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I. INTRODUCTION

The current fervor over bribery and other questionable payments made by or on behalf of large multinational corporations (MNCs) is due to several factors. First is the awareness that since the end of World War I, multinational enterprises have needed international guidelines for their conduct.[1] However, mere awareness of a need for control was not enough to stir action; the real precipitating factors were the scandal and the discoveries of Watergate.[2] Impropriety, beginning in the Office of the President of the United States and filtering throughout the political, economic and business sectors of our society, shocked the consciences of Americans and the rest of the world. A sense of moral indignation over the abuse of power, and the use of money to achieve that end, encouraged demands for investigation and disclosure of information concerning the practices of corporations involved in making questionable payments at home and abroad.

In the midst of Watergate, Special Prosecutor Archibald Cox's investigations of the Nixon Finance Committee revealed that twenty major corporations admitted their misuse of corporate funds.[3] Top business executives who had been solicited by the Nixon Committee became entangled in the web of illegality when the investigation uncovered the use of corporate funds for campaign contributions. Some of America's largest public companies were convicted of violations of the Federal Corrupt Practices Act.[4]

Because the integrity of top management was at issue, the Securities and Exchange Commission (SEC) entered the scene, requiring disclosure to shareholders of the use of corporate funds, and obtaining commitments from the corporations to investigate other illegal contributions.[5] Since payments had been made to foreign agents, the SEC required a check on their accounts to see if the money had returned to the United States. Almost incidentally, Stanley Sporken, head of the SEC Enforcement Division, also required that agents' accounts be checked for other improper payments. Outside directors' and auditors' investigations began the process, while voluntary disclosures followed. As of May 1976, SEC investigations

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

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

3. *Id.* at 161

4. Statement of Roderick M. Hills, Chairman SEC, Before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, The SEC Speaks in 1976 (Sommer & Levenson Co-Chr. 1976).

5. Cutler, *supra* note 2, at 162.

revealed corrupt foreign payments by over three hundred American companies involving hundreds of millions of dollars.[6]

These investigations and subsequent disclosures of improper conduct and questionable payments raised serious political concerns at home and abroad as to how far multinational firms would go to subvert national governments and their policies in order to achieve their business purposes.[7]

Furthermore, it is readily apparent, merely from the SEC's discoveries, that the United States has great difficulty controlling its own corporate entities. National corporate laws originally designed to control domestic business enterprises are inadequate even for their original purposes. On the scale of multinational business organizations, there are virtually no legal structures designed to accommodate, control or direct the vast economic and political units that the MNCs have become.[8]

II. HOW QUESTIONABLE PAYMENTS ARE MADE

A useful preliminary to an analysis of the impact of questionable payments by the MNCs on the host countries in Latin America, and on United States policies, as well as a consideration of solutions to the payments problem, is an explanation of the corporate practices employed.

> One of the most convenient ways to generate corporate cash is with the help of a foreign sales agent or consultant, who banks in a place like Switzerland where the tax and exchange restrictions are loose. Sometimes the agent is used as a foreign subsidiary of the firm itself. The agent submits an outsize invoice which is paid by check so that the records are clean, and on a later visit to the United States, returns an agreed part of the proceeds in cash. The cash then goes into a "black" or off-the-books account concealed from the auditors, and can be used for any business purpose without being recorded.[9]

Depending upon the purpose for the payment and the circumstances of the transaction, certain patterns of conduct have emerged. Corporate funds were paid to consultants abroad who used the money for payments to foreign government officials or for political contributions. Corporate funds were transferred to foreign bank accounts or to subsidiaries where foreign employees withdrew funds to pay bribes, kickbacks and foreign political contributions. In a few instances, funds were directly approved by corporate management for foreign bribes and political contributions.[10]

6. S. Rep. No. 114, 95th Cong., 2nd Sess. *reprinted in* [1978] U.S. Code Cong. & Ad. News 6306.

7. Cutler, *supra* note 2 at 164.

8 R. Tindall, Multinational Enterprises (1975).

9. Cutler *supra* note 2, at 161.

10. Petition of the Project on Corporate Responsibility, The National Council of Churches of Christ in the U.S.A., and Others . . . Before the Securities and Exchange Commission, The SEC Speaks in 1976 (Sommer and Levenson Co-Chr. 1976).

In examining the various corporate practices, it is necessary to distinguish between bribery and "grease" payments. The legal essence of bribery is:

> [A] payment voluntarily offered for the purpose of inducing a public official to do or omit to do something in violation of his lawful duty or to exercise his official discretion in favor of the payor's request for a contract, concession or privilege or some basis other than the merits.[11]

A "grease" payment, on the other hand, is a payment to a minor official intended to expedite a legal action, i.e. licensing, or helping legal imports through customs. Although not condoned, such payments are generally considered an institutionalized practice. They may be viewed as a necessary entitlement or as additional compensation when a public salary is inadequate.[12]

This distinction between the two types of payments made by MNCs is necessary for several reasons. First, until the intentions for making the payments are known, it is difficult to ascertain whether there is indeed a problem worthy of the time and energies of lawmakers. Second, the type of payment will indicate the nature of the remedy to be implemented in order to stop such payments from being made. Third, issues of morality, ethics and comparative commercial practices may be raised regarding "grease" payments, but are inappropriate considerations when dealing with bribery.[13] Bribery must be viewed in terms of the relationship of MNCs as large business enterprises transcending the limits of market and societal restrictions by virtue of their accumulated economic and political powers, to traditional international law notions of nation-states. MNCs employ the instrument of bribery to formulate corporate foreign policy by transnationally linking interest groups in pursuit of common objectives.[14] It is therefore necessary to focus upon the emergence of the MNCs as a large number of significant, nongovernmental, transnational, political actors with effects on domestic politics, economics, and international relations.[15]

III. MNCs' AS NEW WORLD POWERS

In seeking solutions to the problems of payments made by the MNCs, examination of the structure of the corporations and the setting in which they operate is imperative. MNCs are nonpolitical actors in the milieu of international politics, where nation-states have traditionally been the only significant players. However, MNCs function as transnational political actors because they command vast resources. Their autonomous operation and organization allows them virtually to ignore national borders in pursuit

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11. T. Sorenson, *Improper Payments Abroad: Perspectives and Proposals*, 54 For. Aff. 719 at 722 (1976).
12. S. Kobrin, *Morality, Political Power and Illegal Payments*, Colum. J. World Bus. Winter 1976 at 105.
13. *Id.*
14. *Id.* at 107.
15. *Id.* at 105.

of their own best interests. Since the MNCs' operations are global, their goal of profit-maximization through a central strategy transcending national borders dictates their own foreign policy.[16] By mobilizing resources sufficiently large to influence national policies to the MNCs' benefit, the ideals of a host country are threatened by the imbalance of power so created. Furthermore, the functioning of domestic politics in both the home and host countries may be disrupted by violation of home foreign relations policies and by interference with the objectives and societal values of the host countries. A solution to the payments problem must be approached by examining the character of the MNCs and developing a means of controlling their conduct.

The world of MNCs is characterized by oligopolistic industry structure, since foreign direct investment requires some degree of monopoly power. "MNCs are responsible for mobilizing factors of production across national frontiers, allocating resources among their operations in different nation-states in accordance with a centralized management control system."[17] However, among the MNCs, conduct, structure, strategy, and operation lacks uniformity in much the same way as differences exist among countries. In addition, diverse economic, social, and political conditions prevailing among the host nations in which the MNCs operate, together with dissimilarities between the home and host country's cultures, comprise a difficult setting for singular solutions.

The transnational political relationship between MNCs and national governments must be viewed in light of the interactions between the host society and its institutions, and between the parent corporation and its subsidiary. For the MNC, a subsidiary in any country is generally important only in relation to the corporation as a whole, thus engendering a situation in which the interests of the MNC and the host country may not coincide. Host countries will find that MNCs are responsive to the demands of headquarters in another country and indirectly responsive to the demands of another government. Thus, the MNCs' interests are less likely to be in line with the national interests of the host country[18] (not unlike the classic historical conflict between foreign economic interests and nation-states). The effect of this disharmony upon the host country in part depends upon the scope and intensity of interaction between the host society and its institutions. Greater sensitivity to external policy formulations of the MNCs is directly related to the degree of economic and social responsibility undertaken by the host government and its working institutions.[19]

MNCs, as significant nongovernmental political actors with concentrated economic and political powers, operate with corporate business power somewhat freed from market control. Within a host country, they represent a political power responsive to external forces and not entirely un-

16. *Id.* at 108.
17. M. Hodges, Multinational Corporations and National Government (1974).
18. Kobrin, *supra* note 12, at 107.
19. Hodges, *supra* note 17, at 7.

der control of the host.[20] Therefore, the use of bribery and other misconduct by MNCs results in an imbalance of political, economic, and social forces operative within a host country, thereby disrupting self-determined national and social development.

The following hypothetical situation demonstrates the interplay of the factors resulting in a questionable payment. The setting is that of a MNC managing American oil in a small Central American country where a few large American firms have dominated the economy for forty years in the critical fields of oil production and refining and in banana production and exportation.

The corporations employ thousands of local people, pay high taxes, and by implication, have much to say about what kind of government exists there.

Amidst a setting of political instability are frequent rumors of CIA activities. It is also believed that the company's harbor agents make efforts to maintain the status quo, while the local people are discriminated against in having and remaining in jobs of lesser capacities in the corporation.

A political activist seeking a foothold in national politics speaks out against the companies. After his speech, a riot causes $100,000 damage to the oil company.

Subsequently, the local president of the American company receives a visit by a representative of the political activist. He points out the trends towards possible expropriation and the activist's capability to incite the country against the American company. The representative also states that the activist is not wealthy and needs funds to continue his career in politics. He suggests that if the American company will hire the activist as a consultant at a salary of $100,000 a year, it is quite likely that attacks against the company will taper off.[21]

It is in situations of this type that questionable government payments occur. However, due to the tremendously important social function of MNCs as conduits for information and technology transfer, and as a means for capital investment in developing areas, solutions lie in the development of mechanisms for control, rather than in elimination of the MNCs.

IV. SOME EFFECTS OF MNC's ON LATIN AMERICAN COUNTRIES

Since regulation of the conduct of MNCs is the key issue in the problem of questionable payments, it is necessary to determine how the Latin American countries are affected by the MNCs. Following that analysis, conclusions may then be drawn as to viable and meaningful remedial regulation. From the perspective of a progressive, industrialized nation, the Latin American countries are deemed to be lesser developed countries (LDCs).

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20. Kobrin, *supra* note 12, at 108.

21. S. Robock & K. Simmonds, International Business and Multinational Enterprises at 618, 619 (1973).

Underdevelopment in an institutional setting means a lack of adequately trained government civil servants who can investigate and determine whether commercial and business laws are being enforced.[22] Further, existing laws are antiquated, and are unable to meet such major changes in the origins of economic power as the development of MNCs. In addition, the institutions of the LDCs are either not present, or are malfunctioning relative to similar institutions in developed countries.

In many cases Latin American LDCs face political, social, and economic instability. Competing movements playing upon their new nationalism cause a continuous undercurrent of political instability. Anxious to develop industry and to stabilize their monetary systems, the LDCs chafe from their dependence on imported technology and goods, and are unsatisfied with the MNC market criteria for decision-making and use of their resources. LDCs' social concerns with development and equitable participation in economic growth severely conflict with the limits and social costs of MNC market efficiency strategies. An LDC's drive for development coupled with the sheer presence of an MNC, will necessarily have an impact on changing consumer orientations, uproot traditional forms of family and village life by contributing to urbanization, and create new systems of values and aspirations within the culture,[23] which lend to instability in the LDC.

This setting of instability coupled with inadequate institutions and regulatory structures, leaves the Latin American LDCs vulnerable to certain MNC abuses in a trade-off for the technology and industrial development contributed by the presence of the MNCs. Therefore, in the absence of sufficient restraints, the MNCs exacerbate the problems of Latin American LDCs, particularly in the critical areas of technology and finance.[24] While industrialization and goals of economic growth require that technology be available from the developed countries, the problem is that concentrated control of technology remains in foreign hands. As to finance, rather than bringing in finance capital from abroad, MNCs seek funds from local host sources. Due to the established credit of MNCs, the lending pattern of local institutions is to prefer MNCs over local entrepreneurs, following the business logic of risk minimization. There are even greater problems for the host country when local lenders are branch MNC lenders like Bank of America and First National City Bank of New York.[25] Opportunities for market entry by local businessmen are thus severely curtailed. While these effects on technology and finance are attributable to the presence of the MNCs, they are also a result of a lack of, or inadequate governmental controls over capital flow, local borrowing limitations, utilization of foreign supplies, as well as capital, and realistic regulation of imports and exports.

22. Muller, The Multinational Corporation and the Exercise of Power: Latin America, The New Sovereigns Multinational Corporations as World Powers (Said & Simmons, Eds. 1975).

23. J. Gunneman ed., The Nation-State and Transnational Corporations in Conflict — With Special Reference to Latin America (1975).

24. Muller, *supra* note 22, at 56.5

25. *Id.* at 58.

The structural impact of MNCs' concentration and power on LDCs has been empirically reflected in a pre-1970 study of Chile.[26] The study showed that for the period from 1967 to 1969, participation by MNCs in the industrial sector increased from 16.6 percent to 20.3 percent, while domestic participation diminished from 76.1 percent to 63.0 percent. The difference represents state owned firms. Of the once hundred largest industrial firms, forty were MNC controlled. When the sample was increased to the one hundred and sixty largest industrial firms, over fifty-one percent were MNC controlled. Among seven firms involved in the most important industries in Chile, at least fifty-one percent of total production was controlled by one to three foreign firms in each industrial sector. A behavioral analysis of the twenty-two largest MNCs in Chile revealed that five were monopolists, six were duopolists and eight were oligopolists, with each of the eight being the largest supplier in its market. According to this study, these figures reflect not only the reality in Chile prior to 1970, but are representative of most LDCs in Latin America where MNCs are currently operating. Further, the study indicates the ability of the MNCs operating in LDCs in Latin America to increase their power over time.

Some general conclusions can be drawn about the impact of MNCs on the political, economic and social sectors of Latin American host countries. The technology contributed to the countries by the MNCs is a basic cause of further unemployment because as total output increases, less and less labor is required to produce that output. In addition, further concentration of already extreme disparities in income distribution is due to the MNCs.[27]

In the absence of effective regulation by the LDCs, the financial contribution of the MNCs to the Latin American host countries is, in reality, a drain on local savings and ultimately on consumption by the people. The MNCs' transfer of consumptive ideology goals may be relaized by only twenty percent of the LDCs' population, thereby contributing to social and political frustrations.[28] Potential inflows are minimized while the balance of payments outflows are accentuated through import overpricing and inflated royalty payments. Interestingly, studies revealed that MNCs did not have superior export performance relative to local producers and exporters, unless MNC exports were accompanied by export underpricing.[29] Finally, the MNCs' structuring process permits an ever tightening control over the technology and the finances of the Latin American host countries, thereby perpetuating the ever increasing external dependence of these poorer nations on the richer, more industrialized nations of the world.[30]

V. CURRENT REGULATORY SCHEMES

Since regulation of MNCs is the key not only to the problem of questionable payments, but to the conduct of MNCs in the LDCs of Latin

26. *Id.* at 59.
27. *Id.* at 66.
28. *Id.* at 67.
29. *Id.* at 66.
30. *Id.*

America generally, it is necessary to consider the operative regulatory structure of the United States and the Latin American countries. Often, United States policies and regulatory schemes conflict with those of the Latin American countries. This is true even when both the United States and Latin American policies are directed toward international cooperation, since different means of achieving those policies creates conflict.[31] A further complicating factor is that the framework of the regulatory scheme involves four levels: local or state, national, regional, and international. The conflicting interests and interplay among the levels may be observed in the expropriation problems ITT had with Brazil.

During the 1960's, two states of Brazil sought to expropriate ITT facilities there. In one state, a town sought to expropriate local facilities while in the other state, the state government sought expropriation. The United States government was brought in because of the potential use of the Hickenlooper Amendment by ITT to deal with the expropriations. Brazil was brought in to protect its interests against the possibility of being cut off from United States aid. Regional considerations were involved since there was a threat of setting a precedent throughout the Latin American countries. Finally at the international level, international law and agreements were urged as a means of mediation.[32] The result was that the federal government of Brazil was forced to act to carry out expropriations inappropriately initiated at the lower local levels, and against the prevailing foreign policies of the federal government.

VI. ATTEMPTS TO SOLVE THE PAYMENTS PROBLEM

For effective resolution of the problems and misconduct caused by the MNCs, joint action by the United States and Latin America, as well as all other involved and interested countries, is necessary in formulating regulatory schemes for the MNCs. However, several factors complicating joint action are readily apparent. Latin American interests at an international level have not been articulated,[33] nor is it likely that a uniform interest could be articulated in view of existing differences in the needs and policies of the various Latin American countries. In addition, inconsistencies due to different policies of implementation abound even among Andean Code members, who have agreed upon governing regulations and regional code provisions.[34] Notwithstanding these difficulties, the Organization of American States adopted a resolution in 1975 regarding the "Behavior of Transnational Enterprises Operating in the Region and [the] Need For a Code of Conduct to be Observed by Such Enterprises." Special provision was made for prohibiting bribery and other illegal payments and political contributions by the MNCs in the member countries.

31. J. Behrman, Conflicting Constraints on the Multinational Enterprise: Potential for Resolution (1974).

32. *Id.*

33. *Id.*

34. *Id.*

The United States has taken steps in several directions in order to stop questionable payments by the MNCs and by American firms. Predominantly, the tax and securities laws have been used to prosecute those corporations which have made illegal payments and to deter other corporations from such behavior.

Prior to the Tax Reform Act of 1976, Internal Revenue Code provision 162 (c) disallowed as deductions, as a trade or business expense, improper payments to officials or employees of foreign countries.[35] The Tax Reform Act of 1976 (TRA) broadened the provisions of 162 (c),[36] and added to the Code a new area of law dealing with foreign bribe produced income.[37] Section 1065 of the TRA provides that foreign bribes shall include in the "deemed distributed" income of controlled foreign corporations (CFCs) and domestic international sales corporations (DISCs), the amount of any illicit payments to foreign officials, employees or agents in fact of foreign governments. Such payments are also disallowed as deductions from corporate earnings under that provision. By amending the definition of subpart F income to include illegal bribes and payments, United States shareholders of CFCs will be taxed on the payments as a distribution of the CFC's earned income or profits, since the distribution is treated as dividend income.[38] In addition to these new developments in the tax laws, the securities laws and their enforcement are a second important force in policing questionable payments.

The Securities and Exchange Commission has implemented four methods of dealing with the problem of questionable payments: The enforcement program, the voluntary disclosure program, proposed legislation, and the establishment of the Advisory Committee on Corporate Disclosure.[39] The SEC's enforcement program has been a most effective unilateral method of policing the illegal payments problem. To date, nine actions have been brought against corporations for violations of §§ 13, 14, 10b and Rule 10b-5 of the Securities and Exchange Act of 1934.[40] These provisions govern reporting, proxy, and antifraud, respectively.The SEC charged the corporations with violations of the 1934 Act — their filing of false and misleading reports with the SEC without disclosing improper payments to foreign agents or government officials.[41]

SEC v. United Brands Company, an action filed in April 1975 and subsequently settled in January 1976 with the entry of an injunction and consent

35. 26 U.S.C. § 162(c).

36. 26 U.S.C. § 162(c), as amended 1976.

37. Note, *International Boycott Income and Foreign Bribe Produced Income*, 9 Law & Pol'y Int'l Bus 319 (1977).

38. *Id.*

39. *Investment Regulation, Illegal Payments Abroad*, 9 Law & Pol'y Int'l Bus. 234 (1977).

40. Testimony of Comm. Philip A. Loomis, Jr., SEC, Before the Subcommittee on International Economic Policy of the House Committee on International Relations, 9-30-75, The SEC Speaks in 1976 at 634 (Sommer and Levenson Co-Chr. 1976).

41. *Id.*

decree,[42] was the first time that § 10b and Rule 10b-5 were invoked in connection with disclosure and questionable payments. United Brands, a New Jersey corporation and one of the world's largest producers and marketers of bananas, was charged with violations of §§ 13(a), 10(b) and Rule 10b-5. United Brands had agreed to pay $2.5 million to high government officials in Honduras in exchange for favorable government action regarding a recently enacted export tax which would have had a materially adverse effect upon the corporation. United Brands' failure to disclose these and other payments was deemed fraudulent behavior for filing false and misleading reports.[43]

As distinguished from the enforcement program, the voluntary disclosure program encourages the *corporations themselves* to conduct investigations to determine what payments are being made to whom, and whether or not such information has been properly reported to the SEC and to shareholders.[44] Of course, the liability for failure to disclose material information under the 1934 Act is an incentive for corporate cooperation. The issue of stricter disclosure arises in the context of the voluntary disclosure program as well as in recently enacted legislative remedies. In as much as the basic integrity of American capital markets is at issue, the policy of the securities laws — to promote full and fiar disclosure as necessary and appropriate for the protection of investors — has been employed to support the argument that questionable foreign payments are material information.[45] Materiality is the measure of the need for disclosure. A study of the corporate disclosure system and the objectives of the SEC in seeking disclosure was made by the SEC's Advisory Committee on Corporate Disclosure. The summary findings together with the SEC's recommendations were submitted to the Senate Committee on Banking, Housing and Urban Affairs on May 12, 1976.[46]

On December 17, 1977, the Foreign Corrupt Practices Act of 1977 was enacted to impose criminal liability upon United States companies bribing foreign government officials for specified corrupt purposes, and to amend certain of the Securities and Exchange Act of 1934 reporting and disclosure provisions.[47] A payment made for a specified corrupt purpose is "a payment made to a foreign official for the purpose of inducing him to obtain or retain business for the corporation or to influence legislation or regulations of the government."[48] A corrupt purpose, as used in the Act, signifies misuse of an official position to obtain favorable treatment. Payment includes offer, promise, or gift; however, "grease payments" are not included (payments for expediting shipments through customs, securing required permits or obtaining adequate police protection), nor is true extortion included (payment

42. Lit. Rel. No. 7251, SEC v. United Brands Company, The SEC Speaks in 1976 at 695 (Sommer and Levenson Co-Chr. 1976).

43. *Id.* at 696.

44. Investment Regulation, *supra* note 39, at 235.

45. The SEC Speaks in 1976, *supra* note 40, at 661.

46. S. Rep. No. 114, *supra* note 6, at 6307.

47. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1978).

48. S. Rep. No. 114, *supra* note 6, at 6316.

to an official to keep an oil rig from being dynamited).[49] Further, in order for the Act to cover the payment, there must be a nexus with the United States-use of the instrumentalities of interstate commerce or the U.S. mails as well as knowledge of the payment on the part of the domestic concern.[50] Sanctions for violation of the criminal provisions of the Act include maximum fines of $500,000 for companies, and a maximum fine of $10,000 and up to five years imprisonment for individuals acting on behalf of the companies.[51] As a practical matter, direct criminalization relieves the government's enforcement burden and entails no reporting responsibilities for the corporations.

The Act is divided into two titles: Title I deals with corporate bribery of foreign officials and Title II focuses on improvement of disclosure of true corporate ownership. In order to minimize falsification of corporate records, Title I is designed to establish a system of internal controls on the proper use of corporate assets through the imposition of stringent accounting standards. In addition Title I prescribes the prohibitions against corporate bribery.[52] Title II seeks to provide more accurate information about corporate ownership by requiring the disclosure of residence, citizenship, and nature of beneficial ownership of a purchaser of more than five percent of any class of registered equity securities.[53] Moreover, the background and nationality of associates of the purchaser entitled to acquire additional shares of the issuer must be disclosed. A significant purpose of Title II of the Act is to limit the abuse of nominee and street name registration by obscuring the true chain of ownership, thereby adversely affecting the intended jurisdictional reach of both the Securities and Exchange Act of 1934 and the Foreign Corrupt Practices Act.[54] However, the United States' unilateral actions in dealing with the problem. International cooperation is imperative.

The regulation of transnational corporations is not a new idea internationally. An historical review [55] reveals that after World War I, the League of Nations studied the possibility of international controls for cartels and industrial agreements. No action was taken, however, due to diverse national policies, objections as to loss of sovereignty, and the fact that cartels were deemed efficient and beneficial. Before the end of World War II, the United States planned for an International Trade Organization to regulate many areas of international trade. The Havana Charter of 1948 prohibited business practices affecting international trade which restrained competition, limited access to markets, or fostered monopolistic control. The Charter failed when United States support was withdrawn. Since then, a similar United Nations draft code was drawn in 1953, the European

49. *Id.*
50. *Id.* at 6317.
51. *Id.* at 6308.
52. *Id.* at 6313.
53. *Id.* at 6318.
54. *Id.* at 6320.
55. Joelson & Griffin, *supra* note 1, at 10.

Economic Community was formed, the Andean Code was formulated, and various other economic and regulatory movements involving cooperation among nations have occurred.

At the present time the United Nations Committee on Transnational Corporations is working to formulate a code of conduct for the MNCs. To date, the code envisioned deals with the activities of the MNCs in three areas: General and political conduct, economic, financial and social regulation, and disclosure of information to be used to better regulate MNC activities. The other portion of the code is to be directed toward the treatment of the MNCs by the home and host countries, with primary focus on jurisdiction for settlement of disputes,and the problems of nationalization and compensation.[56]

In 1976 the Council of Ministers of the Organization for Economic Cooperation and Development (OECD) adopted voluntary guidelines regarding the conduct of MNCs.[57] The United States adopted the guidelines together with twenty-two other members. The purpose of the OECD guidelines is threefold: To encourage MNCs to contribute to economic and social development; to encourage "national treatment" of MNCs by host countries; and, to promulgate standards of business conduct to be observed by the MNCs. The guidelines expressly prohibit the making of bribes and illegal political contributions, as well as improper participation in local political activities. Information disclosure is encouraged and anti-competitive practices are prohibited.[58]

At a special seminar of the United States Council of the International Chamber of Commerce (ICC), United States businessmen and government officials approved the OECD action.[59] Seminar members felt that the guidelines would lead to greater and more uniform enforcement of ICC member nations' bribery and enforcement laws. Furthermore, it was felt MNCs adhering to the new standards for business conduct would upgrade their overseas financial disclosure practices to bring them in line with United States standards.

The OECD guidelines are a promising remedial measure due particularly to the scope of the parties involved.[60]

The multilateral nature of the guidelines should assuage concerns that United States' MNCs would be at any competitive disadvantage commercially inasmuch as all member nations adopting the guidelines are equally bound. Since joint action is necessary to promote disclosure and to stop bribery by the MNCs, all industrialized democracies, the United States,

56. U.N. Comm. on Transnational Corporations: Intergovernmental Working Group Report on the Formulation of a Code of Conduct (3rd Sess.) E/C 10/31 as published in 16 I.L.M. 709 (1977).

57. *OECD: Guidelines for Multinational Enterprises*, Tax Mgm't. Int'l J. (Aug. 1976).

58. *Id.*

59. *Id.*

60. Cutler, *supra* note 2, at 167.

Latin America, and the MNCs must become involved. Concerted action will be required to formulate threshold requirements (setting a dollar amount yearly on contract or government actions), to negotiate agreements on standards, and to enforce common interests.[61]

VII. CONCLUSION

The complexities of dealing with the problem of bribery and other questionable conduct by the MNCs extend beyond the conflicting needs of development of the Latin American nations and the established difficulties of true cooperation among those and other nations. Despite the fact that MNCs are acknowledged as new and significant nonpolitical actors in the traditional international scenario of nation-states, not a single solution to the problem actually grapples with this factor. Moreover, we cannot escape, deny or ignore the fact that global economics and power sources have and will continue to change. Until our institutions and our approach to problem solving adjust to and incorporate these changes, our remedies will remain inadequate.

61. *Id.* at 169, 171.