.

[109] *See id.* The certification provides:

1. No bribes, rebates, gifts, kickbacks or gratuities have been or will be offered to or given to offices, officials, or employees of the foreign government to secure the contract or favorable treatment; and
2. The contract price includes only specified commission or other contingent fees paid only to bona fide employees or agents which neither expect nor propose to exert improper influences to solicit or obtain the contract.

Id. (citing CONTRACTOR CERTIFICATION AND AGREEMENT WITH DEFENSE SECURITY ASSISTANCE AGENCY, DOD SECURITY ASSISTANCE MANAGEMENT MANUAL, DOD DIRECTIVE, 5108.38-M, ch. 9).

[110] 18 U.S.C. § 1001 (1995).

[111] *See* ZARIN, *supra* note 9, at 11-8.

[112] 991 F.2d 819 (D.C. Cir. 1993), *cert denied*, 114 S.Ct. 286 (1993), *cert denied* 114 S.Ct. 650 (1993), *and appeal after remand sub. nom.*, United States v. Sweeney, 44 F.3d 1032 (D.C. Cir. 1994).

[113] *See id.* at 828-29.

financial operations in Europe and Asia.[114] The first three fraud convictions involved forms Ashton and Executive Vice President David Dale filed with the Department of Defense in 1987 to obtain a security clearance.[115] The fourth fraud count related to an "Application for Small Business Determination" filed with the Small Business Administration, on which Ashton failed to mention her or Dale's interests or positions with various overseas concerns.[116] The D.C. Circuit affirmed all of the convictions.[117]

Similar charges were brought against an American military contractor under the False Statements Act in *United States v. Liebo*.[118] Although ultimately acquitted at trial, Liebo was indicted not only for violations of the FCPA, but also for obtaining Foreign Military Sales financing by submitting a false certification that no "rebates, gifts, or gratuities" had been given contrary to law to Nigerian officials.[119] In both *Dale* and *Liebo*, illicit payments abroad resulted in convictions at home; convictions entirely apart from the provisions of the FCPA.

Similar reporting requirements apply to the sale of arms. The AECA regulates the export of weapons abroad, and requires that, "political contributions, gifts, commissions and fees paid, or

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[114] *See id.* at 826-28.

[115] *See id.*

[116] *Id.* at 829.

[117] *See id.* at 859.

[118] 923 F.2d 1308 (8th Cir. 1991). "Liebo was acquitted at trial of conspiring to defraud the United States and to commit other offenses in violation of 18 U.S.C. § 371 (1988);" ten counts regarding the bribery and record keeping sections of the FCPA; three counts of false corporate income tax reporting in violation of 26 U.S.C. § 7206(2) (1988); and three counts of making false statements to the Defense Security Assistance Agency, in violation of 18 U.S.C. § 1001 (1988). *Id.* at 1310 n.1. This provision states:

> Whoever . . . knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1988). On the first day of trial the district court granted the government's motion to drop one of the three charges regarding false statements. *Liebo*, 923 F.2d. at 1310 n.1.

[119] *Liebo*, 923 F.2d. at 1310.

offered or agreed to be paid, by any person in connection" with "sales of defense articles or defense services . . . or of design and construction services . . . [or] commercial sales of defense articles or defense services,"[120] are to be reported to the Department of State.[121] The Act specifically targets payments made to gain "improper influence."[122] In *Dooley v. United Technologies Corp.*,[123] for example, allegations that British defendants participated in submitting misleading statements to the federal government, as well as making payments in violation of the AECA, were sufficient to establish violations of that Act as well as the Money Laundering Control Act.[124]

4. Tax Laws

In addition to the reporting requirements of the AECA, tax laws have been used to attack international corruption and bribery. For example, § 162 of the Internal Revenue Code[125] disallows tax

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[120] 22 U.S.C. § 2779(a).

[121] *See id.* "In accordance with such regulations as he may prescribe, the Secretary of State shall require adequate and timely reporting . . . ." *Id.*

> Such regulations shall specify the amounts and kinds of payments, offers, and agreements to be reported, and the form and timing of reports, and shall require reports on the names of sales agents and other persons receiving such payments. The Secretary of State shall by regulation require such recordkeeping as he determines is necessary.

Id.

[122] *Id.* § 2779(c). The Act prescribes the following:

> No such contribution, gift, commission, or fee may be included, in whole or in part, in the amount paid under any procurement contract entered into under section 2762 or section 2769 of this title, unless the amount thereof is reasonable, allocable to such contract, *and not made to a person who has solicited, promoted, or otherwise secured such sale, or has held himself out as being able to do so, through improper influence.*

Id. (emphasis added).

[123] 803 F. Supp. 428, 441- 42 (D.D.C. 1992). The case involved the sale of 12 Blackhawk helicopters manufactured by defendant United Technologies Corp. (UTC) to the Saudi Ministry of Defense and Aviation administered by the DOD. *See id.* at 431. UTC allegedly agreed to pay bribes to Saudi businessmen and government officials. *See id.*

[124] 18 U.S.C. § 1956 (1995). *See Dooley*, 803 F. Supp. at 441-42.

[125] *See* Section 288(a) of the Tax Equity and Financial Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324, 26 U.S.C. § 162(c) (1988); 26 U.S.C. § 7454 (1988); 26

deductions for payments that would be illegal under the FCPA.[126] Tax laws could prove to be an effective way to reach international corruption, even where corporate activity might not be reached under the FCPA. In *United States v. Dale*,[127] for example, tax fraud convictions[128] were upheld against American corporate officers who made illegal payments to two Hong Kong corporations for studies and services never performed.[129] The court further held that the tax code was not an exclusive weapon for prosecuting tax fraud in international business transactions.[130]

5. *Title VII of the 1988 Trade Act*

Title VII of the 1988 Trade and Competitiveness Act[131] (1988 Trade Act) requires the President to report annually to Congress (until its expiration in April 1996)[132] on discrimination against U.S. goods or services by foreign countries in government procurement.[133] This function was delegated to the United States Trade Representative,[134] who is charged with identifying countries

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C.F.R. § 1.162-18 (1993).

[126] For a discussion of payments illegal under the FCPA, see *supra* notes 9-11 and accompanying text. For a detailed discussion of payments that are illegal under the FCPA, see INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 321-25.

[127] 991 F.2d 819, 826-27, 859 (D.C. Cir. 1993); *see supra* notes 112-17 and accompanying text.

[128] Defendants were convicted, inter alia, under 26 U.S.C. § 7201, 7206(2) (1988). *See Dale*, 991 F.2d at 831-32.

[129] *See Dale*, 991 F.2d at 826-29. The case involved a complex scheme formed by officers of Automated Data Management System, Inc. (ADM), an American firm. *See id.* ADM had offices in Germany and Korea, through which ADM made illicit payments to four shell corporations in Hong Kong, as well as to a Swiss investment firm. *See id.*

[130] *See id.* at 849. Defendants were also convicted of wire fraud under 18 U.S.C. § 1343. *See id.* Defendants wired $316,000 to a Swiss bank account as part of their tax fraud scheme. *See id.* The court upheld their convictions for wire fraud. *See id.*

[131] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 § 5003(d)(2) (codified as amended in scattered sections of 19 U.S.C.).

[132] The 1988 Amendments pursuant to Pub. L. 100-418 ceased to be effective on April 30, 1996. *See* 19 U.S.C. § 2515 (Amendment of Section, Termination date of 1998 Amendment); *see also* discussion *infra* note 143.

[133] *See id.*

[134] *See Office of the U.S. Trade Representative*, ANNUAL REPORT ON DISCRIMINATION IN FOREIGN GOVERNMENT PROCUREMENT, Apr. 30, 1996 [hereinafter

that fail to apply "transparent and competitive procedures."[135] The 1994 Amendments to Title VII[136] added new categories regarding corrupt practices[137] to countries not signatories to GATT's Government Procurement Code.[138] Although the 1995 *Annual Report on Discrimination In Foreign Government Procurement* did not single out any particular country, it did address corrupt practices as an area of important interest.[139] The 1996 *Report*, published April 30, 1996, describes various anti-corruption initiatives, including, "seeking a [WTO] mandate . . . to launch a broader negotiation on procurement among all WTO members to develop an interim arrangement on transparency, openness and due process in the procurement of goods and services."[140] The People's Republic of China was singled out in the report for non-transparent procurement procedures.[141]

Title VII called for consultations with countries identified in the report, followed by sanctions if discriminatory practices are not remedied within specified time frames.[142] The extent to which Title VII has effect now that it has expired remains to be seen, but

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ANNUAL REPORT ON DISCRIMINATION].

[135] *Id.*

[136] Subsec. (d)(3)(c), Pub. L. 103-465 § 341(c)(2).

[137] *See* 19 U.S.C. § 2515(d)(3)(c) (1994). The amendments provide that in identifying foreign nations engaging in discrimination against American products, *see* 19 U.S.C. § 2515(d)(1), one consideration is "the failure to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement." 19 U.S.C. § 2515(d)(3)(c).

[138] *See id.*; *see also* Office of the United States Trade Representative, *Results of the 1995 Title VII Review*, at III, *available from* USTR FAX RETRIEVAL SYSTEM (1-800-USA-TRADE).

[139] U.S. Dept. of Commerce, THE ANTI-CORRUPTION REVIEW, May 1, 1996, at 7-8 [hereinafter ANTI-CORRUPTION REVIEW].

[140] *Id.*

[141] *See* ANNUAL REPORT ON DISCRIMINATION, *supra* note 134.

> With few exceptions, China's government procurement practices are not transparent, open or competitive. For the most part, information on China's procurement practices remains inaccessible to foreign suppliers. Purchasers for virtually all projects in China are subject to at least one and usually several approvals from governments at various levels . . . [c]ompetition is by direct negotiation rather than by competitive bid.

Id.

[142] *See id.*

identification of issues and countries made prior to that date will continue.[143]

6. *Section 301 of the Trade Act of 1974*

With the expiration of Title VII, other unilateral measures may be called upon to combat transnational bribery. An idea which has been raised by at least one commentator,[144] as well as Clinton administration officials,[145] is the use of proceedings prescribed under Section 301 of the Trade Act of 1974.[146] Section 301 is a unilateral remedy the United States may impose when foreign nations engage in unjustifiable, unreasonable,[147] or discriminatory conduct.[148] If either the President or the United States Trade Representative is dissatisfied with the negotiated result regarding a section 301 complaint, the United States may undertake retaliatory proceedings against an offending nation.[149]

In March 1996, Secretary of Commerce Mickey Kantor suggested using section 301 sanctions as a method of fighting foreign corruption.[150] Some point out that use of section 301

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[143] *See id.* The bribery and corruption provisions of Title VII, 19 U.S.C. § 2515(d)(3)(c) expired on April 30, 1996, pursuant to § 7004 of the 1988 Act, which terminated subsections (d)-(k) of 19 U.S.C. § 255. *See* History; Ancillary Laws & Directives, 19 U.S.C.S. § 2515 (1996).

[144] *See* Mark J. Murphy, Note, *International Bribery: An Example of an Unfair Trade Practice?*, 21 BROOKLYN J. INT'L L. 385, 389 (1995).

[145] Helene Cooper, *Kantor Suggests Using Trade Sanctions As a Way to Fight Foreign Corruption*, WALL ST. J., Mar. 7, 1996, at A2.

[146] 19 U.S.C. § 2411 (1994).

[147] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 532.

> Foreign country practices are "unreasonable" if they are unfair and inequitable, regardless of whether they are in violation of or inconsistent with the international legal rights of the United States. Unreasonable practices include those which deny fair and equitable opportunities for the establishment of a business abroad, those which provide inadequate or ineffective protection of intellectual property rights, those which deny market opportunities as a result of systematic anticompetitive activities of private firms, and those which constitute export targeting . . . .

Id. at 532.

[148] *See id.*

[149] *See id.* at 534.

[150] *See* Cooper, *supra* note 145, at A2.

would not only advance the stated goal of ensuring access and equitable conditions for U.S. commerce, but would also promote those same conditions in international business.[151] One proponent of using section 301 to fight foreign corruption concludes, "[t]he use of section 301, at least in the context of combating bribery, is an instance where aggressive unilateralism can actually advance the goal of establishing a multilateral world trading regime."[152]

B. Federal Laws that Permit Private Actions by Injured Parties

The federal government is not the only actor in the fight against corruption. While private causes of action are not provided for under the FCPA, it is clear that private parties injured or damaged by international business corruption are aggressively searching for ways to use the legal system to recover their damages and to expose their adversaries.[153] Furthermore, private parties have a greater incentive to do so.[154]

1. Robinson-Patman Act

Section 2(c) of the Robinson-Patman Act[155] forbids the

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[151] *See* Murphy, *supra* note 144, at 403.

> The elimination of international bribery certainly advances the goal of insuring 'fair and equitable conditions for U.S. commerce,' but it also has the effect of insuring those same conditions for international commerce, . . . [W]ith the emergence of a new world trade order, the best interests of the United States and those of the rest of the international economic community can no longer be seen as mutually exclusive.

Id. at 403-04 (quoting S. REP. NO. 93-1298, at 164 (1974)).

[152] *Id.* at 404.

[153] *See infra* notes 158-94 and accompanying text.

[154] For this reason some commentators have suggested amending the FCPA to include a private right of action, in order to make the Act self-policing. *See* Pines, *supra* note 26, at 185. *Lamb v. Philip Morris*, 915 F.2d 1024 (6th Cir. 1990), *cert. denied* 111 S. Ct. 961 (1991), decided by the Sixth Circuit in 1990, is the leading case on whether a private right exists regarding illicit foreign payments. The *Lamb* court expressly found that allowing an implicit right of action would contravene the FCPA compliance program currently in place, and that alternative means, notably in the realm of antitrust law, already existed. *See id.* at 1030. Later rulings have followed these lines. *See Anti-Corruption Review, supra* note 139, at 11-18, 11-19; Citicorp Int'l Trading Co. v. Western Oil & Refining Co., 771 F. Supp. 600 (S.D.N.Y. 1991).

[155] 15 U.S.C. §§ 13a, 13b, 21a (1996).

payment of brokerage fees, commissions, and other illegitimate compensation to agents in connection with the sale of goods.[156] Although principally a tool against price discrimination, courts have held that section 2(c) does prohibit commercial bribery.[157] Private plaintiffs have used section 2(c) effectively against competitors engaging in illicit payments.

In *Environmental Tectonics*, the Third Circuit held that the passing of payments from "seller to buyer" (from Kirkpatrick to Nigerian sources) was clearly a violation of section 2(c).[158] The standing requirement of the Robinson-Patman Act was satisfied as well, in that "it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber."[159] The court observed that a more direct injury than losing business to a competitor due to illicit payments would be hard to imagine.[160] Similarly, in *Municipality of Anchorage v. Hitachi Cable, Ltd.*,[161] Hitachi Cable's bribery of two employees of the municipality of Anchorage led to various charges, including violations of the Robinson-Patman Act.[162]

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[156] *See* Clayton Act § 2(c), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(c).

[157] *See* Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066 (3rd Cir. 1988). (For discussions of the other issues in *Environmental Tectonics* see *supra* notes 83-85, 93-100 and accompanying text.) For decisions holding that the Robinson-Patman Act prohibits bribery generally, see Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 716 F.2d 245, 246 (4th Cir. 1983); Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 696 (9th Cir. 1976) *cert. denied,* 429 U.S. 940 (1940).

[158] *See Environmental Tectonics*, 847 F.2d at 1066.

[159] *Id.*

[160] *See id.* at 1067.

[161] 547 F. Supp. 633 (D. Alaska 1982).

[162] *See id.* at 637. Hitachi argued that the municipality lacked standing to sue, based on the argument that when a seller bribes a buyer's agent, only competitors of the seller suffer competitive injury. *See id.* The court expressly rejected this narrow reading of the standing requirement of § 2(c), holding that "when commercial bribes are paid to a company's employees to obtain contracts for the sale of goods, the company has standing to sue under section 2(c) . . . ." *Id.* at 641.

2. *Sherman Antitrust Act*

Similarly, private plaintiffs are attempting to broaden Sherman Act[163] coverage to reach commercial bribery.[164] Section 1 of the Sherman Act has been interpreted as prohibiting "unreasonable restraints of trade,"[165] typically anticompetitive agreements among competitors in the form of price fixing,[166] sharing of price information,[167] or prohibitions on competitive bidding by members of a commercial organization.[168] Recently the Sherman Act also has been used to address bribery in international business transactions.[169] Bribery, like other anti-competitive arrangements,

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[163] 15 U.S.C. §§ 1-7 (1988). Section 1 of the Sherman Act provides: "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988). Section 2 provides, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1988).

[164] Gevurtz, *supra* note 28, at 367 n.8.

[165] The classic rule formulation can be found in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502 (1911). "If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide...." *Id.* at 66. The *Standard Oil* formulation of the rule of reason has been used to distinguish permissible from impermissible exclusionary practices in monopolization cases. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 248 (1994). In current antitrust litigation, most exclusionary practices are analyzed under the rule of reason. *See id. See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (finding that a dominant ski company that refused to continue a joint venture with a competitor was only explicable as an attempt to destroy competition).

[166] *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (holding that licenses to theaters which required a minimum price of admission and other restraints was a violation of the Sherman Act).

[167] *See, e.g.*, Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936) (holding that a trade association controlling nearly all imported raw sugar and supplying 70 to 80 percent of refined sugar; and collecting and disseminating data concerning, inter alia, prices and terms and conditions of sale; was an unreasonable restraint, especially where steps were undertaken to secure undeviating adherence to prices and terms).

[168] *See, e.g.*, National Society of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (holding that a professional organization's canon of ethics prohibiting its members from submitting competitive bids for services was a violation of § 1 of the Sherman Act).

[169] *See infra* notes 179-83 and accompanying text.

is increasingly regarded as a restraint of trade.[170] Accordingly, commercial bribery claims are being prosecuted with increased regularity,[171] although outcomes in these cases are often criticized.[172]

One line of cases, beginning with *Parmelee Transportation Co. v. Keeshin*,[173] concluded that commercial bribery was not a classic "restraint to trade" and therefore was beyond the scope of the Sherman Act.[174] In *Municipality of Anchorage v. Hitachi Cable Ltd.*,[175] a federal district court in Alaska applied this reasoning to bribery in the context of international business transactions.[176] In that case bribes by Hitachi Cable officials were, by themselves, insufficient to sustain a Sherman claim.[177] The court conceded, however, that "where commercial bribery is coupled with other acts tending to restrain trade, a claim under the Sherman Act may be established."[178]

A different approach, which views commercial bribery more as an "unfair trade practice" reachable by the Sherman Act, was adopted by the Fifth Circuit in *Associated Radio Service Co. v. Page Airways, Inc.*[179] The *Page Airways* court noted, "if buyers

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[170] 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW § 738b at 279-80 (1978) (assessing situations where bribery can be punished as an unreasonable restraint of trade).

[171] *See id.; see also* Municipality of Anchorage v. Hitachi Cable Ltd., 547 F. Supp. 633, 645 (D. Alaska 1982) (noting that commercial bribery coupled with other acts tending to restrain trade establishes a claim under the Sherman Act).

[172] *See* Gevurtz, *supra* note 28, at 365-66 (noting that prosecutions under the Sherman Act "have yielded results and methods of analysis that are often inconsistent and usually erroneous").

[173] 292 F.2d 794 (7th Cir), *cert denied,* 368 U.S. 944 (1961).

[174] *Id.* at 804. This formal reading of the Sherman Act was followed by the United States District Court for the District of Idaho in *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393 (N. Idaho 1964), *aff'd on other grounds,* 351 F.2d 851 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966), as well as by the Ninth Circuit in *Calnetics Corp. v. Volkswagen of America,* 532 F.2d 674 (9th Cir.) (per curiam), *cert. denied,* 429 U.S. 940 (1976).

[175] 547 F. Supp. 633 (D. Alaska 1982).

[176] *See id.* at 645.

[177] *See id.*

[178] *Id.*

[179] 624 F.2d 1342 (5th Cir. 1980), *cert denied* 450 U.S. 1030 (1981).

were influenced through bribes or similar practices, this might constitute an exclusionary practice in violation of section 2 [of the Sherman Act]."[180] The *Page Airways* ruling appears to accord more with scholarly opinion. Philip Areeda and Donald F. Turner's treatise on Antitrust, alluded to by the *Page Airways* court, points out that

> [t]here may be instances in which the means used by the monopolist are unlawful or otherwise clearly improper. For example . . . the monopolist might 'bribe' the supplier's employee who is thus induced to act in his personal interest and not in his employer's interest. Such improprieties can be exclusionary for § 2 purposes whenever they have a significant impact upon the competitive vitality of the rival.[181]

As Areeda and Turner point out, bribery is substantively different from other anticompetitive behavior (such as misrepresenting one's own or a rival's product).[182]

Despite problems inherent in Sherman Act cases, some experts believe the Act will likely become an increasingly popular weapon against commercial bribery because of the Act's broad jurisdictional reach, its access to the federal courts, and its provision for treble damages and recovery of attorney's fees.[183]

3. *Employment Discrimination*

Suits by employees fired for their refusal to participate in illegal bribery schemes have recently proven an effective and lucrative means of private relief.[184] Originally, the FCPA included what was referred to as the Eckhardt Amendment,[185] which disallowed FCPA actions against employees without first going

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[180] *Page Airways*, 624 F.2d at 1354 (quoting 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW § 738b at 279-80 (1978)). In assessing exclusionary tactics by the defendants, the *Page Airways* court also found relevant the evidence of foreign bribery coupled with the fact that Page had paid $10,000 over the next highest bid, permitting the proper inference of corrupt practices. *See id.* at 1354.

[181] 3 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW § 738e at 282 (1978).

[182] *See id.*

[183] *See* Gevurtz, *supra* note 28, at 367.

[184] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 330.

[185] 15 U.S.C. §§ 78dd-2(b)(3), 78ff(c)(3) (1977) (amended 1988).

after the employer.[186] The Eckhardt Amendment was eliminated in 1988, allowing the government to prosecute employees directly and independently.[187] This raised the possibility of low-level employees being used as scapegoats when illegal payment schemes were discovered.[188] The added ability of employees to sue their former employers for wrongful discharge, or breach of contract, leveled the playing field.

In *Williams v. Hall,*[189] for example, employment discrimination claims were asserted against a former employer (a petroleum company) that allegedly fired employees because of their refusal to participate in illicit international payments.[190] The employees

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[186] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 330.

[187] *See id.* The intent of the Eckhardt Amendment was to prevent a company from labeling an employee as a renegade and making an employee a scapegoat for the company's misdeeds. *See* 133 CONG. REC. S2105 (1987) (statement of Senator Robert Dole on the Trade, Employment, and Productivity Act of 1987). The lead-in clause of the Eckhardt Amendment read, "whenever an issuer/domestic concern is found to have violated . . . ." 15 U.S.C. § 78dd-2(b)(3) (amended 1988); *see* 134 CONG. REC. H1863 (1988) (conference report on H.R. 3, Omnibus Trade and Competitiveness Act of 1988). The provision was narrowly construed by the Fifth Circuit in *United States v. McLean*, 738 F.2d 655 (1984), thereby, in Senator Dole's words, "prevent[ing] the Government from prosecuting an individual even where the company was convicted of a conspiracy to violate the FCPA." 133 CONG. REC. S2105 (1987) (statement of Senator Robert Dole). The 1988 amendments allowed suits to be brought directly against the employee, the employer, or both, effectively broadening the reach of FCPA enforcement. *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 330.

[188] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 330. "An employer may now urge the government to bring suit directly against the employee who made the payment, even if the payment was authorized by other higher level officials. The possibility of a scapegoat is back." *Id.*

[189] 683 F. Supp. 639 (E.D.Ky. 1988). A related case, *McKay v. Ashland Oil, Inc.*, No. 84-291 (E.D.Ky), was consolidated for discovery and for trial with a suit brought by a second employee named Harry Williams. The consolidated case was called *Williams v. Hall,* 683 F. Supp. 639 (E.D.Ky. 1988). Later cases such as *Bowman v. Western Auto,* 985 F.2d 383 (8th Cir.), *cert denied* 508 U.S. 957 (1993), have criticized *Williams.* The Eighth Circuit in *Bowman* disallowed for lack of standing the claim of an employee who alleged he was fired for not participating in racketeering from bringing RICO charges. *See id.* at 385. The court found he was not harmed by RICO predicate acts committed in furtherance of a felony. *See id.* Other cases have restricted RICO standing as well. *See, e.g.,* Hecht v. Commerce Clearing House, 897 F.2d 21 (2nd Cir. 1990) (denied standing to a fired employee). The *Hecht* court held that the purpose of RICO liability was not to deter every illegal act, such as retaliatory firings, where there existed state or common law remedies. *See id.* at 24.

[190] *See Williams*, 683 F. Supp. at 639.

claimed that their employer had engaged in a RICO conspiracy by paying bribes to officials in the Middle East, and that their firing was part of the cover-up.[191] The jury found that the employer had breached its employment contract and had wrongfully discharged the employees in violation of public policy.[192] Ultimately, a lump-sum settlement of $25 million was reached between the parties.[193] One observer noted that the company had "learned that firing an employee for refusing to make an illegal payment abroad can be costly."[194]

Several courts have dealt with wrongful termination suits brought by employees who refused to engage in illicit payments or other corrupt activities abroad. In doing so, states which allow termination-at-will (except where it conflicts with public policy) have looked to the public policy considerations behind the FCPA—honesty in international business transactions—for guidance in construing state law. The Washington Supreme Court effectively adopted the FCPA as the state law standard in *Thompson v. St. Regis Paper Co.*,[195] which allowed a tort action for wrongful discharge where the plaintiff alleged that he was fired for instituting an internal compliance program.[196] Similarly in *Adler v.*

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[191] *See id.*

[192] *See id.* For a recounting of the *Williams* trial as well as post-trial developments, see *McKay v. Commissioner*, 102 T.C. 465, 470 (1994), a related case concerning the tax status of the settlement proceedings. In *Williams*, with respect to the breach of contract claim, the jury found that McKay had not been fired for just cause. *See id.* With respect to the wrongful discharge claim, the jury found that the following factors influenced the firing: (1) plaintiff's refusal to make illicit payments, and (2) his refusal to commit perjury to the IRS in covering up the payments. *See id.* at 470-71.

[193] *See id.* The jury awarded plaintiff McKay $1,602,103 as damages for lost compensation between January 1, 1984, and the time of trial in 1988, and future damages of $12,846,209. *See id.* at 471. The damages were trebled to over $43 million for RICO violations. *See id.* McKay also received $125,000 in punitive damages. *See id.* A settlement in the case was reached on August 26, 1988. *See id.* Pursuant to the settlement agreement, of the $16,744,300 going to McKay, $12,250,215 was paid for the wrongful discharge tort claim, and $2,044,085 for breach of his employment contract. *See id.* at 472. Plaintiff Williams received the remainder of the $25 million. *See id.*

[194] INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 331.

[195] 685 P.2d 1081, 1089 (Wash. 1984).

[196] *See id.*

American Standard Corp.,[197] an employee claimed he was discharged for discovering illegal bribery of Mexican officials by corporate officers.[198] The court found a "clear mandate of public policy [against bribery] was allegedly contravened by this discharge."[199]

C. State Remedies

Beyond the employment law context, state regulation of international business conduct has typically been less aggressive and less effective than federal initiatives. Every state has various criminal or civil penalties for commercial bribery and unfair competition, though apparently none specifically address bribery in international business transactions; almost all are limited to actions committed within the state's borders.[200] The *Environmental Tectonics* court, however, allowed New Jersey state racketeering charges (similar to federal RICO charges) to proceed against the defendants.[201]

Some state laws against commercial bribery have been extended to cover international business transactions. A New York penal law proscribing bribery of non-public servants[202] was at issue in *United States v. Young & Rubicam, Inc.*[203] In that case, the court noted the statute's purpose of "prohibiting and punishing corruption of any commercial transaction within [New York's] borders," including those involving foreign corporations.[204] In the

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[197] 538 F. Supp. 572, 577 (D. Md. 1982), *aff'd and rev'd on appeal on other grounds*, 830 F.2d 1303 (4th Cir. 1987).

[198] *See id.*

[199] *Id.* at 578.

[200] *See* Lamb v. Phillip Morris, 915 F.2d 1024, 1030 (6th Cir. 1990), *cert denied*, 111 S. Ct. 961 (1991) (citing the lack of state laws proscribing bribery specifically in international business transactions).

[201] Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1064 (3rd Cir. 1988).

[202] N.Y. PENAL §§ 180.00, 180.05.

[203] 741 F. Supp. 334, 339 (D. Conn. 1990).

[204] *Id.* The court held that

> [t]o construct the statute to apply only to bribery of persons in private business is to suggest that [the] State of New York intended not to prosecute instances of bribery occurring within its borders by New York corporations involving non-

related case of *Abrahams v. Young & Rubicam, Inc.*,[205] plaintiff claimed that defendant's alleged foreign bribery violated a Connecticut unfair trade statute.[206] The Second Circuit, fearing a misinterpretation of Connecticut law, severed the state law claim and certified it to the Connecticut Supreme Court.[207]

Connecticut is not alone in providing civil and criminal relief to corporations injured by corruption in international transactions. New York also provides a civil remedy for violation of its criminal statute, and even allows a defense to the enforcement of contracts tainted by such business practices.[208] Colorado has a law against

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> New York public officials. Such an interpretation would be inconsistent with the statutory purpose of prohibiting and punishing corruption of any commercial transaction within its borders.

Id. at 339.

[205] 79 F.3d 234 (2nd Cir.), *cert. denied*, 117 S. Ct. 66 (1996).

[206] *See id.* at 239. CONN. GEN. STAT. § 42-110b(a) (1994) prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

Abrahams, the former Minister of Tourism and Information for the Jamaican government, claimed that he had been falsely accused of participating in a bribery conspiracy. *See Abrahams v. Young & Rubicam*, 79 F.3d at 236. In the early 1980s, the Young and Rubicam advertising agency had funneled nearly a million dollars to a Jamaican and an American who claimed they could obtain advertising by bribing Abrahams. *See id.* All the money was apparently kept by the two intermediaries. *See id.* Abrahams claimed he learned of the scheme only when he, the agency, and the two intermediaries were indicted in 1989, and that he had suffered emotionally, financially, and socially from the false allegations. *See id.*

[207] *Abrahams v. Young & Rubicam*, 79 F.3d at 239.

> Bribery to obtain a commercial advantage is surely an unfair trade practice . . . . There is no dispositive Connecticut case law as to whether [the Connecticut Unfair Trade Practices Act (CUTPA)] protects a person in Abraham's position against the harm that befell him. Any decision of that issue would involve setting parameters on CUTPA claims that might affect numerous other factual situations. We are reluctant to put either a narrowing or expanding gloss on the statute; not only might it misconstrue Connecticut law, but it might also lead to forum shopping to achieve or avoid federal disposition of unusual CUTPA claims.

Id. at 239. The Connecticut Supreme Court has yet to rule on the issue.

[208] *See* Mark Miller, *America Singing: The Role of Custom & Usage in the Thoroughbred Horse Business*, 74 KY. L.J. 781, 826 (1995). Many laws against commercial bribery understandably overlap with other provisions of corporate law regarding breaches of fiduciary duty, which could apply to international business transactions if the right set of facts arose. Illinois, for example, has a special provision in its corporate law that makes any director or officer liable to their corporation for

"commercial bribery and breach of duty to act disinterestedly," which prescribes that officers, directors, as well as consultants, professional advisors—which would include lawyers—and other professionals, make fair and impartial decisions.[209]

Recently, in *D'Agostino v. Johnson & Johnson*,[210] the New Jersey Supreme Court adopted the FCPA as state policy as well.[211] Richard D'Agostino, an American citizen but long-time resident of Switzerland, was employed by a Swiss subsidiary of Johnson & Johnson.[212] D'Agostino refused to sign vouchers authorizing payments to Swiss officials responsible for registering new drugs and was thereafter discharged.[213] The court noted, "[n]ot only can federal policy constitute state policy, it can also apply extraterritorially when Congress intends that the policy have

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treble damages if they offer or receive a commercial bribe. *See* 805 ILL. ANN. STAT. 5/8.65 (West 1993); *see also* John A. MacKerron, *Variety of Choice in the Corporate Law 'Menu' of the Great Lake States*, 71 U. DET. MERCY L. REV. 469, 485 n.105 (1994). Some cases have allowed shareholders to bring an action against corporate directors for violation of their fiduciary duties when engaging in bribery. *See* Miller v. American Tel. & Tel. Co., 507 F.2d 759 (3d Cir. 1974); *see also* Gevurtz, *supra* note 28, at 365 n.3. In *Miller*, a case involving not bribery but failure to collect an outstanding debt owed the corporation by the Democratic National Committee, the court found that the failure to collect the debt was sufficient to state a claim against the corporation and all but one member of the board of directors in a stockholder derivative action for breach of fiduciary duty. *Miller*, 507 F.2d at 761.

209 COLO. REV. STAT. § 18.5.401 (1986); *see also* Carry N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. J. 213, 239 (1994). In 1988 the Tenth Circuit reversed an earlier ruling that had declared Colorado's commercial bribery statute void for vagueness. *See* United States v. Gaudreau, 860 F.2d 357 (10th Cir. 1988). The court held that prohibiting enumerated classes of people from "knowingly violating or agreeing to violate a duty of fidelity," provided sufficiently clear, objective standards to satisfy due process, when applied to defendants accused of bribing a corporate officer to compromise the corporation's interest. *Id.* at 359. Colorado's commercial bribery statute duplicates the American Law Institute Model Penal Code § 228.4 provisions, except that the MPC proposes misdemeanor penalties whereas the Colorado statute is a felony. *See* COLO. REV. STAT. § 18.5.401. Similar commercial bribery statutes have been uniformly upheld in challenges on grounds of vagueness. *See* Ex Parte Mattox, 683 S.W.2d 93 (Tex. App. 3 Dist. 1984); United States v. Perrin, 580 F.2d 730, 735 (5th. Cir. 1978); State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, 277 (1963), *appeal dismissed for want of a substantial federal question*, 375 U.S. 9 (1963); People v. Nankervis, 46 N.W.2d 592, 595 (Mich. 1951).

210 628 A.2d 305, 313-14 (N.J. 1993).

211 *See id.* at 313-14.

212 *See id.* at 307.

213 *See id.* at 308.

overseas applications."[214] This consideration, plus New Jersey's strong public policy interest in resolving the dispute, was enough to outweigh Switzerland's interest in at-will employment.[215] In so doing, New Jersey joined a growing number of states which have decided that state law can and should be a weapon in the fight against international bribery.

D. Other U.S. Initiatives

In addition to federal civil sanctions, the United States has also supported less formal initiatives against corruption. In February of 1995, the American Bar Association Section on International Law & Practice adopted resolutions supporting efforts by the international community, national governments, and non-governmental organizations to fight corrupt practices in international businesses.[216]

The Clinton Administration recently released what it calls Model Business Principles[217] for firms engaged in international business to encourage "good corporate citizenship [which] makes a positive contribution to the communities in which the company operates; and where ethical conduct is recognized, valued, and exemplified by all employees."[218] Principle Four calls for, "[c]ompliance with US and local laws promoting good business practices, including laws prohibiting illicit payments and ensuring fair competition."[219]

The FCPA has attracted renewed attention in Congress.[220]

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214 *Id.* at 315.

215 *See id.* at 315-16.

216 The American Bar Association Resolution can be found in *ABA Section of International Law & Practice Reports to the House of Delegates, adopted* Feb. 1995, *reprinted in* INT'L L., Spring 1996, at 193.

217 U.S. Dept. of Commerce, *Model Business Principles,* May 26, 1996. Among those multinational companies publicly supporting the Model Business Principles as a "useful reference point" are Boeing, Honeywell, GE, and Westinghouse. *Administration Releases Details on Voluntary Business Principles*, 12 Int'l Trade Rep. (BNA) 935 (May 31, 1995).

218 U.S. Dept. of Commerce, *Model Business Principles,* May 26, 1996.

219 *Id.*

220 *See* 142 CONG. REC. S4833 (May 8, 1996) (statement of Senator Feingold concerning international trade and bribery). "[I]f international markets are indeed to

Colorado Senator Hank Brown's proposed bill, referred to as the "FCPA of 1996,"[221] would have amended section 301 to make foreign nations which tolerate illicit payments guilty of creating an unfair trade barrier to U.S. exports.[222] The draft bill also would authorize Overseas Private Investment Corporation (OPIC) benefits only to countries that have laws comparable to the FCPA.[223] In addition, the bill proposes a private cause of action against companies that "obtain or retain the business that the plaintiff competed for in a foreign country,"[224] where the offending corporation obtained such business through the "payment, gift, offer, or promise of anything of value to a foreign official."[225] Guilty defendants would be liable for three times the value of the business lost, plus legal fees.[226]

While Senator Brown's bill has yet to be introduced, towards the end of the 104th Congress Pennsylvania Senator Arlen Specter introduced the "Fair Trade Practices Act."[227] The bill called for the President to submit annual reports to Congress identifying foreign persons and corporations that engage in corrupt trade practices, and foreign countries that do not have or do not enforce laws similar to the FCPA.[228] The report would also include information

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connect nations around the globe, somehow we have to be able to conduct business in a transparent and responsible manner. Bribery has to be discouraged, not rewarded, by all governments." *Id.*; *see also* S. RES. 89, 104th Cong. (1995) (commending the Clinton Administration's efforts in promoting transparency in international business transactions, and urging universal adoption of the principles of the FCPA).

221 S. __, 104th Cong., 2d Sess. (1996), *available from* Senator Hank Brown's office.

222 *See id.* § 2. The bill would have amended section 301(d)(3)(B)(i) of the 1974 Trade Act to allow sanctions against nations which condone or allow bribery of their officials. *See id.* § 3(2)(V), (VI).

223 *See id.* § 4. Section 4 would amend Section 231A of the Foreign Assistance Act of 1961 to read, "[t]he Corporation may insure, reinsure, guarantee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that are substantially similar to the Foreign Corrupt Practices Act of 1977 . . . ." *Id.* § 4(2).

224 *Id.* § 3(a)(2)(A).

225 *Id.* § 3(a)(2)(B).

226 *See id.* § 3(a)(3)(A)-(C).

227 S. 2165, 104th Cong. (1996); *see* 142 CONG. REC. S12349 (October 3, 1996) (statement of Senator Arlen Specter).

228 *See* S. 2165 § 2(a)(1)(A).

regarding corrupt practices[229] and efforts by foreign nations to curtail such activities.[230] Under the bill, if the President were to determine that a nation identified in such a report "is not making a good faith effort to enact or enforce" laws similar to the FCPA, he is "authorized and directed" to enforce sanctions.[231] Sanctions against nations would include reductions in either foreign aid,[232] or multilateral development bank assistance.[233] Sanctions against foreign persons or corporations would be levied if, inter alia, they are found in violation of the FCPA and "such conduct has placed a United States concern at a competitive disadvantage."[234] Persons or corporations could be barred from government procurement,[235] or from obtaining licenses to conduct business in the United States.[236]

The Clinton Administration has also spoken out plainly against corruption. Speaking at the Organization for Economic Cooperation and Development (OECD) in June 1994, then Secretary of State Warren Christopher stressed the "vital objective of build[ing] an international consensus against the bribery of foreign officials in international business transactions."[237] On February 16, 1996, then Trade Representative Mickey Kantor

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229 *See id.* § 2(a)(1)(B)(i).

230 *See id.* § 2(a)(1)(B)(ii).

231 *Id.* § 2(b)(1).

232 *See id.* § 2(b)(2)(a).

> Fifty percent of the assistance made available under part I of the Foreign Assistance Act of 1961 and allocated each fiscal year pursuant to section 653 of such Act for a country shall be withheld from obligation and expenditure for any fiscal year in which a determination been made . . . with respect to the country.

Id.

233 *See id.* § 2(b)(2)(b). "The United States Government shall oppose, in accordance with section 701 of the International Financial Institutions Act, 22 U.S.C. 262d, the extension of any loan or financial or technical assistance by international financial institutions to any country [in violation]." *Id.*

234 *Id.* § 3(a)(1).

235 *See id.* § 3(b)(1)(A).

236 *See id.* § 3(b)(1)(B).

237 Gevurtz, *supra* note 28, at 396; *see* Murphy, *supra* note 144, at 385, 387, 388 n.19.

wrote to the Director General of the WTO, stressing his concern that corruption would continue to be a barrier to trade among WTO member states.[238] "[W]e must find a role for the WTO," Kantor wrote, "[and] an important first step would be through increasing transparency, openness and due process in government procurement systems in all WTO member countries."[239]

IV. The Global Fight Against Corruption—Foreign and Multinational Efforts

A. The Moral Issue

1. Bribery is Universally Shameful

Virtually every nation in the world has criminal penalties against bribery.[240] Even where practiced openly and extensively, it remains taboo, not to be spoken of publicly.[241] Commercial bribery, therefore, is not a cultural difference, to be respected as "diverse."[242] Nowhere in the world do high government officials

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[238] *See Anti-Corruption Review*, *supra* note 139, at 2.

[239] *Id.* Kantor was concerned that "bribery and corruption in international markets of WTO members may compromise the progressive elimination of trade barriers," that the Uruguay Round had achieved. *Id.*

[240] *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 335.

[241] *See* DE GEORGE, *supra* note 28, at 104.

[242] *See id.* at 103-05. For an analysis exploding the myth of cultural relativity as it relates to bribery see Transparency International, The TI Source Book, Part A: Analytical Framework, ch.2 (Sept. 21, 1996) <http://www.transparency.de/sourcebook/Part_A/Chapter_1/index.html> [hereinafter TI SOURCE BOOK]. General Olusegun Obsanjo, former President of Nigeria, put it well when he assessed the false nexus between bribery and culture:

> I shudder at how an integral aspect of our culture could be taken as the basis for rationalizing otherwise despicable behaviour. In the African concept of appreciation and hospitality, the gift is usually a token. It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open, and never in secret. Where it is excessive, it becomes an embarrassment and it is returned. If anything, corruption has perverted and destroyed this aspect of our culture.

Id. (quoting Benin Cotonou, *Corruption, Democracy and Human Rights in Africa, keynote address to* Africa Leadership Forum on Corruption, Democracy and Human Rights in Africa, Sept. 1994, at 21) (statement of Gen. Olusegun Obsanjo); *see* AYODELE ADERINWALE, CORRUPTION, DEMOCRACY, AND HUMAN RIGHTS IN WEST

openly practice or condone bribery.[243] Indeed, as legal scholar and U.S. Court of Appeals Judge John T. Noonan, Jr. has observed, bribery is universally shameful.[244] He points out that

> [t]here are some laws such as those on gambling that are constantly broken without any particular sense of shame attaching to the offense. Bribery is not among them. In no country do bribe takers speak publicly of their bribes, or bribe givers announce the bribes they pay. No newspapers lists them .... No one is honored precisely because he is a big briber or a big bribee.[245]

The universal disapproval of bribery suggests that as developing nations achieve greater prosperity and democracy, bribery will be tolerated less and less.[246]

2. *Corruption and "Colonial Imperialism"*

Previously, many Westerners regarded corruption as a cultural attribute.[247] As Judge Noonan emphasizes, "it is often the Westerner with ethnocentric prejudice who supposes that a modern Asian or African society does not regard the act of bribery as shameful in the way Westerners regard it."[248] Singapore, which now has one of the most stringent and effective policies against

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AFRICA (ALF Publications, Ibadan, 1995).

[243] *See* DE GEORGE, *supra* note 28, at 104. The author asserts that

> [i]n no country do high government officials openly practice and publicly justify the acceptance of large sums of money for preferential treatment. If the practice were ethically justifiable and acceptable to the public, the whole point of paying bribes would be lost. It would become a normal way of doing business, and no special advantages could be gained from it.

Id.

[244] *See* JOHN T. NOONAN, JR., BRIBES 702-03 (1994).

[245] *Id.*

[246] Robert Leiken suggests this dynamic is at work today. *See Hearings on Int'l Crime, supra* note 3. He notes that clean government movements have sprouted in nations as diverse as Italy, Cambodia, Argentina, Hungary, Pakistan, Saudi Arabia, El Salvador, South Korea, Thailand, and Venezuela. *See id.* Leiken points out that, "strengthening civil society and modernizing the state are complimentary not antithetical. Together they comprise a crucial dimension of an anti-corruption strategy." *Id.*

[247] *See* ROBERT KLITGAARD, CONTROLLING CORRUPTION 10-11 (1988).

[248] *Id.* Indeed, Transparency International points out that in many instances, bribery originated with the colonial powers. *See* TI SOURCE BOOK, *supra* note 242.

corruption,[249] has consistently deplored the double standard many used to justify illegality abroad.[250] Singapore's Minister of Foreign Affairs spokesman has stated,

> I think it is monstrous for these well-intentioned and largely misguided scholars to suggest corruption as a practical and efficient instrument for rapid development in Asia and Africa .... The current defense of Kleptocracy is a new kind of opium by some Western intellectuals, devised to perpetuate Asian backwardness and degradation.[251]

3. Nigeria

As Singapore's tough stand against bribery illustrates, developing nations are becoming less likely to condone corrupt practices. These nations recognize that countries that tolerate corruption are increasingly seen as pariahs by international businessmen.[252] Nigeria is infamous for its ubiquitous scam-letters.[253] Gullible, naive, and greedy accomplices in the U.S. and other countries have lost millions of dollars, and, in at least two instances, their lives.[254] "[F]raudulent activities have adversely affected Nigerian efforts to expand legitimate commercial links with its trading partners."[255] A report on the impact of such fraud concluded that, "Nigeria's large number of reputable firms have

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[249] *See* Geoffrey Crothall, *China: Mayor Urged to Lead Battle on Corruption,* S. CHINA MORNING POST, Oct. 16, 1991; Andrew Taylor, *Singapore Exposes Tip of Corruption Iceberg,* FIN. TIMES, Feb. 15, 1996, at 4; Chuang Peck Ming, *Foreign Businessmen Welcome OECD's Anti-corruption Move,* BUS. TIMES, Apr. 13, 1996, at 3.

[250] *See* KLITGAARD, *supra* note 247, at 29.

[251] *Id.*

[252] *See* Ettorre, *supra* note 8.

[253] *See The Great Nigerian Scam,* ECONOMIST, Jan. 7, 1995, at 36. In the 1980s, so-called "419 letters," named after the section of the British penal code that deals with such fraud, were sent to thousands of potential victims in Europe and elsewhere. *Id.* The year 1995 saw "such a resurgence of these letters, dispatched from Nigeria to Europe and beyond, that credulous foreigners . . . lost millions." *Id.*

[254] *See Fraudulent Business Activity Is Growing in Nigeria,* BUS. AM., Jan. 13, 1992, at 21 [hereinafter *Fraudulent Business Activity*]; Nick Green, *Get-Rich-Schemes Based in Nigeria Are Targeted by Authorities,* L.A. TIMES, Oct. 24, 1995, at 4; Michael Gillard, *Racketeering: African Conmen Rip Off the Greedy & Gullible,* OBSERVER, Jan. 14, 1996, at 10.

[255] *Fraudulent Business Activity, supra* note 254, at 21.

encountered increasing reluctance on the part of foreign businesses to conduct business with them, due to the activities of a relatively few [corrupt] individuals."[256]

4. Attitudes are Changing

Despite the pervasive corruption in places such as Nigeria, it is clear that attitudes in the developing world are changing. One expert has asserted, "Asian nations are telling us that in many of their markets [bribery] is viewed as unacceptable and destructive to their economies."[257] A new generation of Third World leaders, many of whom were educated at western institutions such as Harvard or the London School of Economics, is returning home to see their native countries being ruined by corruption, and they will no longer stand for it. The new president of Tanzania, Benjamin Mkapa, for example, recently made public both his and his wife's income and assets, and how they were acquired.[258]

The transparency trend, while discernible, is developing slowly, but inexorably. Corporations, no less than governments, have had difficulty abandoning the Cold War, business-as-usual mentality. According to Frank Vogl, the Vice President of Transparency International,[259] "[m]ajor multinationals have not understood that the whole value system of dealing with developing countries is changing radically and rapidly.... The colonial mind-set of 'bribery-as-usual' is coming under greater risk for

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[256] *Doing Business in Nigeria,* BUS. AM., Nov. 1995, at 26. The report identified several different types of schemes that have been used to victimize foreigners. The most prevalent is the money transfer and government contracts scam, in which Nigerians solicit foreigners for bank account numbers, company stationery, and other bank information in exchange for money or contracts from the Nigerian government. *See id.* Variations on this scam involve false wills, charities, real estate, or fraudulent orders for U.S. products. *See id.*

[257] Ettorre, *supra* note 8, at 20. Another expert contends that "[m]ore countries are evolving in a democrative way, and there is less and less tolerance by the local political process itself of corruption." Marianne Lavelle, *Nations Try to Match U.S. on Biz Bribe Law,* NAT. L.J., Jan. 20, 1997, at B2.

[258] *See* Stevie Cameron, *Dreaming of a World Without Corruption,* MACLEAN'S, Apr. 8, 1996, at 36.

[259] Transparency International is a not-for-profit, non-governmental organization devoted to combating corruption in international business. *See* <http://www.transparency.de/index.html>.

bribers."[260]

B. *The Political Issue*

1. *Costs to Governments and Business Officials*

Nations in the "First World" are also beginning to recognize the political costs of corruption to their countries. Old ways are changing.[261] Recently in Europe, revelations of corruption have led to ministerial resignations and criminal prosecutions.[262] Sixteen former French ministers and the heads of several household names in French industry—Renault, Paribas and Alcatel among them—have been prosecuted.[263] Six were convicted of various corrupt activities and payments.[264] Italy's troubles are also well documented.[265] The suicides of officials, revelations of Mafia ties,[266] and the spectacle of Silvio Berlusconi being tried for bribery[267] have revealed the price that nations pay for a stagnant

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[260] Ettorre, *supra* note 8, at 20 (quoting statement of Frank Vogl, Vice-President of Transparency International).

[261] *See* Naím & Gall, *supra* note 51, at 1.

[262] *See id.*

[263] *See id.* Investigations by aggressive magistrates have brought to light collusion between political leaders and business executives. *See id.* In addition to the heads of Renault, Paribas, and Alcatel, officials indicted chief executives at Compagnie Generale des Eaux and Groupe Bouyjues. *See id.* Of the sixteen, six were convicted of and sentenced on bribery and kickback charges. *See id.*

[264] *See id.*

[265] *See Italy: Mess Continues,* ECONOMIST, Jan. 20, 1996, at 49; John Tagliabue, *Some Plea Deals in Trial of Italy's Fashion Elite,* N.Y. TIMES, May 11, 1996, at 31; *Designer Armani fined $87,000 Over Tax Bribes,* TORONTO STAR, May 11, 1996, at A15; Robert Graham & John Simkins, *Berlusconi Goes on Trial for Corruption,* FIN. TIMES, Jan. 17, 1996, at 2; David Henderson, *Berlusconi at Bay,* NEW STATESMAN & SOCIETY, Dec. 1, 1995, at 24; Ray Moseley, *Italy's Revolution Won't Be Built in One Day,* CHI. TRIB., Nov. 28, 1995, at 16; Daniel Williams, *Berlusconi Ordered Tried for Corruption,* WASH. POST, Oct. 15, 1995, at A27.

[266] *See* Naím & Gall, *supra* note 51, at 1. Giulio Andreotti, a minister in 30 Italian governments since the end of World War II, and Italian Prime Minister seven times, is on trial for ties to the Mafia. *See id.*; *see also* Tom Mueller, *Cosa Nostra,* NEW REPUBLIC, Apr. 15, 1996, at 17.

[267] *See* Daniel Williams, *supra* note 265, at A27. According to charges, Fininvest, Berlusconi's media conglomerate, paid approximately $230,000 in bribes between 1989 and 1991 to Italian tax auditors. *See id.* Berlusconi has denied knowing of the bribes.

and corrupt public service, and a *laissez faire* attitude towards bribery.[268] Large-scale political scandals worldwide—from the jailing of the former president of South Korea[269] to the difficulties of President Samper in Colombia[270]—leave little doubt that the world will no longer tolerate "bribery as usual."

2. Political Unrest

Corruption can also do more than merely embarrass governments or CEOs. Bribery can lead to serious political unrest, and has played a role in the collapse of governments in Japan, Italy, and Holland.[271] The consequences of years of corruption in India continue as 65 politicians representing all major parties are being investigated for over $18 million in bribes.[272]

Financial markets despise political unrest and reward political stability. Accordingly, as former World Bank President Robert McNamara has pointed out, the climate of world opinion today is more conducive to addressing bribery seriously than at any time in the past 40 years.[273] "[E]merging business and government classes around the world are gradually adopting a new attitude. These educated people—many seeking democratization in their home countries—are coming to regard bribery as ultimately ruinous to

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See id.

[268] *See id.*

[269] Former South Korean President Roh Tae Woo was convicted of receiving over $300 million in bribes from 35 business groups during his five years as President. *See* Naím & Gall, *supra* note 51, at 1.

[270] Colombian President Ernesto Samper has been "pressured to resign amid disclosure that he knowingly received millions of dollars in campaign contributions from the Cali drug syndicate." *Id.*

[271] *See* Pines, *supra* note 26, at 204. Part of the impetus for the creation of the FCPA was to prevent payments which would destabilize foreign policy relationships between the United States and foreign nations. INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 313. Ironically, Congressional investigations prior to passage of the FCPA by the Senate Subcommittee on Multinational Corporations "threatened foreign relations . . . [and caused] considerable embarrassment and withdrawal or removal from office . . . of national leaders." *Id.* Prime Minister Tanaka of Japan resigned in disgrace, while Prince Bernard of Holland was publicly humiliated by disclosure that he had received bribes. *See id.* For discussion of Italy's political scandals, *see supra* notes 265-68 and accompanying text.

[272] *See India: A System Shakes,* ECONOMIST, March 23, 1996, at 35.

[273] *See* Ettorre, *supra* note 8, at 20.

their economies."[274]

C. The Economic Issue

Corruption distorts markets because it sets prices not through supply and demand, but through self-serving, inefficient preferences.[275] The efficient enterprise is often punished; the corrupt enterprise prospers. One research center estimates that corruption has inflated Italy's total outstanding government debt by as much as 15 percent, or about $200 billion.[276] According to Hong Kong's Independent Commission Against Corruption, outright bribes as well as gifts or payments to establish *guanxi* ("connections") average 3 to 5 percent of operating costs, or $3 billion to $5 billion a year.[277] A Chinese government internal report reported in the Hong Kong press in 1993, claims that over the decade of the 1980s, Chinese state assets fell by more than $50 billion, primarily because corrupt officials had deliberately undervalued them in trading them off to foreigners.[278] Further, a 1992 Russian study found that when food vendors were protected from extortion and mob pressure, prices to shoppers fell 15 to 20 percent.[279] There are less tangible consequences as well. "The real cost of corruption lies in the demoralization, cynicism, and enervation of entrepreneurial activity throughout the Third World."[280]

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[274] *Id.*

[275] *See* Elaine Sternberg, *Relativism Rejected: The Possibility of Transnational Business Ethics, in* EMERGING GLOBAL BUSINESS ETHICS 148 (W. Michael Hoffman et al. eds., 1994). For an excellent summary of the relationship between market inefficiency and corruption (bribery in particular) see TI SOURCEBOOK, *supra* note 243, ch. 2.

[276] *See* Karen Pennar et al., *The Destructive Cost of Greasing Palms*, BUS. WK., Dec. 6, 1993, at 133.

[277] *See id.*

[278] *See* Gregory Miles, *Crime, Corruption, and Multinational Business*, INT'L BUS., July 1995, at 34-35.

[279] *See* Pennar et al., *supra* note 276, at 133.

[280] *Id.* (quoting statement of Robert Klitgaard).

> Graft and bribery in developing countries do not simply line the pockets of a few officials, they butcher the entire economy.... Corruption produces negligent, cynical government and inept officials who owe their jobs to nepotism and patronage. It destroys the people's trust in their government, breeds mutual distrust among citizens, subverts the rule of law and undermines

Nor are the costs contained to particular nations. The global economy as a whole suffers.[281] The European Union Court of Auditors reported last year that member states have wasted $1.2 billion on fraudulent infrastructure projects.[282] The Hallcrest Report, an analysis of corruption in international business, estimates that the cost of economic crime runs between $100 billion and $150 billion annually.[283]

D. The Consequences

These moral, political, and economic costs of corruption can no longer be ignored. All over the world governments are cracking down. Malaysia, for example, recently banned the award of any government contracts to British firms,[284] as a result of an alleged $50,000 bribe paid by George Wimpey International to secure a contract.[285] This relatively small bribe now threatens to undermine diplomatic relations between these two venerable trading partners.[286]

Singapore recently banned five multinational corporations—BICC of Britain, Siemens of Germany, Pirelli of Italy, as well as Tomen and Marubeni, both of Japan—from bidding for local power contracts due to their involvement in a bribery scandal.[287] This followed a 14 year jail sentence meted out to the Deputy Chief of the Public Utilities Board of Singapore for his involvement.[288] In Ecuador, five firms bidding on a $160 million construction contract were required to sign a no-bribery agreement.[289] In Argentina, government officials, in conjunction with Transparency International, are taking steps to clean up

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the work ethic.

Hearings on Int'l Crime, supra note 3.

281 *See* Miles, *supra* note 278, at 34-35.

282 *See id.*

283 *See id.*

284 *See* Murphy, *supra* note 144, at 391.

285 *See id.* at 392.

286 *See id.* at 391.

287 *See* Taylor, *supra* at note 294, at 4.

288 *See id.*

289 *See* Cameron, *supra* note 258, at 36.

hospital contracting practices.[290] Nations are learning that the price of bribery and other forms of corruption within their borders is too high. Their response indicates that, "[t]he day is coming when bribery as a way of greasing the wheels of business will be a memory . . . ."[291]

E. The Results: Multinational Efforts to Control Corruption

1. "Pre-Revolution" Attempts

In addition to national and non-governmental endeavors, recent years have seen a proliferation of international initiatives.[292] While multilateral efforts to control corruption have gained new vitality and credibility in recent years, earlier efforts were not so well received. One of the first attempts at a multilateral approach was a 1976 United Nations General Assembly resolution condemning all corrupt practices in business, including bribery.[293] The resolution, however, was non-binding and the initiative failed.[294] An ad hoc Intergovernmental Working Group on Corrupt Practices of the U.N. Economic and Social Council[295] issued a draft agreement[296] in 1979, condemning illicit payments and requiring all signatories to prohibit bribes to foreign officials, including

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290 *See id.*

291 Ettorre, *supra* note 8, at 20.

292 *See infra* notes 304-33 and accompanying text.

293 G.A. Res. 3514, U.N. G.A.O.R., 13th Sess., Supp. No. 34, at 69, U.N. Doc. A/10034 (1976), *reprinted in* 15 I.L.M. 180 (1976). The resolution was adopted without a vote on December 15, 1975. *See id.* The resolution, "*condemn*[ed] all corrupt practices, including bribery, by transnational and other corporations" and called upon nations to investigate and prosecute those involved in corrupt payments. *Id.* (emphasis in original).

294 The U.N. Resolution of 1975 was the first in a series of "unsuccessful efforts within the UN to control real and perceived evils of multinationals operating in third world and nonmarket economies." INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 336.

295 *See* Economic & Social Council Resolution 2041 (LXI) of August 5, 1976, establishing ad hoc intergovernmental working group on the problem of corrupt practices, *reprinted in* 15 I.L.M. 1222 (1976).

296 U.N. Economic & Social Council, *International Agreement on Illicit Payments*, U.N. Doc. E/104/1979, May 25, 1979, *reprinted in* 18 I.L.M. 1025 (1979).

"grease" payments[297] exempted under the FCPA.[298] No conference was ever convened to formalize the draft, however, and it was never signed by any nation.[299]

The OECD guidelines of 1976[300] called upon member nations to shun illicit payments, but again, the code was voluntary, with no enforcement mechanisms.[301] The International Chamber of Commerce adopted rules the following year to combat corruption and bribery,[302] and a panel was established to oversee

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[297] Grease payments are direct payments to government officials to help establish, continue, maximize the profitability of, or minimize government interference in business ventures in a given jurisdiction.

[298] *See* American Bar Association, *ABA Section of International Law & Practice Reports to the House of Delegates, adopted* Feb. 1995, *reprinted in* INT'L L., Spring 1996, at 194 [hereinafter *ABA Report*].

[299] Murphy, *supra* note 144, at 387. *See* Interim Report to Congress: Implementation of Section 5003(d) of the Trade Act of 1988, Aug. 25, 1995. Attempts by Third World Nations to couple the agreement with the Code of Conduct for Transnational Corporations (which was being worked on contemporaneously) left the Working Group draft stillborn. *See* Murphy, *supra* note 144, at 387.

> The last proposed text in 1988 included provision 21, comprising two brief paragraphs which state that transnational corporations should not make bribes and should maintain accounting records of payments to officials. Typical of the efforts of the UN . . . no suggestion was included that foreign officials should not request and accept bribes.

INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 336.

[300] OECD, *Regulation of Foreign Investment,* OECD/GD(92)16, *available in* LEXIS, Intlaw Library, 1 Bdiel File, at 563 (1976). The original OECD Investment Guidelines promulgated in 1976 consisted of five documents: an umbrella declaration and four annexed instruments. *See* Daniel B. McGraw, *Introduction to the OECD Regulation of Foreign Investment,* (Nov. 1989), *available in* LEXIS, Intlaw Library, 1 Bdiel File, at 559. Following periodic reviews in 1979 and 1984, five documents are now annexed to the declaration: the Guidelines; a section on Conflicting Requirements Added in 1984; a Second Revised Decision on intergovernmental consultation and conflicting requirements; a Second Revised Decision on national treatment; and a Second Revised Decision on investment incentives and disincentives. *See id.*

[301] *See ABA Report, supra* note 298, at 195. The Guidelines suggested that corporations should neither offer nor accept bribes. *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 335. All OECD nations have endorsed the Guidelines. *See id.*

[302] International Chamber of Commerce, *Commission on Ethical Practices Recommendations to Combat Extortion and Bribery in Business Transactions, reprinted in* 17 I.L.M. 417 (1978).

implementation.[303] While the time was not yet ripe for such measures, that has since changed.

2. Post-Cold War Efforts

The end of the Cold War and the increasing importance of economic issues in international affairs has focused new global attention on the issue of corruption.

a. OECD Recommendations

In May 1994, the 26 nations of the OECD issued their Recommendation on Bribery in International Business Transactions,[304] the first multilateral consensus against overseas bribery of foreign officials.[305] The OECD concluded that if nations only enforced legislation that already existed, international corruption would be a thing of the past.[306] The OECD Council has also recently recommended formal elimination of the tax deductibility of bribes in international business.[307] Unfortunately,

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[303] *See ABA Report, supra* note 298, at 195.

[304] OECD, *Council Recommendation on Bribery in International Business Transactions,* May 27, 1994, *reprinted in* 33 I.L.M. 1389 (1994) [hereinafter *Council Recommendation on Bribery*].

[305] *See ABA Report, supra* note 298, at 195. The OECD Recommendation can be found at <http://transparency.de/sourcebook/Part_C/cvL/14.html>.

[306] *See Council Recommendation on Bribery, supra* note 304. The UNESCO Ad Hoc Committee also noted that

> although national laws exist in most countries with respect to corrupt practices, they are not always effective against illicit payments in international commercial transactions because of the transnational . . . . element of the offense and its international implications. The impediments to effective national action are many and varied. Effective enforcement at the national level may be impeded by conflicts of jurisdiction, the inadequacy of information available in any one State and conflicting governmental policies towards enterprises and their activities.

Gevurtz, *supra* note 28, at 386 n.4.

[307] *See* Larry Elliott, *France & US Trade Blows Over Business of Bribes,* GUARDIAN, Apr. 13, 1996, at 2. The Recommendation on the Tax Deductibility of Bribes to Foreign Government Officials

> recommends that those Member States which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal . . . [and] instructs the

over half of the 26 OECD members still permit corporations to write off on tax returns bribes paid to foreign officials.[308]

b. U.N. Efforts

Recent U.N. projects include the adoption of a Model Law on Procurement of Goods and Construction in July of 1993 by the Commission on International Trade Law.[309] A parallel Model Law on Services was adopted in July 1994.[310] Both contained anti-bribery provisions.[311]

c. European Efforts

Although the nations of Europe, with the arguable exception of Sweden,[312] have been slow to enact anti-bribery legislation along the lines of the FCPA,[313] some encouraging measures have recently

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> Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

Anti-Corruption Review, supra note 139, at 11-12.

[308] *See Hearings on Int'l Crime, supra* note 3.

[309] UNCITRAL, Model Law on Procurement of Goods and Construction, *reprinted in* 33 I.L.M. 445 (1994).

[310] UNCITRAL Model Law on Procurement of Goods, Construction, and Services, art. 15 (1994) <http://itl.irv.uit.no/trade_law/documents/procurement/un_model_law/txt/uncitral.model.law.procurement.94.complete.html#N>. The Model Law prescribes that

> a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submits it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, on an inducement with respect to any act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings.

Id.; *see also* G.A. Res. 49/54, Dec. 9, 1994.

[311] *See Anti-Corruption Review, supra* note 139, at 11-12. "These model laws . . . are offered as advisory legislation to countries establishing procurement regulations." *ABA Report, supra* note 298, at 197.

[312] *See id.* For a discussion of applicable Swedish law see ZARIN, *supra* note 9, at 1-3 n.8.

[313] INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 335. For example, France's export insurance program (*Compagnie Francaise d'Assurance pour le Commerce Exterieur,* or COFACE) covers foreign bribery ("commissions") as a part of

been put forth at the supra-national level. In June of 1994, the Justice Ministers from the Council of Europe adopted an anti-corruption program calling for research projects, training programs, and other educational programs aimed at curtailment of corrupt practices.[314] In June of 1995, the European Parliament authorized the Committee on Civil Liberties and Internal Affairs to draw up a report on corruption in Europe.[315] Thereafter, the Parliament called upon EU member states to repeal tax deductions and other indirect legislation that encourage or support illicit payments.[316] The Resolution stated, in part, "combating corruption nationally and internationally concerns all Member States and that the agreements concluded between the Member States on this subject are inadequate [and] that legal provisions and stiffer penalties for crimes of corruption are not enough on their own."[317]

d. Organization of American States Efforts

Since the end of the Cold War, the Organization of American States (OAS) has taken several public stands against corruption.[318] On June 1, 1994, the General Assembly of the OAS adopted a resolution concerning international trade that stated, "corrupt practices are capable of frustrating the process of overall development, generating the diversion of resources necessary to the improvement of the economic and social conditions of the people . . . ."[319] Thereafter, on June 9, 1995, the General Assembly of the Organization of American States adopted a resolution which called for a working group to look into the links between honesty and civic ethics.[320] An Inter-American Convention Against Corruption negotiated by OAS member states was adopted and opened for signature on March 29, 1996 in Caracas,[321] and was

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export risk. *See id.*

[314] *See ABA Report, supra* note 298, at 197.

[315] *See Anti-Corruption Review, supra* note 139, at 9-10.

[316] *See id.*

[317] *Id.* at 9.

[318] *See ABA Report, supra* note 298, at 197.

[319] *Id.*

[320] *See Anti-Corruption Review, supra* note 139, at 9.

[321] *See id.* at 13. As one U.S. Senator characterized the Convention,

later signed by 21 nations.[322] The Convention calls for institutional development to fight corruption, including legal assistance and technical cooperation.[323] Further mechanisms were developed for cooperation in extradition, seizure of assets, and mutual legal aid where corruption affects parties to the Convention.[324]

e. World Trade Organization Measures

Prior to the end of the Cold War, the members of the General Agreements on Tariffs and Trade (GATT) took no interest in dealing with international corruption.[325] The Uruguay Round of GATT did, however, establish a Government Procurement Code,[326] which the United States signed on April 15, 1995.[327] The World Trade Organization (WTO), established by the Uruguay Round, adopted a code that covers procurement of goods and services, including construction, by central government entities, subcentral government entities, and other quasi-governmental bodies.[328] The new WTO Code "substantially increases the scope and value of coverage compared to the existing GATT Procurement Code, as well as improves its procedural disciplines, particularly on new

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> [S]ome might see this document [as unenforceable], but what it does do is begin the process, in Latin America, as has been done in the rest of the world, to commit the parties—in theory, at least—to the notion that bribery is a destructive force in democratic development and international business.

142 CONG. REC. S4833 (May 8, 1996) (statement of Senator Russell Feingold). The response of the OAS stands in stark contrast to the response by ASEAN nations. *See id.* When United States Trade Representative Jeffrey Lang raised the issue, he was criticized by Malaysian and Indonesian officials. *See id.*

322 *See Anti-Corruption Review, supra* note 139, at 13.

323 *See id.*

324 *See id.*

325 *See* INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 9, at 335. The Uruguay Round did not result in any express anti-bribery provisions either. *See id.*

326 Agreement on Government Procurement, General Agreement on Tariffs and Trade, Jan. 1, 1981, GATT B.I.S.D. (26th Supp.) (1980) (entered into force Jan. 1, 1981). This Agreement was adopted as part of the Final Act Embodying the Results of the Uruguay Round of the Multilateral Trade Negotiations, opened for signature Apr. 15, 1994, *reprinted in* GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations* at 438, GATT Sales No. 1994-4 (1994).

327 *See Anti-Corruption Review, supra* note 139, at 12.

328 *See id.*

provisions on bid challenges."[329] Thus far only the EU, the U.S., Japan, Canada, Norway, Israel, and South Korea have adopted the Code.[330]

The United States continues to press the WTO on the subject. Louis Freeh, Director of the FBI, and Kenneth Kendall, Secretary-General of Interpol, spoke of the need to make corrupt practices a new action item at the first biannual summit meeting last December in Singapore.[331] Indeed, the Ministerial Declaration issued December 13, 1996, called for a working group to study transparency in government procurement practices and, based on the results, to develop elements for inclusion in a future agreement on transparency.[332] The WTO remains a "crucial international arena for effecting reforms among the countries which demand bribes . . . ."[333]

V. The Response of the Private Sector

A. Learning the Lesson—Corruption is Bad for Business

Ironic as it may seem, the private sector is beginning to outpace governmental efforts in the fight against international business corruption. Businesses increasingly appreciate that compliance with the law is not only legally required, but can be financially profitable. Multinational corporations are also learning that corporate codes of conduct which go beyond mere compliance with legal standards and norms are increasingly essential in sustaining long-term international competitiveness. At the most cynical level, international companies are learning the hard lesson that the so-called "benefits" of corruption are simply not worth the risk. The "wages of sin" can indeed be death—both literally and figuratively—in the brave new world economy, as the following

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[329] *Id.*

[330] *See id.* at 13. The WTO Procurement Code entered into force on January 1, 1996. *See id.*

[331] *See* John Zarocostas, *WTO Urged to Take on Battle Against Corruption*, J. COM., Feb. 6, 1996, at 1A.

[332] *See* WTO, *Singapore Ministerial Declaration*, Dec. 13, 1996, art. 21 <http:www.wto96.org/wto-dec.html>.

[333] *Hearings on Int'l Crime, supra* note 3.

examples show.

1. Dassault Aviation

Consider the recent bribery charges involving Dassault Aviation.[334] A far-reaching scandal involving bribery of Belgian Socialist Party members to secure helicopter contracts has put Dassault and Agusta SpA in the world-wide spotlight.[335] Investigations have resulted in the resignation of Willy Claes as Secretary General of NATO,[336] Guy Coeme, who was the defense minister at the time of the contracts,[337] the suicide of Belgium's former Air Force Chief of Staff,[338] and numerous indictments.[339] The CEO of Dassault cannot leave France without risking arrest by Interpol, while the former CEO of Agusta SpA, Raffaele Teti, was extradited to Belgium from Brazil to stand trial.[340] The scandal has severely hampered Dassault's efforts to sell its new Rafale fighter bomber abroad, and French President Jacques Chirac is now pressuring Dassault to merge with Aerospatial, France's biggest aerospace company.[341] Mr. Dassault, hiding in France, is poorly positioned to resist. In sum, bribes paid to secure a $210 million dollar contract have resulted in at least one suicide, a public relations disaster, litigation costs, possible jail terms for several CEOs, and, in the case of Dassault, quite possibly the end of this old and venerable family enterprise.

2. The Law of Unforeseeable Consequences

The Dassault disaster illustrates another compelling force that

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334 *See* Martin DuBois & Mark M. Nelson, *Belgium Pursues Corruption Probe Involving Dassault,* WALL ST. J., May 13, 1996, at A16.

335 *See id.*

336 *See Vote in Belgium's Parliament sends NATO Chief to Court,* BALTIMORE SUN, Oct. 20, 1995, at 16A. Prosecutors allege Claes knew the Socialist Party, of which he was a high minister, received a $1.7 million bribe from Agusta SpA in order to secure a $330 million contract. *See id.*

337 *See Belgium Sentenced,* INDEP., Apr. 6, 1996, at 12.

338 *See* DuBois & Nelson, *supra* note 334, at A16.

339 *See id.*

340 *See id.*

341 *See id.*

international businessmen must respect: the "law of unforeseeable consequences." Experience in China, for example, shows that when a company first agrees to pay bribes, it is immediately tainted with a reputation for corruption that is virtually impossible to shake.[342] Virtue, once lost, is rarely ever regained. One payment quickly becomes two, then four, and so on. The smell of corruption attracts other would-be bribees like flies, all of whom exert their leverage by threatening to report previous transgressions. A company that behaves and plays by the rules may lose a deal or two to less scrupulous competitors, particularly in the short-term. However, it will likely not suffer the fate of Dassault, or of Kirkpatrick, or of others who gambled, failed, and have lost it all.

B. Private Initiatives—Beyond Compliance

Multinational corporations know that standards and expectations are rising, and many are re-inventing their corporate cultures. Companies will not tolerate corruption simply because it is bad for business and makes the firm less competitive in a world of ever-shrinking margins. U.S. companies are clearly taking the lead in this effort.[343] Many farsighted multinationals have adopted corporate codes that shadow FCPA provisions, and in many instances go beyond them.[344] A 1987 survey found that 94.7% of corporate respondents had adopted a written code of conduct that included anti-bribery provisions, and of these 83.3% specifically discussed FCPA compliance.[345] Other corporations have made integrity their calling card. For example, during Colgate-Palmolive's recent investment in Guangdong province, corporate

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[342] *See* Ettorre, *supra* note 8 ("Once a company has gotten business via illegal payments, it is difficult to shed the image of corruption. Expectations have been created, and it is almost impossible for a company to get out from under a corrupt reputation.").

[343] *See, e.g.*, Gabriella Stern and Joann S. Lublin, *New GM Rules Curb Wining & Dining*, WALL ST. J., June 5, 1996, at B1 (discussing GM's implementation of a new anti-bribery policy considered "among the toughest in corporate America"). Additionally, Wal-Mart bars any employee accepting anything of monetary value, and competitor K-Mart recently revised its ethics code to do the same. *See id.*

[344] *See id.*

[345] *See* Pines, *supra* note 26, at 211.

officials heavily publicized the company's "no-bribery" policy, which enabled them to open a $20 million dollar factory without any illicit payments or shady deals.[346]

Promoting business integrity can even be a money-making enterprise. Swiss Procurement Corporation (SWIPCO) is one of a number of new international agencies providing "credibility" services to governments as primary purchasing agents.[347] Many Latin American nations, in their attempts to move away from their traditional corrupt practices, have purchased SWIPCO's services.[348]

General Motors instituted some of the toughest guidelines in the world recently in response to accusations of kickbacks at GM's Adam Opel AG unit in Europe.[349] GM employees may only accept token gifts of nominal value such as lucite cubes or baseball caps.[350] Football tickets, lavish post-closing dinners, and the like are now explicitly forbidden.[351] General Electric, Enron, and other large multinationals have instituted rigorous self-policing policies to ensure their employees not only obey the law, but go beyond compliance.[352] These and other successful businesses view tight ethical codes as creating and sustaining a competitive advantage over their competitors.

The essential link between honesty and efficiency is not a new concept, having been promoted years ago by such prominent thinkers as Friedreich Hayek and Milton Friedman.[353] Their theoretical approach has seen practical expression in recent years in the form of the worldwide Total Quality Management (TQM)

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346 *See id.*

347 Michael Skol, *Out From Under the Table,* BUS. MEX., Feb. 1996.

348 *See id.*

349 *See* Stern & Lublin, *supra* note 343, at B1.

350 *See id.*

351 *See id.*

352 *See* Miles, *supra* note 278, at 35.

353 *See, e.g.,* MILTON FRIEDMAN, FREE TO CHOOSE (1980) (discussing how free markets—and the virtues of thrift, honesty, and independence associated therewith—are superior to state sponsored or centrally planned models of organization). Regarding Hayek *see* Brian Lee Crowley, *Knowledge: The Scarcest Resource,* CAN. BUS. REV., Dec. 22, 1992, at 14.

movement.[354] The global trend towards honesty and transparency is a natural outgrowth of industry's preoccupation with product quality, customer focus, and quality management. It is extraordinarily difficult for a global enterprise to expect and enforce "zero defect" quality standards in an corporate atmosphere of moral and ethical hypocrisy. As a result, the worldwide TQM phenomenon, originally a strategy to establish or regain industrial competitiveness, has also resulted in a rising standard of global business conduct.[355]

VI. Conclusion

Hayek and Friedman teach that corporations that behave ethically perform efficiently. The Greek word for "ethical virtue," *ethike,* was derived from the Greek word for "habit," *ethos.*[356] "Our moral dispositions," Aristotle wrote, "are formed as a result of [our] corresponding activities."[357] Corruption—in a word—corrupts. Or, as Edmund Burke observed two centuries ago, "[C]riminal means once *tolerated* are soon *preferred.* They present a shorter cut to the object than through the highway of the moral virtues."[358]

"Moral virtues" sounds somewhat antiquated to our more cynical modern ears; and Burke's ideas at first do not seem

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[354] Total Quality Management (TQM) was developed by W. Edward Deming just after the Second World War. *See* Ron Carter, *Honda Conference to Toast Management Style*, COLUMBUS DISP., Nov. 25, 1996, at 3. TQM was adopted by many Japanese corporations, such as Honda, in the 1950s. *See id.* Generally, the philosophy of TQM is "to give rank-and-file employees more power and encourage them to participate in making decisions." *Id.* TQM gained favor in American business circles in the 1980s. For a general discussion of Deming's theory and TQM, see ANDREA GABOR, THE MAN WHO DISCOVERED QUALITY: HOW W. EDWARDS DEMING BROUGHT THE QUALITY REVOLUTION TO AMERICA (1990).

[355] *See* Lavelle, *supra* note 257, at B2. One commentator has noted that it has "generally been recognized that it's very hard to run a competitive business attempting to apply global management and performance standards if one of your units in a particular country is effectively having to funnel cash into the hands of local suppliers." *Id.*

[356] *See* FRANCIS FUKUYAMA, TRUST 36 (1995).

[357] *Id.* (quoting ARISTOTLE, NICHOMACHEAN ETHICS, BOOK II, at i.8).

[358] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 92 (1790) (Liberal Arts Press 1955).

appropriate to a hard-nosed discussion of FCPA compliance. However, confidence in and understanding of the nexus between ethical behavior and wealth creation—i.e., between markets and morals—is gaining strength as never before. James Q. Wilson in *The Moral Sense* reminds us that, "[c]ommercial life requires transactions—buying, selling, lending, borrowing—that are made easier by trust and a reputation for trustworthiness. To acquire that useful reputation, fair dealing is necessary . . . ."[359] By the same token, as Francis Fukuyama makes clear in his recent work *Trust,* the prevalence of entrepreneurial spirit, and the success of a nation's economy, exists in direct proportion to the level of trust and sociability in its culture.[360] As Fukuyama points out, "[i]f people who have to work together in an enterprise trust one another because they are all operating according to a common set of ethical norms, doing business costs less."[361] People cannot trust each other, however, in enterprises or nations that encourage or condone corruption. For this reason, "the international wheels of commerce are slowly—but inevitably—grinding away at the practice of bribery. It makes sense then for companies and managers to operate globally as though this change had already occurred."[362] Today, perhaps as never before in the history of world commerce, there is at least a fair chance that the force of the invisible hand may well triumph over the culture of the greased palm.

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[359] JAMES Q. WILSON, THE MORAL SENSE 210 (1993).

[360] *See* FUKUYAMA, *supra* note 356, at 6-7.

[361] *Id.* at 27. "Such a society will be better able to innovate organizationally, since the high degree of trust will permit a wide variety of social relationships to emerge." *Id.* Due to the high degree of trust in their cultures, "highly sociable Americans pioneered the development of the modern corporation in the late nineteenth and early twentieth centuries, just as the Japanese have explored the possibilities of network organizations in the twentieth." *Id.*

[362] Ettore, *supra* note 8.