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# Criminal Prosecution of United States Multinational Corporations

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# Criminal Prosecution of United States Multinational Corporations

DONALD H. J. HERMANN\*

Since the early 1970's, the activities of American corporations abroad acting directly or through subsidiaries have become a special concern to government officials in the United States and to the American public.<sup>1</sup> From the post-World War II period through the 1960's, the rise of the multinational corporation was regarded in this country as a desirable development which was thought to be uniquely suited for breaking down trade barriers, providing avenues for American investment, serving as a source of profits which would counter a developing balance of payments deficit, and facilitating the maximization of the efficiency to be gained from the business

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An earlier draft of this article was written while the author was a Fellow in Law and Economics at the University of Chicago, 1975-1976. An earlier version of this article was delivered at the International Conference on Criminal Law and Multinational Corporations, Simposio Direito Penal e Multinacionais, A Federacao e o Centro de Comercio de Estado De Sao Paulo, at Sao Paulo, Brazil, August 18-20, 1976.

1. See, e.g., U.S. Department of Commerce, *The Multinational Corporation—An Overview*, a paper prepared by the Investment Policy Division, Office of International Investment, U.S. Department of Commerce in April, 1972, and included in UNITED STATES SENATE COMMITTEE ON FINANCE, MULTINATIONAL CORPORATIONS: A COMPENDIUM OF PAPERS SUBMITTED TO THE SUBCOMMITTEE ON INTERNATIONAL TRADE OF THE COMMITTEE ON FINANCE OF THE UNITED STATES SENATE (1973). Since 1973, the Subcommittee on Multinational Corporations of the Committee on Foreign Relations of the United States Senate has continued to hold hearings on various multinational corporations and the nature of their operations. The first hearings were held in March, 1973, and the most recent were held in December, 1975. See generally *Hearings on Multinational Corporations and United States Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, Parts I-XIII* 93d-94th Cong. (1973-1976) [hereinafter cited as *Multinational Corporations and Foreign Policy*]. Other congressional committees have also considered the operations and impact of multinational corporations; these include: Committee on Finance, United States Senate; the Committee on Banking, Housing and Urban Affairs of the United States Senate; the Subcommittee on International Economic Policy of the Committee on International Relations of the House of Representatives; and the Committee on Interstate and Foreign Commerce of the House of Representatives, as well as the Joint Economic Committee. Various departments of the executive branch, particularly the Department of State and the Department of Commerce have devoted extensive attention to the activities of multinational corporations.

For a widely read critical study of multinationals, see R. BARNET & R. MULLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974). A balanced collection of papers on the subject of multinational corporations was prepared by the American Assembly. See G. BALL, *GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS* (1975).

enterprise.<sup>2</sup> However, the tremendous growth in the number and size of multinational firms, as well as the experience of an international economic recession, has led to concern about the revenue effect of foreign investment, the impact of the multinational firm on capital movements, and the effects on American labor.<sup>3</sup>

Concern with the revenue effects of multinationals has brought forth such proposals as the Burke-Hartke bill which would have eliminated the tax deferral privilege, repealed the foreign tax credit, required straight line depreciation, and repealed the exemption of foreign earned income.<sup>4</sup> Study of the capital movements aspects of United States multinational corporations has revealed that the value of fixed assets of foreign affiliates of United States companies amounts to at least twelve percent of fixed assets of the entire domestic corporate sector, that annual plant and equipment expenditures by foreign affiliates amounts to nearly twenty-five percent for the manufacturing sector, that before-tax profits on United States direct investments abroad have been approximately one-third of total corporate profits before tax in the United States, and that sales by majority-owned foreign affiliates of American companies are over four times the level of all United States exports.<sup>5</sup> Concern with these capital effects has led to congressional hearings and the introduction of bills to provide for executive branch study of the economic impact of multinational activity on the United States economy.<sup>6</sup> In

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2. See E. KOLDE, *INTERNATIONAL BUSINESS ENTERPRISE* 232 (1968). In discussing the benefits to be gained from the multinational enterprise, the author concludes: "Its real meaning and value lie in minimizing the abnormalities and perversions and in enabling international business relations to develop according to the normal price and cost patterns rather than to arbitrary restraints. Multinationalism has opened up new areas of profitable endeavor for business and industry and has paved the way for direct contact with and among operating facilities in foreign areas." *Id.*

3. See generally *Hearings on Multinational Corporations Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 93d Cong., 1st Sess. (1973) including a reprint of *REPORT BY THE STAFF OF THE SUBCOMMITTEE ON INTERNATIONAL TRADE OF THE SENATE COMMITTEE ON FINANCE, THE MULTINATIONAL CORPORATION AND THE WORLD ECONOMY* (1973), describing criticism of the multinational firm: "In the United States, organized labor has charged that multinational corporations export American jobs through the transfer of precious technology and productive facilities to foreign nations; erode our tax base and exacerbate our balance of payments problems." *Id.* at 397.

4. H.R. 62 and S. 151, 93d Cong., 1st Sess. §§ 102-05 (1973), *reintroduced as* S. 2124, 94th Cong., 2d Sess. (1975); see *COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, MULTINATIONALS PERSPECTIVES ON TRADE AND TAXES*, 93d Cong., 1st Sess. (July, 1973). See also Fisher, *The Multinationals and the Crisis in United States Trade and Investment Policy*, 53 B.U.L. REV. 308 (1973).

5. *SUBCOMM. ON MULTINATIONAL CORPORATIONS OF THE SENATE COMM. ON FOREIGN RELATIONS, DIRECT INVESTMENT ABROAD AND THE MULTINATIONAL: EFFECTS ON THE UNITED STATES ECONOMY* (1975) (Musgrave Report).

6. See, e.g., S. 3151, 94th Cong., 2d Sess. (1976). See generally *Multinational Corporations and Foreign Policy*, *supra* note 1.

a study commissioned by the Department of State, the conclusion was reached that most foreign investment directly displaces domestic investment and results in the loss of hundreds of thousands of jobs per year. The researchers responsible for the State Department study testified that: "Our calculations show that, using best estimates of the home-foreign substitution factors, in 1970, the net impact of foreign investment on domestic employment was a net loss of more than 160,000 U.S. jobs."<sup>7</sup> Concern with labor effects of multinational corporations has also led to demands for further study and for specific legislation to reduce the attractiveness of foreign investment.<sup>8</sup>

While some question has developed as to the desirability of unrestrained multinational business activity of American based firms, there has been at the same time a widespread concern that regardless of the economic desirability or inevitability of the multinational firm, there is a need to make certain that these enterprises operate in compliance with the basic public policies of the United States Government and that they operate within the legal parameters established to police and regulate economic activity. The shared belief that American based firms must operate within the framework established for domestic corporations has produced government prosecutions and investigations with concomitant proposals for enforcement, legislation, or regulation in three principal areas: the prohibition and punishment of anti-competitive activity,<sup>9</sup> payment of bribes to foreign officials,<sup>10</sup> and acts subversive of foreign governments.<sup>11</sup> After a brief consideration of the nature of corporate criminal liability, this article will focus on the use of criminal sanction in the latter three areas.

## CORPORATIONS AND THE CRIMINAL LAWS

### *Corporate Criminal Liability*

The use of criminal sanctions against corporations is well established in American law.<sup>12</sup> In discussing criminal sanctions against

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7. *Id.* at 56 (testimony of Robert Frank and Richard Freeman of Cornell University).

8. *Id.* at 93, reprinting Statement of Jacob Clayman, Secretary-Treasurer, Industrial Union Department, AFL-CIO.

9. See, e.g., *Hearings on the International Aspects of Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st & 2d Sess. (1973 & 1974).

10. See, e.g., *Hearings on Prohibiting Bribes to Foreign Officials Before the Senate Comm. on Banking, Housing and Urban Affairs, Parts I & II*, 94th Cong., 2d Sess. (1976).

11. See, e.g., *Multinational Corporations and Foreign Policy*, *supra* note 1.

12. *New York Central R.R. v. United States*, 212 U.S. 481, 494-95 (1909): "[T]here is a large class of offenses, of which relating under the Federal statutes is one, wherein the crime

multinational corporations, it should be recognized that civil law countries do not recognize the criminal liability of corporations. This is a result of their strict adherence to a requirement of intent for criminal liability which cannot be imputed in civil law.<sup>13</sup> Indeed, the early common law theory which continued through the middle of the nineteenth century was that corporations were not criminally liable.<sup>14</sup> Early efforts were made to limit corporate criminal liability to nonfeasances; this was based on the legal principle of *actus non facit reum, nisi mens rea*.<sup>15</sup> For instance, the Massachusetts Supreme Court held at the end of the nineteenth century: "Corporations cannot be indicted for offenses which derive their criminality from evil intent, or which consist in a violation of those social duties which pertain to men and subjects."<sup>16</sup>

It is now recognized in American law that the intent, knowledge, or willfulness of a corporate agent or employee may be imputed to a corporation.<sup>17</sup> Since a corporation can act only through its agents,

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consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents acting within the authority conferred upon them." See generally Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280 (1961). A review of the development of corporate criminal liability is provided in Lee, *Corporate Criminal Liability* 28 COLUM. L. REV. 1 (1928).

13. See Schneider, *The German Code of Regulatory Offenses*, in E. WISE & G. MUELLER, *STUDIES IN COMPARATIVE CRIMINAL LAW* 265 (1975):

The German Penal Code of 1871 took almost no notice of crimes committed by corporations. Despite a great number of amendments to the code since that time, this situation has not greatly changed. Such abstention from the imposition of corporate criminal liability was probably a consequence not only of the systematic problems which would otherwise be posed but was also based on ideological considerations. . . . The whole notion of legal prescriptions directed at legal entities as opposed to natural persons represents a new departure for the German law of sanctions. The imposition of sanctions on corporations which has long been traditional in Anglo-American law is practically blasphemous in German doctrine as a result of the requirement of guilt. Such sanctions have become possible in Germany only by construing them as collateral consequences of the sanctions imposed on natural persons.

*Id.* See also Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 28 (1957).

14. 1 Bl. Comm. [1765] bk. 1, ch. 18, p. 476: "A corporation cannot commit treason, or felony or any other crime in its corporate capacity though its members may in their distinct individual capacities." The liability of a corporation to a criminal indictment was first recognized by the English courts in *Regina v. The Birmingham and Gloucester Railway Co.*, 3 Q.B. 223 (1842).

15. See, e.g., *Peaks, Gunston & Tee, Ltd. v. Ward* [1902] 2 K.B. 1, 11, where the court observed: "By the general principles, if a matter is made a criminal offense, it is essential that there should be something in the nature of a mens rea, and therefore in ordinary cases a corporation cannot be guilty of a criminal offense, nor can a master be liable criminally for an offense committed by his servant."

16. *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. 345, 399 (1854).

17. See, e.g., *Boise Bridge, Inc. v. United States*, 406 F.2d 771, 772 (9th Cir. 1969), where

it is clear that corporate criminal liability is necessarily vicarious.<sup>18</sup> In order to establish corporate liability for an offense requiring specific criminal intent, it must be shown that the corporate agent was acting in the course of employment and within the scope of duty.<sup>19</sup> While it must be shown that the corporate agent intended to benefit the corporation by his conduct,<sup>20</sup> it is not necessary to demonstrate actual benefit to the enterprise.<sup>21</sup>

Although early cases required that the criminal act be done by someone with a high corporate office,<sup>22</sup> it is now recognized that any corporate employee acting within the scope of employment can create criminal liability for the corporation.<sup>23</sup> Nevertheless, there is some division of authority with regard to the level and nature of corporate authorization of an agent's conduct which creates the corporate criminal liability. The Model Penal Code, as well as many state courts, would limit the situations where a corporation could be convicted of a criminal offense to those where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment."<sup>24</sup> The Code goes on to define "high managerial agent" to be "an officer of a corporation."<sup>25</sup> The drafters' commentary to the Model Penal Code notes that the effort is to limit corporate criminal liability; the drafters state that the section

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the court observed that "a corporation through the conduct of its agents and employees, may be convicted of a crime, including a crime involving knowledge and willfulness." *See also* *United States v. Knox Coal Co.*, 347 F.2d 33 (3d Cir.), *cert. denied*, 382 U.S. 904 (1965).

18. *See* Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 HARV. L. REV. 283 (1946).

19. *See, e.g.*, *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147 (5th Cir. 1975). *See also* *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

20. *See, e.g.*, *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1972), holding that "the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation." *See also* *Egan v. United States*, 137 F.2d 369 (8th Cir.), *cert. denied*, 320 U.S. 788 (1943).

21. *See* *Standard Oil Co. v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962), where the court in considering the significance of an agent's act concludes that if it "is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse." *See also* *United States v. Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963).

22. *See, e.g.*, *Denver & R. G. Ry. v. Harris*, 122 U.S. 597 (1887).

23. *See, e.g.*, *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946).

24. MODEL PENAL CODE § 2.07(1)(c) (Prop. Official Draft, 1962). *See also* *People v. Canadian Fur Trappers*, 248 N.Y. 159, 161 N.E. 455 (1928).

25. MODEL PENAL CODE § 2.07(4)(c) (Prop. Official Draft, 1962).

"would result in corporate liability for the conduct of the corporate president or general manager but not for the conduct of a foreman in a large plant or of an insignificant branch manager in the absence of participation at higher levels of corporate authority;" this result stems from the intention of the drafters to establish "a substantial limitation on corporate responsibility."<sup>26</sup>

The proposed Federal Criminal Code (S. 1), however, would maintain the broadened liability of a corporation for an employees' conduct as long as it is within the scope of duty or is later ratified. Section 402 of the proposed code provides that a corporation is criminally liable for an offense if the conduct of its agent "occurs in the performance of matters within the scope of the agent's employment or within the scope of the agent's actual implied or apparent authority" or "is thereafter ratified by the organization."<sup>27</sup> The Report of the Senate Judiciary Committee makes it clear that there is no intention to limit corporate criminal liability as was done in the Model Penal Code. The Report observes: "this section does not limit criminal liability to acts authorized, requested or commanded by supervisory or control persons, but continues existing law rendering organizations criminally liable for the act of any agent within the area of duties or functions entrusted to him."<sup>28</sup> The position adopted by the drafters of S. 1 has been recognized by some state courts; for instance, the Supreme Judicial Court of Massachusetts has stated:<sup>29</sup>

[W]e are of the opinion that the quantum of proof necessary to sustain the conviction of a corporation for the acts of its agents is sufficiently met if it is shown that the corporation has placed the agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the *particular* corporate business, operation or project in which he was engaged at the time he committed the criminal act. . . . [T]his standard does not depend upon the responsibility or authority which the agent has with respect to the entire corporate business,

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26. MODEL PENAL CODE, Comment at 151 (Tent. Draft No. 4, 1955).

27. S. 1, 94th Cong., 2d Sess. § 402 (1976).

28. S. REP. NO. 94-00, 94th Cong., 2d Sess. 70 (1976). See also *United States v. Union Supply Co.*, 215 U.S. 50 (1909).

29. *Commonwealth v. Beneficial Finance Co.*, 360 Mass. 188, 257, 275 N.E.2d 33, 86 (1971), cert. denied, 407 U.S. 910 (1972) (emphasis in the original). The court identified three factors in evaluating whether the conduct of a corporate employee is within the scope of his authority and a basis for finding corporate criminal liability: "(1) the extent of control and authority exercised by the individual over and within the corporation; (2) the extent and manner to which corporate funds were used in the crime, and (3) a repeated pattern of criminal conduct tending to indicate corporate toleration or ratification of the agent's acts." *Id.*



but only to his position with relation to the particular business in which he was serving the corporation.

The fact that an agent of the corporation engaged in conduct in contradiction to instructions, or even acted beyond the scope of his duty, will not relieve the corporation of liability if a corporate officer has failed to properly supervise the agent.<sup>30</sup> It has been held that it is the duty of the principal officers of the corporation to supervise subordinates and to ensure that they perform their duties in a manner consistent with the law.<sup>31</sup>

A corporation can be held criminally liable without a conviction of the corporate employee.<sup>32</sup> In fact, convictions of corporations have been sustained even though the corporate agent has been acquitted.<sup>33</sup> This possibility of corporate liability becomes important in the case of multinational firms where the employee may be a foreign subject who engages in his criminal conduct outside the territorial boundaries of the United States, and thus, is beyond the jurisdictional reach of United States courts. The basis for the American based firms' liability will be the direction of the criminal conduct, the adoption or ratification of the agent's acts, or the toleration of the employee's conduct.<sup>34</sup>

### *Criminal Sanctions*

The remainder of this article will consider efforts by the United States Congress to control and regulate the foreign activities of American based firms through the use of criminal sanctions.<sup>35</sup> The next section will review the current state of antitrust enforcement involving foreign activities of firms based in the United States. Special attention will be directed at the extraterritorial application of United States antitrust laws which experience can serve as an analogy for other extensions of the application of United States law

30. See, e.g., *United States v. Harry L. Young & Sons*, 464 F.2d 1295 (9th Cir. 1972).

31. *United States v. E. Brooke Matlack, Inc.*, 149 F. Supp. 814, 820 (D. Md. 1957). See also *People v. Sheffield Farm-Slawson-Decker Co.*, 225 N.Y. 25, 121 N.E. 474 (1918), where it was observed that an officer of the corporation "must then stand or fall with those whom he selects to act for him. . . . It is not an instance of respondent superior. It is the case of non-performance of a non-delegable duty." *Id.*

32. See, e.g., *Sherman v. United States*, 282 U.S. 25 (1930).

33. See, e.g., *Magnolia Motor & Logging Co. v. United States*, 264 F.2d 950 (9th Cir.), cert. denied, 361 U.S. 815 (1959).

34. See, e.g., *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960).

35. The function of the use of criminal sanctions against the corporation is a subject that has been widely discussed in the literature and is generally beyond the scope of this article. See generally Coleman, *Is Corporate Criminal Liability Really Necessary*, 29 Sw. L.J. 908, 917-26 (1975); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963).

beyond the territorial boundaries of the United States. The following two sections of the article will first consider proposed efforts to control practices of bribes and corrupt payments abroad and will then examine the attention given by the United States government to the control of activities of American based firms which are subversive of foreign governments.

It should be understood that the primary motivation of the various government departments, agencies, and legislative committees of the United States is to protect the competitive structure and business behavior of American companies, including export companies, from possible anticompetitive consequences of the operation of multinational corporations, and to maintain the confidence of the American investor who is disturbed by reports of bribes and payments to foreign officials by companies operating in the American securities market. The United States, by itself, does not aim to regulate all multinationals in the interest of other nations.<sup>36</sup>

#### UNITED STATES ANTITRUST LAWS AFFECTING FOREIGN BUSINESS ACTIVITY

Competition is the principal method by which the economy of the United States is to accomplish the allocation of scarce resources and to produce efficiently the goods and services desired by consumers.<sup>37</sup> The Sherman Act, which has been described by the United States Supreme Court as a "charter of freedom: with the generality and

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36. The position of the United States government that control of multinational corporate abuse beyond that which directly affects American interests is a subject for international control and agreement was made by Deputy Secretary of State Robert S. Ingersoll in a prepared statement made before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee. Ingersoll, *Department Proposes Two New Actions to Deal With International Problem of Bribery*, 74 DEP'T STATE BULL. 412, 414 (1976): "We think there are many advantages to a multinational approach which is based on international agreement both as to the basic standards to be applied in international trade and investment and the procedures to curtail corrupt practices. A coordinated action by exporting and importing countries would be the only effective way to inhibit improper activities of this kind internationally."

A consideration of international efforts to control and regulate the activities of multinational corporations is generally beyond the scope of this article. However, attention has been given to international control by such organizations as the United Nations. See UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON TRANSNATIONAL CORPORATIONS, REPORT ON SECOND SESSION, Doc. E/5782, E/C 10/16 (March 1976). See generally Rubin, *Developments in the Law and Institutions of International Economic Relations: The Multinational Enterprise at Bay*, 68 AM. J. INT'L L. 475 (1974). For reports of other international efforts and national efforts at control of multinationals, see, e.g., Comment, *Multinational Undertakings and the European Communities*, 19 ANTITRUST BULL. 553 (1974); Ness, *Brazil: Local Equity Participation in Multinational Enterprises*, 6 LAW & POL. INT'L BUS. 1017 (1974).

37. See generally REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1-3 (1955) [hereinafter cited as ATT'Y GEN. REP.].

adaptability comparable to that found to be desirable in institutional provisions,"<sup>38</sup> along with the supplemental antitrust statutes, provide the legal authority for the efforts of governmental agencies to control business activity in order to produce an open and competitive market. By their terms such antitrust statutes as the Sherman and Clayton Acts apply expressly to foreign as well as interstate commerce.<sup>39</sup> In a world economic system it is impossible to isolate the activities of American firms in foreign commerce, just as in an earlier day the United States Supreme Court found it impossible to limit the effects of a single farmer to the state where he farmed from its necessary impact on interstate commerce.<sup>40</sup> As one commentator has observed: "[I]t is almost impossible to disentangle the considerations relevant to an entirely domestic setting from those relevant to foreign activities affecting foreign commerce."<sup>41</sup>

At present, the United States has four principal statutes which regulate anticompetitive activity of multinational corporations: the Sherman Act,<sup>42</sup> the Clayton Act,<sup>43</sup> the Webb-Pomerene Act,<sup>44</sup> and the Federal Trade Commission Act.<sup>45</sup> Each of these acts will be briefly considered and then a review will be made of the current state of litigation being conducted under the United States antitrust laws against companies engaged in business in the United States or in business activities which affect the United States.

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38. *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936).

39. 15 U.S.C. § 1 *et seq.* (1970); *id.* § 12 *et seq.*

40. See *Wicker v. Filburn*, 317 U.S. 111 (1942), where the Supreme Court observed: The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. . . .

It is well established by the decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.

*Id.* at 127-28.

41. H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 987 (1976); see E. KITNER & M. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER* (1974). See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-88 (1975); Comment, *Goldfarb v. Virginia State Bar: Professional Legal Services and the Antitrust Laws*, 7 *LOY. CHI. L.J.* 254, 262-65 (1976).

42. 15 U.S.C. § 1 (1970).

43. *Id.* §§ 12-27.

44. *Id.* § 18.

45. *Id.* §§ 14-58.

*Survey of United States Antitrust Laws*

## 1. The Sherman Act

Section 1 of the Sherman Act of 1890<sup>46</sup> provides in part:

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 hereby declared to be illegal

. . . .

Section 1 does not attempt to define the types of conduct which constitute a "contract," "combination," or "conspiracy" in "restraint of trade."<sup>47</sup> Much of the Sherman Act language and principles were taken from the common law rules governing restraint of trade and monopolies.<sup>48</sup> Courts have held that these terms must be given the same general meaning and construction that they had under the common law.<sup>49</sup> The modifying term "every" has been construed to mean unreasonable contract, combination, or conspiracy in restraint of trade.<sup>50</sup> Unreasonable restraints of trade have been defined to include price-fixing,<sup>51</sup> market division,<sup>52</sup> group boycotts,<sup>53</sup> tying arrangements,<sup>54</sup> and reciprocal dealing.<sup>55</sup> Violations of sections 1, 2, and 3 of the Sherman Act are denominated felonies and currently carry sanctions of (1) a fine, not exceeding \$1,000,000 for a corporation and up to \$100,000 for a person; (2) imprisonment, not exceeding three years; and (3) both fine and imprisonment.<sup>56</sup>

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46. *Id.* § 1.

47. See Hermann, *Conspiracy, the Business Enterprise, White Collar Crime and Federal Prosecution: A Primer for Practice*, 9 CREIGHTON L. REV. 647, 656-71 (1976).

48. See STICKELS, *FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS* 2 (1972).

49. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

50. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

51. *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

52. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), *rev'g* 319 F. Supp. 1031, 1043 (N.D. Ill. 1970); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

53. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

54. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Standard Oil Co. v. United States (Standard Stations)*, 337 U.S. 293 (1949); *International Salt Co. v. United States*, 332 U.S. 392 (1947).

55. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

56. Pub. L. No. 93-528, 88 Stat. 1706, § 3 (1974).

Section 2 of the Sherman Act provides:

Every 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 misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.<sup>57</sup>

This section of the Sherman Act has been construed to prohibit actual monopolization, attempts to monopolize, and combinations and conspiracies to monopolize.<sup>58</sup> The three crimes specified in section 2 have been held not mutually exclusive and a defendant's action may violate all three proscriptions.<sup>59</sup> It is not necessary that actual monopolization be obtained or approached to find a section 2 violation; all that is needed is a showing of concerted action with a specific intent to achieve monopolization of a substantial part of commerce, *plus* some overt act in furtherance of such an effort.<sup>60</sup>

## 2. The Clayton Act

The Clayton Act<sup>61</sup> was passed in 1914 to supplement the Sherman Act. Section 1 of the Clayton Act defines "commerce" to include trade or commerce among the several states and with foreign nations.<sup>62</sup> A principal section of the Clayton Act which has significance for multinational corporations is section 7 which prohibits commercial corporate mergers "where in any line of commerce in any section of the country, the effect may be substantially to lessen competition, or tend to create a monopoly."<sup>63</sup> In considering mergers between American firms and foreign firms doing business or potentially doing business in the United States, the finding of a significant anticompetitive effect in the United States market has been held sufficient to prohibit the merger.<sup>64</sup> While violation of section 7

57. 15 U.S.C. § 2 (1970).

58. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *United States v. E. I. du Pont de Nemours & Co. (Cellophane Case)*, 351 U.S. 377 (1956); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

59. *See, e.g., American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946).

60. *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965); *see Swift & Co. v. United States*, 196 U.S. 375, 395-97 (1905).

61. 15 U.S.C. §§ 12-27 (1970).

62. *Id.* § 12.

63. *Id.* § 18.

64. *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966). *See generally* Graham, Hermann & Marcus, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests*, 23 STAN. L. REV. 205 (1971).

is not made a criminal offense, refusal to comply with a court order which may require dissolution or divestiture will give rise to a contempt order and could provide the basis for the imposition of substantial fines. Moreover, consolidations or agreements which can be prosecuted under the Clayton Act may often be attacked under the Sherman Act with the possible imposition of criminal sanctions.

### 3. The Federal Trade Commission Act

The Federal Trade Commission Act<sup>65</sup> enacted in 1914 created the Federal Trade Commission and gave it power to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. The jurisdiction of the Federal Trade Commission over "unfair methods of competition" has been construed to include all acts which are illegal under the other antitrust laws.<sup>66</sup> Moreover, Congress has further provided that the Federal Trade Commission Act "shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even if the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."<sup>67</sup> Violations of the antitrust laws, of section 5 of the FTC Act, and of FTC "cease and desist orders" are denominated violations and the amended statute provides for the obtaining of a civil penalty of up to \$10,000 for unfair or deceptive practices that are done with knowledge or implied knowledge.<sup>68</sup>

### 4. The Webb-Pomerene Act

The Webb-Pomerene Act of 1918<sup>69</sup> provides in section 2 that nothing in the Sherman Act

shall be construed as declaring to be illegal an association entered for the sole purpose of engaging in export trade, and actually engaged in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association.<sup>70</sup>

This Act provides a special exemption from the antitrust laws for American firms which cooperate in export activity. These export

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65. 15 U.S.C. §§ 41-58 (1970).

66. *FTC v. Cement Institute*, 333 U.S. 683 (1948).

67. 15 U.S.C. § 64 (1970).

68. Pub. L. No. 93-528, 88 Stat. 1706, § 205 (1974).

69. 15 U.S.C. §§ 61-65 (1970).

70. *Id.*

associations must be limited to American members; there is no application of the Act to joint foreign investment.<sup>71</sup> The Act does not authorize any activities by merger or joint venture between American and foreign corporations which could restrain domestic export commerce, nor does the Act exempt acts of American firms which would constitute efforts to enhance or depress prices or substantially lessen competition within the United States.<sup>72</sup> Section 4 of the Act provides for the expansion of the jurisdiction of the Federal Trade Commission to include acts of unfair competition outside the territorial jurisdiction of the United States which might be committed by associations required to register with the FTC under section 5 of the Act.<sup>73</sup> Actions maintained by the FTC can result in the same assessment of civil penalties as provided for domestic acts of unfair or deceptive business practices.

### *Extraterritorial Application of United States Antitrust Laws*

Three theories of extraterritorial jurisdiction have been invoked to legitimize the applications of United States antitrust laws to American corporations' activity abroad and to foreign corporations doing business in the United States. These include: (1) the territorial principle, (2) the principle of power to regulate conduct which has its effect within the territory of the prescribing nation, and (3) the power of a nation to regulate the conduct of its own nationals.<sup>74</sup>

Under the territorial principle, a nation may prescribe rules of law attaching legal consequence to conduct occurring within its territory, whether or not the effect of that conduct falls within the territory.<sup>75</sup> The territorial principle is the principle of law on which the Congress is deemed to rely absent a specific indication of legislative intent to apply the statutory prescriptions extraterritorially.<sup>76</sup> A second principle of extraterritoriality, which has been adopted by American courts, provides that there is jurisdiction to proscribe with respect to effects within the territory of the enforcing nation.<sup>77</sup> This "effects" jurisdiction is limited to cases where (1) the conduct and the effect of that conduct are generally recognized as constituent elements of a crime, (2) the effect within the territory is substan-

71. See *United States v. United States Alkali Export Ass'n, Inc.*, 86 F. Supp. 59 (S.D.N.Y. 1949).

72. Pogue, *Webb-Pomerene Export Trade Act*, 33 ABA ANTITRUST L.J. 105 (1967).

73. 15 U.S.C. § 65 (1970).

74. See Comment, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1011 (1976).

75. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965).

76. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

77. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

tial, and (3) the effect is a direct and foreseeable result of the extraterritorial conduct.<sup>78</sup> A third principle of extraterritorial jurisdiction provides that a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct of its nationals wherever the conduct occurs.<sup>79</sup> A corporation is generally held to have the nationality of the state which creates it;<sup>80</sup> any corporation chartered by a state of the United States is deemed to be a national of the United States and potentially subject to United States regulatory laws, even though the specific conduct of the corporation which is at issue occurs in a foreign country.<sup>81</sup>

### 1. Extraterritorial Application of the Sherman Act

The Sherman Act has been increasingly extended to parties and acts outside the territorial limits of the United States so that now domestic courts exercise jurisdiction over foreign corporations and over domestic corporations doing business abroad.<sup>82</sup> Two principal questions arise when domestic courts deal with international anti-trust problems: (1) does the domestic court have jurisdiction, and (2) did Congress intend an extraterritorial application of the statute in question.<sup>83</sup>

Establishing personal jurisdiction over foreign corporations has been accomplished by the recognition of a corporation as a person under the Sherman Act; section 8 of the Act provides that "person" includes corporations established under foreign law.<sup>84</sup> The commonly accepted test for determining personal jurisdiction within the United States is followed in the case of suits brought against foreign corporations; a federal court can exercise jurisdiction over such a foreign entity if the corporation has such "minimum contacts" with the forum that the maintenance of the suit does not offend tradi-

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78. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

79. *Id.* at § 30.

80. *Id.* at § 27.

81. *See Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

82. *See Note, The Conflict of Laws and the Extraterritorial Application of the Sherman Act*, 4 CASE W. RES. J. INT'L L. 164, 169, (1972), citing ATT'Y GEN. REP., *supra* note 37, at 76, which suggested that the Sherman Act applied to any combination between United States nationals or between a United States national and a foreigner which had a sufficiently substantial anticompetitive effect on trade with foreign nations so as to constitute an unreasonable restraint; and, secondly, that the Act should be applied to conspiracies between foreign competitors where there was both intention and effect resulting in substantial anticompetitive impact on United States foreign commerce. *See also Fortenberry, Jurisdiction over Extraterritorial Antitrust Violations—Paths through the Great Grimpen Mire*, 33 OHIO ST. L.J. 519 (1971).

83. *See Fugate, An Overview of Antitrust Enforcement and the Multinational Corporation*, 8 J. INT'L L. & ECON. 1 (1973).

84. 15 U.S.C. § 8 (1970).



tional conceptions of fair play and substantial justice.<sup>85</sup> The "minimum contacts" test has been liberally applied so that courts are satisfied with "relatively few acts of 'doing business'."<sup>86</sup>

Just as courts have extended the concept of in personam jurisdiction, the federal courts have found the reach of the Sherman Act to extend beyond the territorial limits of the United States.<sup>87</sup> In the earliest cases, the United States Supreme Court limited application of the Sherman Act by strict application of the territorial principle.<sup>88</sup> Justice Holmes, for instance, observed in the first Sherman Act case involving foreign commerce that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the Law of the country where the act is done . . ."<sup>89</sup> Nevertheless, the Supreme Court soon determined that there was jurisdiction over foreign defendants entering into combinations or agreements which affected American markets.<sup>90</sup> For instance, in *United States v. Sisal Sales Corp.*<sup>91</sup> the Court declared a conspiracy to monopolize United States foreign commerce illegal while emphasizing the fact that not only were there unlawful results in the United States, but also that there were acts done pursuant to the agreement in the United States by a foreign corporation, or pursuant to an agreement with a domestically incorporated company.

The contemporary approach of American courts has shifted the emphasis from the territorial principle requiring that anticompetitive acts within the United States be proven, to application of the Sherman Act to restrictive agreements which affect domestic American commercial markets.<sup>92</sup> In *United States v. Timkin Roller Bearing Co.*,<sup>93</sup> it was held that restrictive agreements made in foreign countries by a domestic corporation with two of its independent foreign subsidiaries were violative of the Sherman Act. The district court observed that "the fact that the cartel arrangements were made on foreign soil does not relieve defendant from responsibility . . . . [T]hey had a direct influencing effect on trade in tapered

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85. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

86. *Beja v. Jahangiri*, 453 F.2d 959 (2d Cir. 1972).

87. See generally Comment, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1017 (1976).

88. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

89. *Id.* at 356.

90. *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Pac. & Arctic Ry. and Navigation Co.*, 228 U.S. 87 (1913).

91. 247 U.S. 268 (1927).

92. *United States v. Nat'l Lead Co.*, 63 F. Supp. 513, *aff'd*, 332 U.S. 319 (1947).

93. 83 F. Supp. 284, (E.D. Ohio 1949), *modified on appeal*, 341 U.S. 593 (1951).

bearings between the United States and foreign countries.”<sup>94</sup> The Supreme Court not only treated the wholly owned foreign subsidiaries as independent entities for purposes of satisfying the plurality requirements of the Sherman Act, but refused to accept the argument that the pressures of foreign trade required collusive activity:

This position ignores the fact that the provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that competition in both export and import . . . is both possible and desirable. Those provisions of the Act are wholly inconsistent with appellants' argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad.<sup>95</sup>

The adoption of the “effects” test by the Supreme Court has resulted in very extended extraterritorial application of the Sherman Act. In *United States v. Aluminum Company of America*,<sup>96</sup> the court noted that the United States can impose its antitrust laws upon persons not within its borders for conduct outside its borders which has consequences within its borders. The court concluded that where there is (1) intent to affect imports or exports of the United States, and (2) an anticompetitive effect, the Sherman Act may be applied to foreign corporations.<sup>97</sup> Moreover, the effect of concern to the United States does not necessarily occur directly within the United States; the division of foreign markets can constitute conduct in violation of the Sherman Act.<sup>98</sup> Finally, the agreement to affect the United States market may be confined to foreign firms. Nevertheless, there will be liability if there is injury in the United States in the form of higher prices in the business conducted by agents or subsidiaries of the foreign firms.<sup>99</sup>

## 2. Extraterritorial Application of the Clayton Act

Section 7 of the Clayton Act prohibits the acquisition by one corporation “engaged in commerce” of “another corporation engaged also in commerce,” if the acquisition may substantially lessen competition “in any line of commerce in any section of the coun-

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94. 83 F. Supp. at 309.

95. 341 U.S. at 599.

96. 148 F.2d 416 (2d Cir. 1945).

97. *Id.* at 443-44.

98. See *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962).

99. *United States v. The Watchmakers of Switzerland Information Center*, 1965 Trade Cas. ¶ 71,352 (S.D.N.Y.).

try.”<sup>100</sup> Section 1 of the Clayton Act defines “commerce” as including “trade or commerce with foreign nations.”<sup>101</sup> The Clayton Act requires only that the anticompetitive effects be felt within “a section of the country”; the merger, consolidation, or joint venture causing the prohibited effect does not need to occur within the geographical territory of the United States.<sup>102</sup> The language of section 7 which restricts its applications to “corporations engaged in commerce” does not exclude foreign mergers involving the foreign subsidiary of an American firm and a foreign firm.<sup>103</sup> Furthermore, judicial construction of the Clayton Act has extended section 7 to cover corporations which are “potential” competitors. The Supreme Court has held that competition might be substantially lessened even if only one company would have entered the market while the other company would have remained an important potential competitor on the edge of the market.<sup>104</sup>

Few section 7 suits to date have been brought against mergers and joint ventures involving foreign firms,<sup>105</sup> although nothing in the current policy of the Department of Justice or the Federal Trade Commission precludes such suits in the future. As early as 1964, the Department of Justice employed section 7 as part of its attack on the establishment and operation of the Mobay Chemical Co., a joint venture involving two of the world’s largest chemical companies, one foreign and one domestic.<sup>106</sup> In 1965, the United States successfully challenged the merger of Schlitz Brewing Company, a domestic firm, and General Brewing Co., the United States subsidiary of John Labatt, Ltd., a Canadian corporation. The gravamen of the complaint was the elimination of the potential competition of the foreign competitor.<sup>107</sup> In a 1970 case involving two Swiss chemical companies, a consent decree was entered which required divestiture of United States subsidiaries of the two merging foreign corpora-

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100. 15 U.S.C. § 18 (1970).

101. *Id.* § 12.

102. *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

103. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). *See also* Graham, Marcus & Hermann, *Section 7 of the Clayton Act and Mergers Involving Foreign Interests*, 23 STAN. L. REV. 205 (1972).

104. *United States v. Penn-Olin Chem. Corp.* 378 U.S. 158, *decision on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff’d per curiam*, 389 U.S. 308 (1967).

105. *See, e.g.*, *United States v. CIBA Corp.*, 1970 Trade Cas. ¶ 73,269 (S.D.N.Y.) (consent decree).

106. *United States v. Monsanto Co.*, 1967 Trade Cas. ¶ 72,001, at ¶ 83,553 (W.D. Pa.) (consent decree).

107. *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966), *aff’d per curiam*, 385 U.S. 37 (1966).

tions.<sup>108</sup> Although foreign companies have been involved in the above cited cases and others, all cases in which the United States has challenged an acquisition as unlawful have been cases in which either the acquiring or acquired company was a domestic firm or a foreign concern's operating subsidiary doing business in the United States. To date, there are no reported cases involving a joint venture or a merger between foreign firms transacting no business in the United States, either directly or through significant subsidiaries.

### 3. Extraterritorial Application of the Federal Trade Commission Act and the Webb-Pomerene Act

Section 7 of the Clayton Act is supplemented by section 5 of the Federal Trade Commission Act which gives it jurisdiction over unfair trade practices.<sup>109</sup> Through the Webb-Pomerene Act, section 4, the provisions of section 5 of the Federal Trade Commission Act are applicable to "unfair methods of competition used in export trade against competitors engaged in export trade even though the acts . . . are done without the territorial jurisdiction of the United States."<sup>110</sup> The broad discretion found to reside in the FTC in the application of section 5,<sup>111</sup> means that the Commission is largely free to fashion bases for action and to develop appropriate relief for anticompetitive practices in the export trade. The far reach of the FTC's jurisdiction can be seen in *Branch v. FTC*,<sup>112</sup> where the Commission's finding of unfair trade practices based on the defendant's misleading advertising in South America was upheld on the basis that the FTC's action was to protect the defendant's United States competitors, not the consumers in South America.

### 4. Conflicts of Laws Problems and Extraterritorial Application of United States Antitrust Law

The extraterritorial application of antitrust laws can create very serious problems in the area of conflicts of national laws. These problems are well illustrated by the aftermath of the district court decree in *United States v. Imperial Chemical Industries, Ltd.*<sup>113</sup> The court had found that Imperial Chemical Industries, Ltd. (ICI) and

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108. *United States v. CIBA Corp.*, 1970 Trade Cas., ¶ 73,269 (S.D.N.Y.) (consent decree).

109. 15 U.S.C. § 45 (1970).

110. *Id.* § 64.

111. See *Atl. Refining Co. v. FTC*, 381 U.S. 357 (1965). See also *FTC v. Colgate & Co.*, 310 F.2d 89 (1st Cir. 1962).

112. 141 F.2d 31 (7th Cir. 1944).

113. *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y.), 105 F. Supp. 215 (S.D.N.Y. 1951); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780, *final judgment*, [1954] 2 All E.R. 88.

others had through the use of patent licenses divided world markets. The district court ordered ICI to license United States parties and to grant immunity to British users of the patent. British Nylon Spinners sued in the English court to protect their exclusive patent licensing agreement with ICI and to prevent ICI from complying with the American decree. The British court held that comity did not require acceptance of the United States court decree which impaired British contract rights of a party—British Nylon—not subject to the jurisdiction of the American court. The American judgment was viewed as an assertion of extraterritorial jurisdiction that British courts would not recognize.

Some efforts at international cooperation in administering domestic antitrust laws have been joined by the United States.<sup>114</sup> In 1967 the Organization for Economic Cooperation and Development (OECD), a treaty organization made up of nineteen European countries, Canada, Japan, and the United States, recommended areas for international cooperation in antitrust problems.<sup>115</sup> These recommendations covered three problem areas: (1) advance notification of actions to be taken by one country under its antitrust laws which could affect the interests of another country; (2) coordination of enforcement policies of national states; and (3) exchange of information on restrictive business practices to the extent permissible under national law.<sup>116</sup>

Since 1950 the United States has negotiated a number of bilateral agreements affecting extraterritorial application of antitrust laws. These treaties of friendship, commerce, and navigation with Denmark, France, Germany, Greece, Ireland, Israel, Italy, Japan, Korea, Nicaragua, and Pakistan contain general clauses on restrictive business practices exemplified by the terms of the Italian agreement:

The two High Contracting Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one

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114. O.E.C.D. Doc. c(67) 53 (October 10, 1967).

115. Suggestions have been made for international agreements to regulate multinational corporations and thus avoid the conflicts of laws problems created by such cases as *Imperial Chemical*. See, e.g., Market, *Recent Developments in International Antitrust Cooperation*, 13 ANTITRUST BULL. 355, 359 (1968). For descriptions of current United States efforts to develop conflicts of laws principles for avoiding the problem of unenforceable judgments, see Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1156 (1956) and Trawtman, *The Role of Conflicts Thinking in Refining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 617 (1961).

116. See note 114 *supra*.

or more private or public commercial enterprises or by combination, agreement or other agreement among public or private commercial enterprises may have harmful effects upon the commerce between their respective territories. Accordingly, each High Contracting Party agrees to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.<sup>117</sup>

In general, the United States has one of the most developed and widely applicable antitrust policies in the world. Through consultation and treaty, efforts are made to coordinate United States enforcement efforts with the policies and official activities of foreign governments. Nevertheless, the enforcement of United States antitrust laws with the possibility of criminal sanction provides one of the most potent legal devices for the United States to control the activities of American based firms and to compel adherence to the basic public policy of the United States which is embodied in the doctrine of competition and open markets. The experience with the extraterritorial application of the United States antitrust laws provides a model or analogy which can serve as a reference in considering the application of other economic regulatory laws with attendant criminal sanctions to American based multinational corporations.

#### UNITED STATES PROPOSED LAWS TO DEAL WITH THE PROBLEM OF BRIBES AND CORRUPT OVERSEAS PAYMENTS

By mid-year 1976, some eighty-four American companies acknowledged making bribes or paying sales commissions to obtain contracts in foreign countries.<sup>118</sup> Initial disclosures were authenticated in hearings before the Senate Foreign Relations Committee in its Subcommittee on Multinationals.<sup>119</sup> This in turn gave rise to hearings before the Senate Banking, Housing and Urban Affairs Committee.<sup>120</sup> These hearings and general public concern resulted in

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117. Treaty with Italy, Feb. 2, 1948, art. XVIII, ¶ 3, 63 Stat. 2255, T.I.A.S. No. 1965 (effective July 26, 1949).

118. *Repeal of Laws Aiding Multinationals Sought*, 34 CONG. Q. 1026 (1976). For reaction typical of the business community, see Guzzardi, *An Unscandalized View of Those "Bribes" Abroad*, FORTUNE, July, 1976 at 118; Nehemkis, *Business Payoffs Abroad: Rhetoric and Reality*, 18 CALIF. MGT. REV. 5 (1975). For typical reaction of the legal community, see Murphy, *Payoffs to Foreign Officials: Time for More National Responsibility*, 62 A.B.A.J. 480 (1976); Solomon & Linville, *Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad*, 17 B.C. IND. & COM. L. REV. 303 (1976); Kane & Butler, *Improper Corporate Payments: The Second Half of Watergate*, 8 LOY. CHI. L.J. 1 (1976).

119. See *Multinational Corporations and Foreign Policy*, *supra* note 1, at pt. 12.

120. See *Hearings on Foreign and Corporate Bribes and on Prohibiting Bribes to Foreign Officials Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d

the introduction of a number of bills in the Senate in the last Congress which characteristically provided two distinct approaches to the problem of bribes and corrupt payments to foreign officials: (1) the development of additional reporting requirements,<sup>121</sup> and (2) the development of new criminal prohibitions directed at preventing the payment of bribes to foreign officials.<sup>122</sup> In addition, the Securities and Exchange Commission prepared a special study on the problem of corrupt payments<sup>123</sup> and the President appointed a special Task Force headed by then Secretary of Commerce Elliot Richardson to study the problem of bribes to foreign officials.<sup>124</sup> The following section will deal first with pending congressional proposals and second with the reports of the SEC and the Special Presidential Task Force.

*Proposed Congressional Measures to Deal With Bribes and Corrupt Payments to Foreign Officials*

Legislative proposals submitted to the Senate last year provided several approaches for dealing with the problem of bribes and corrupt payments to foreign officials; these included: (1) the establishment of special reporting requirements;<sup>125</sup> (2) the establishment of criminal sanctions for bribes and corrupt payments;<sup>126</sup> (3) the requirement of special audit committees to be established by domestic corporations;<sup>127</sup> and (4) the removal of benefits to taxpayers from special treatment of foreign earnings where there is proof of payments to foreign officials.<sup>128</sup> Congressional consideration of this problem resulted in the Senate passing of S. 3664<sup>129</sup> which was reported out of the Senate Committee on Banking, Housing and

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Sess. (1976) [hereinafter cited as *Hearings on Prohibiting Bribes*].

121. See, e.g., S. 3133, 94th Cong., 2d Sess. (1976); S. 3418, 94th Cong., 2d Sess. (1976).

122. See, e.g., S. 3379, 94th Cong., 2d Sess. (1976); S. 3151, 94th Cong., 2d Sess. (1976). See also S. 3150, 94th Cong., 2d Sess. (1976), which would have denied tax benefits to those making bribes or other illegal payments to foreign government agents or officials.

123. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, submitted to the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976) [hereinafter cited as the REPORT OF THE SEC], reprinted in [1976] 353 SEC. REG. & L. REP. (BNA).

124. 10 Named by Ford to Review Bribes, N.Y. Times, Apr. 1, 1976, at 43, col. 6. For a reprint of the preliminary report of the Task Force headed by former Secretary of Commerce Elliot Richardson, see Appendix to *Hearings on Prohibiting Bribes*, supra note 120, at 39-67.

125. See S. 3379, §§ 3,4,6.

126. See id. § 3.

127. See id. § 8.

128. See S. 3150; S. 3379, § 7.

129. S. 3664 was passed by the Senate on September 15, 1976, without amendments and was reported to the House Interstate and Foreign Commerce Committee on September 16, 1976.

Urban Affairs.<sup>130</sup> S. 3379 introduced by Senator Church and others<sup>131</sup> and S. 3133 introduced by Senator Proxmire<sup>132</sup> best exemplify the alternative approaches of reporting, and the application of criminal sanctions which were considered by the last Congress. These latter bills will first be described; then the compromise bill, S. 3664 which was passed by the Senate, will be considered at some length.

S. 3133, as introduced by Senator Proxmire, would have authorized the SEC to issue regulations requiring issuers of registered securities to keep accurate books and records.<sup>133</sup> It would have required such issuers to report to the SEC all payments in excess of \$1000 to foreign officials, political parties, or sales agents retained in connection with obtaining business from, or influencing legislation or regulations of, a foreign government regardless of any corrupt purpose.<sup>134</sup> Further, the bill specifically would have prohibited the use of the mails or any means of interstate commerce, and would have authorized the SEC to prosecute such use of the mails or interstate commerce to offer or to pay a bribe, or to make a corrupt payment to influence legislation, regulation or to obtain business.<sup>135</sup>

S. 3379, as introduced by Senator Church and others, would have required issuers of registered securities to file with the SEC reports describing foreign political contributions, payments to foreign officials intended to influence their decisions, and payments to businessmen intended to influence their business decisions.<sup>136</sup> Further, this bill provided for an annual foreign policy analysis by the State Department on foreign policy implications of questionable payments.<sup>137</sup> The proposed legislation provided for disclosure of information relating to these payments directly to investors and would have amended the Internal Revenue Code to eliminate deductions for illegal payments.<sup>138</sup> Further, this bill would have required companies to establish audit committees made up of outside directors who would review the corporate accounts and identify payments made to foreign officials and agents.<sup>139</sup> The bill also would have

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130. See S. REP. NO. 94-1031, 94th Cong., 2d Sess. (1976).

131. S. 3379 was introduced by Senator Church (for himself and Senators Clark and Pearson) on May 5, 1976 and referred to the Senate Committees on Banking, Housing and Urban Affairs, and Foreign Relations.

132. S. 3133 was introduced by Senator Proxmire on March 11, 1976, and referred to the Senate Committee on Banking, Housing, and Urban Affairs.

133. S. 3133, § 1.

134. *Id.* § 2.

135. *Id.* § 3.

136. *Id.* §§ 3-4.

137. *Id.* § 5.

138. *Id.* § 7.

139. *Id.* § 8.



authorized the President to seek international agreements to inhibit improper payments.<sup>140</sup> Finally, S. 3379 would have created new private rights of action by shareholders or competitors injured by the payment of bribes.<sup>141</sup> This bill did not provide, however, for the imposition of criminal sanctions for the giving of bribes.

S. 3664, which was reported out by the Committee on Banking, Housing and Urban Affairs and passed by the Senate, is the legislative proposal from the last Congress most likely to receive favorable action by the new Congress. It was a hybrid bill which combined the approaches of the bills offered by Senators Proxmire and Church and also reflected the content of the SEC report discussed below.<sup>142</sup> This bill under its first section would require companies registered with the SEC under section 12 of the Securities Exchange Act of 1934<sup>143</sup> and companies required to report under section 15(d) of the Securities Exchange Act of 1934:<sup>144</sup> (1) to develop and maintain accurate books and records; (2) to develop and maintain accounting controls to assure that transactions will be executed in accordance with management's instructions, and will be accurately reported and audited; and (3) to be subject to criminal sanction for falsification of books, records, accounts, or documents, or for deceptive disclosures to an accountant in connection with an audit.<sup>145</sup>

Section 2 of the proposed legislation provides for the criminal sanctioning of corrupt payments to foreign public officials.<sup>146</sup> This section of S. 3664 applies to companies registered with or reporting to the SEC.<sup>147</sup> The bill applies the existing criminal penalties of the securities laws, up to two years imprisonment and a fine of up to \$10,000, for payments, promises of payment, or authorization of payment of anything of value to any foreign official, political party, candidate for office, or intermediary, where there is a corrupt pur-

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140. *Id.* § 11.

141. *Id.* §§ 9-10.

142. *See* note 123 *supra*.

143. S. 3664, § 1. Section 12 of the Securities Exchange Act of 1934 requires a registration with the Securities and Exchange Commission of any security other than those specially exempted, which are traded on a national securities exchange. 15 U.S.C. § 78l (1970).

144. S. 3664, § 1. Section 15(d) of the Securities Exchange Act of 1934 requires issuers using interstate commerce to effect transactions to file a registration with the Securities and Exchange Commission. 15 U.S.C. § 78o(d) (1970).

145. S. 3664, § 1.

146. *Id.* § 2.

147. This section applies to all issuers required to file reports pursuant to 15 U.S.C. § 78o(d) (1970) on the basis of their use of the mails or any instrument of interstate commerce to corruptly offer to pay or promise to pay any official or agent of a foreign government in order to obtain the use of his influence, or to cause him to fail to fulfill any official duty or to obtain business opportunities with the foreign government in which the official holds an office or has authority.

pose.<sup>148</sup> The corrupt purpose must be to induce the recipient to use his influence to direct business to any person, to influence legislation or regulations, or to direct business to any person, to influence legislation or regulations, or fail to perform any official function in order to influence business decisions, legislation, or regulations, or a government.<sup>149</sup> The use of the word "corruptly" is derived from the domestic law prohibiting bribery<sup>150</sup> and connotes an evil motive or purpose; it indicates an intent or desire to wrongfully influence the recipient. This section does not require that the act be fully consummated or successful in producing the desired outcome.<sup>151</sup>

Section 3 of S. 3664 applies the identical prohibitions and penalties provided by section 2 to any domestic business concern other than one subject to the jurisdiction of the SEC pursuant to section 2. This would then apply to any company incorporated in the United States and to any subsidiary of a company incorporated in the United States<sup>152</sup> since by definition such companies would be engaged in interstate or foreign commerce which establishes the jurisdiction for federal regulation.<sup>153</sup> Violations of section 3 would be investigated and prosecuted by the Justice Department while the violation of section 2 would be investigated by the SEC, but prosecuted by the Justice Department.<sup>154</sup>

This proposed legislation would not reach small gratuities to expedite shipments or to receive needed customs permits.<sup>155</sup> For example, payments made to expedite proper performance of duties would not be reached by this legislation. Nor would this legislation reach all corrupt payments overseas which might benefit American com-

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148. S. 3664, § 3(b).

149. See S. REP. NO. 94-1031, 94th Cong., 2d Sess. 608 (1976).

150. See 18 U.S.C. § 201(b)(1970), which provides:

Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty.

151. See *United States v. Kemmel*, 188 F. Supp. 736 (E.D. Pa. 1960), *aff'd*, 295 F.2d 712 (3d Cir. 1961), *cert. denied*, 368 U.S. 988 (1962).

152. S. 3664, § 3.

153. U.S. CONST. art. I, § 8.

154. See S. REP. NO. 94-1031, 94th Cong., 2d Sess. 9-10 (1976).

155. *Id.* at 6.

panies. Cases of foreign nationals who pay bribes overseas acting entirely on their own initiative would not be reached by this law.<sup>156</sup> Nevertheless, the report of the SEC to the Senate Banking Committee showed that in most cases involving bribes attributable to American-controlled companies or their agents, some responsible official or employee of the United States parent company had knowledge of the bribery and approved the practice.<sup>157</sup> This legislation would permit the prosecution of such corporate employees, and accepted legal doctrines such as aiding and abetting and joint participation would provide a broad prosecutorial reach under this law.<sup>158</sup>

As this review of S. 3664 suggests, the bill combines a broadening of disclosure requirements and the adoption of a criminal sanction for bribing conduct. The disclosure approach, in addition to drawing on public opinion and investor pressures as policing devices, also permits the penalizing of failures to report and misreporting. The inclusion of a criminal sanction for bribery permits the widest possibility of deterrence of the practice of corrupt payments. The current SEC investigation powers and practices without threat of criminal sanction have in fact produced a large number of disclosures and have resulted in cooperation with the SEC.<sup>159</sup> The additional threat of prosecution by the Department of Justice for the making of corrupt payments should further assist in the elimination of these practices.<sup>160</sup>

The experience with the extraterritorial application of the securities laws indicates that so long as foreign conduct produced domestic harm and so long as the defendant is engaged in domestic commerce, the securities laws apply.<sup>161</sup> The essential question has been the congressional intent with regard to the extraterritorial application of the domestic law.<sup>162</sup> There can be no question that the intent of S. 3664 is to provide the court with jurisdiction over United

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156. *Id.* at 7.

157. REPORT OF THE SEC, *supra* note 123, at 41.

158. S. REP. NO. 94-1031, 94th Cong., 2d Sess. 7 (1976).

159. REPORT OF THE SEC, *supra* note 123, at 6-13.

160. See testimony of Roderick M. Hills, Chairman of the Securities and Exchange Commission in *Hearings on Prohibiting Bribes*, *supra* note 120, at 6.

161. See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968), *cert. denied sub nom. Manly v. Shoenbaum*, 395 U.S. 906 (1969). See also *Bersh v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 914 (1975). See generally Jones, *An Interest Analysis Approach to Extraterritorial Application of Rule 10b-5*, 52 TEXAS L. REV. 983 (1974); Nate, *American Adjudication of Transnational Securities Fraud*, 89 HARV. L. REV. 553 (1976).

162. See, e.g., *Bersh v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 914 (1975).

States companies and their agents who engage in corrupt payments to foreign officials.<sup>163</sup>

*Reports of the SEC and the Special Task Force on Illegal Foreign Payments*

On May 12, 1976, the Securities Exchange Commission submitted a report to the Senate Banking, Housing and Urban Affairs Committee.<sup>164</sup> This report with testimony from commissioners of the SEC was available prior to the reporting out of S. 3664 and its influence is apparent on the text of the proposed legislation.<sup>165</sup> The SEC found the practice of foreign bribery to be extensive; reports were cited of at least 100 companies having engaged in such practices.<sup>166</sup> Further, it was reported that the effect of these corrupt payments was debilitating on public confidence in American business.<sup>167</sup> While the SEC expressed confidence in its present disclosure program, it did urge passage of a three-part legislative program to: (1) specifically prohibit and penalize the falsification of corporate records which should reflect payments to foreign officials; (2) prohibit and punish corporate officials or agents who make false statements to auditors; and (3) require that corporations develop independent auditing systems in accord with generally accepted accounting principles.<sup>168</sup> The SEC specifically recommended amendments to S. 3133 as introduced by Senator Proxmire.<sup>169</sup> These amendments suggested by the SEC would require the keeping of books and records which accurately and fairly reflect the transactions and disposition of assets of American companies and would require them to develop an internal system of internal accounting control.<sup>170</sup> The SEC proposal would not require that the identity of foreign persons to whom payments are made be part of the necessary reporting.<sup>171</sup>

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163. See S. REP. NO. 94-1031, 94th Cong., 2d Sess. 3 (1976).

164. REPORT OF THE SEC, *supra* note 123.

165. See S. REP. NO. 94-1031, 94th Cong., 2d Sess. 1 (1976).

166. REPORT OF THE SEC, *supra* note 123, at 37.

167. *Id.* at 54.

168. *Id.* at 58-59. See also Kane & Butler, *Improper Corporate Payments: The Second Half of Watergate*, 8 LOY. CHI. L.J. 1 (1976).

169. REPORT OF THE SEC, *supra* note 123, at 60-66.

170. *Id.* at 63-64.

171. *Id.* at 60, where the Report reads:

Similarly, we are reluctant to see imposed a hard-and-fast rule requiring every reporting corporate issuer, in every instance, to identify the recipients of their foreign payments. In some cases, disclosure of the identity of the person receiving such payments may be important to an investor's understanding of the transaction. More frequently, however, the identity of a particular foreign government employee

The SEC urged that there be a prohibition and prosecution for the affirmative making of false statements and the omission of entries which would be "material," *i.e.*, information useful to a reasonably prudent investor, under general SEC reporting requirements.<sup>172</sup> Further, such false statements or omissions of material information in connection with the required independent audit would also be penalized.<sup>173</sup>

The SEC has thus urged the enactment of reporting and disclosure requirements for payments to foreign officials.<sup>174</sup> Rather than offering specific guidelines for necessary reporting, it has urged the continued use of its "material" disclosure requirement as developed in domestic securities reporting. In a sense the SEC would augment the requirements which are viewed as "material" to a reasonable investor by including the requirement of reporting of significant payments to foreign officials and politicians which are designed to influence legislation, regulation or to obtain business.<sup>175</sup>

A special Cabinet Level Group was appointed by President Ford on March 31, 1976, to study foreign payoffs and to suggest policy steps to eliminate these abuses. This Task Force was headed by Secretary of Commerce Elliot Richardson and included in its ten

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who received the payment may have little or no significance to the investor. In addition to our desire to see the Commission's flexibility preserved, we are also cognizant of the fact that, as our experience to date demonstrates, in many instances corporations are unable to verify their initial pronouncements concerning the recipients of these types of payments.

172. *Id.* at 64, providing in the proposed amendment to § 13(b)(4) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(b) (1970): "It shall be unlawful for any person, directly or indirectly: (A) to make, or cause to be made, a materially false or misleading statement, or (B) to omit to state, or cause another person to omit to state any material fact necessary in order to make statements made in light of the circumstances under which they were made, not misleading . . . ." The term "material" has been defined by the Securities Exchange Commission to include that information which a reasonably prudent investor reasonably ought to know before buying a security. 17 C.F.R. §§ 230-408, 240, 12b-20, 240, 14(a)-9(a) (1976). See *Fiet v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971). The federal courts have construed this information to be "facts which have an important bearing upon the nature or condition of the issuing corporation or its business." *Escott v. Ban Chris Construction Corp.*, 283 F. Supp. 643, 681 (S.D.N.Y. 1968). In applying the test of "materiality" to issuing corporations for instance, one court held that the issuer must disclose any "fact" which in reasonable and objective contemplation might affect the value of the corporation's stock or securities." *Kohler v. Kohler Co.*, 319 F.2d 634, 642 (7th Cir. 1963). While S. 3664 would require report of *all* payments, it is not at all unlikely that the requiring of reporting of all material information, in fact of this broad construction of the term "material" would not in fact include the reporting of all bribes or payments to foreign officials. Nevertheless, there is the possibility that the SEC proposal limited to material facts would not be as inclusive as the coverage provided in S. 3664.

173. REPORT OF THE SEC, *supra* note 123, at 64.

174. *Id.* at 57-59.

175. *Id.* at 66.

person membership, Secretary of State Kissinger, Secretary of the Treasury Simon, Secretary of Defense Rumsfeld, and Attorney General Levi. A preliminary report of the Task Force on Questionable Corporate Payments Abroad was made to the Senate Banking Committee on June 11, 1976.<sup>177</sup> The Richardson report calls for legislation which would not include a specific prohibition of and penalty for bribes or payments to foreign officials or politicians; the justification given for the exclusion of criminal penalization is the difficulty of regulating and penalizing acts committed abroad.<sup>178</sup> Instead, the Task Force proposes a special disclosure requirement and prosecution for failure to disclose. United States corporations abroad would be required to report all payments in excess of some floor amount, made directly or indirectly to any person employed by or representing a foreign government or to any foreign political party or candidate for foreign political office in connection with obtaining or maintaining business with, or influencing the conduct of a foreign government.<sup>179</sup> The Task Force would require a report of the amount of such payments, its purpose, and the name of the recipient.<sup>180</sup>

The Task Force would have these reports made to an executive department such as the Departments of Commerce or State and not the SEC.<sup>181</sup> The Task Force report took the position that the SEC efforts should be to protect investors and that reporting to the SEC should be limited to material information; thus the SEC ought to be confined in its reporting requirements "to those matters as to which an average prudent investor ought reasonably to be informed."<sup>182</sup> The suggestion of the Task Force is that all significant foreign payments require reporting and that such a reporting requirement would avoid the difficult problem of defining what is meant by a "bribe."<sup>183</sup> The requirement of reporting all payments above a certain amount leaves those bribes or corrupt payments made below that amount unreported; this has given rise to criticism of the Task Force recommendations.<sup>184</sup> Moreover, in suggesting that

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176. See N.Y. Times, Apr. 1, 1976, at 43, col. 6.

177. REPORT OF THE SECRETARY OF COMMERCE TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS 139-67 (1976), reprinted in the Appendix to *Hearings on Prohibiting Bribes*, *supra* note 120 [hereinafter cited as REPORT OF THE SECRETARY OF COMMERCE].

178. *Id.* at 61.

179. *Id.* at 63.

180. *Id.*

181. *Id.*

182. *Id.* at 52-56.

183. *Id.* at 62.

184. *Id.* at 10-11.

reports of these payments be made to a specially identified executive department, the preliminary report has given rise to criticism that such an arrangement can too easily lead to suppression of information or "coverup" by an executive department and would involve duplication of agency and department ability to obtain and analyze reports made.<sup>185</sup>

The Task Force would provide the Department of State with discretion to convey the contents of payments reports to affected governments and would, after the interval of a year or so, make these reports available to the public.<sup>186</sup> This would allow foreign official action prior to any public controversy created by the release of reports.<sup>187</sup>

The requirements of reporting foreign payments suggested by the Task Force would apply to all American business entities and to foreign subsidiaries they control.<sup>188</sup> The Task Force suggestion is that penalties for failure to report should apply only to United States parent corporations and their officers, thus avoiding the problem of extraterritorial application of United States criminal sanctions.<sup>189</sup> The criminal penalty for negligent or willful failure to report would be set at a fine up to \$10,000, or imprisonment up to five years, or both.<sup>190</sup>

The Task Force report would impose no penalty under United States law for the making of a bribe or a corrupt payment abroad;<sup>191</sup> in a sense, the domestic corporation would gain immunity from domestic prosecution by making a proper report of the questionable payment. However, the availability of these reports to foreign governments,<sup>192</sup> at the discretion of the State Department, would present serious prospects of foreign prosecution.

#### CONTROL OF ACTIVITIES OF AMERICAN CORPORATIONS SUBVERSIVE OF FOREIGN GOVERNMENTS

In March and April of 1973, the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations held hearings on the role and influence of multinational corporations in

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185. S. REP. NO. 94-1031, 94th Cong., 2d Sess. 10-11 (1976).

186. REPORT OF THE SECRETARY OF COMMERCE, *supra* note 177, at 64.

187. *Id.*

188. *Id.* at 63.

189. *Id.* at 64.

190. This is the current penalty set for making false statements to any agency or department of the United States government in 18 U.S.C. § 1001 (1970).

191. REPORT OF THE SECRETARY OF COMMERCE, *supra* note 177, at 62.

192. *Id.* at 64.

the shaping of American foreign policy.<sup>193</sup> Specifically, the Senate subcommittee investigated allegations that the International Telephone and Telegraph Co. (ITT) sought to enlist the cooperation of the United States government in preventing the election of Dr. Salvador Allende Gossens as President of Chile in 1970, and in encouraging his downfall after his election.<sup>194</sup> The hearings focused on meetings and conversations between ITT and the CIA and other government officials where possibilities for creating an economic crisis in Chile were discussed.<sup>195</sup> Evidence was received of an ITT offer of up to \$1,000,000 to the United States government in support of anti-Allende activities.<sup>196</sup> Further, testimony was obtained which indicated that there were efforts on the part of ITT to enlist the aid of other multinational corporations.<sup>197</sup>

The congressional response to the evidence developed in the Senate hearings was further investigation of the CIA and an effort to develop monitoring controls through congressional oversight committees.<sup>198</sup> As to the control of multinational corporations, bills have been introduced, and one has passed the Senate, which would provide for the reporting of transactions to and the gathering of information by the Department of Commerce.<sup>199</sup> Typical of the bills introduced was that presented by Senator Church to the Senate Committee on Foreign Relations and Commerce, S. 3151, which was introduced on March 16, 1970.<sup>200</sup> This bill would require domestically incorporated companies not only to supply information about the general level of business activity, but also to report all expenditures made in foreign countries.<sup>201</sup> Specifically, the bill would require reports to the Secretary of Commerce of: (1) the amount of total direct investment; (2) the amount of gross sales; (3) employ-

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193. *Hearings on Multinational Corporations and United States Foreign Policy: The International Telephone and Telegraph Company and Chile, 1970-1971, Part I and Part II Before the Subcommittee on Multinational Corporations of the Senate Comm. on Foreign Relations*, 93rd Cong., 1st & 2d Sess. (1973).

194. *Id.*, Part I, at 4-53, reprinting testimony of William R. Merriam, a representative for international trade of ITT.

195. *Id.*, Part I, at 59-357.

196. *Id.*, Part I, at 92-121, reprinting testimony of John A. McCone, director of ITT and former director of the CIA; *id.*, Part I, at 244-60, reprinting testimony of William V. Broe, Director of Clandestine Services for the Western Hemisphere, CIA.

197. *Id.*, Part I, at 263-76, reprinting testimony of William E. Quigley, Vice-Chairman of the Board of Directors of Anaconda Co.

198. See, e.g., *Hearings on the Activities of Multinational Corporations Abroad Before the Subcommittee on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 2d Sess. (1975).

199. See, e.g., S. 2839, 94th Cong., 2d Sess. (1976); S. 3151, 94th Cong., 2d Sess. (1976).

200. S. 3151 was introduced by Senator Frank Church on March 16, 1976.

201. *Id.* § 4.



ment data showing the number of employees and the level of compensation for both American and foreign employees; (4) the amount expended on research and development; (5) the name and location and nature of activity of each foreign affiliate; and (6) "the dollar amount of all expenditures made in the United States or in foreign countries . . . directly or indirectly through any agent or pursuant to any contractual arrangement."<sup>202</sup> The Secretary of Commerce would be required to make regular publication of these statistics.<sup>203</sup> Failure to report or falsification of reports could be punished by a fine of up to \$10,000, or by imprisonment for one year, or both.<sup>204</sup>

A similar bill, S. 2839, was reported to the Senate by the Committee on Commerce and passed by the Senate on May 18, 1976.<sup>205</sup> This bill included the general information required in the bill introduced by Senator Church. The bill would require that reports be made by United States business enterprises and their affiliates to a department designated by the President. The reports would include: (1) the location, nature and amount of investment in affiliates; (2) balance sheets of parent and affiliates; (3) employment data; (4) amount paid in taxes; and (5) the amount spent on research and development. The bill grants discretionary authority to the Secretaries of Commerce and Treasury to collect data and conduct surveys of financial activities of multinational companies.<sup>206</sup> Because the bill would not specifically require that all payments to foreign officials or agents be reported, as in the Church proposal, it eliminates the chief basis for discovery of efforts of United States companies to overtly or covertly affect foreign governments. It does, however, provide for a fine up to \$10,000 or imprisonment of natural persons up to a year or both for failure to report.<sup>207</sup>

There are no congressional proposals pending which would impose criminal sanctions on domestic corporations or their affiliates or any of their employees for acts subversive to foreign governments in nations where they do business. Nor is there any proposal to prohibit corporate cooperation with government agencies or prevent corporate activity to instigate efforts of United States government agencies which would be subversive of foreign governments.

The Department of State has taken the position that United States companies must obey the laws of host countries and refrain

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202. *Id.*

203. *Id.* § 5.

204. *Id.* § 8.

205. S. 2839, 94th Cong., 2d Sess. (1976).

206. *Id.* § 2.

207. *Id.* § 6.

from unlawful intervention in the domestic affairs of host countries. This position was strongly made by then Secretary of State Henry A. Kissinger in a speech before the United Nations on September 1, 1975.<sup>208</sup> Kissinger urged recognition of the economic benefits of multinational corporations while declaring that the United States will continue to seek cooperation with foreign governments to assure that all corporations obey the laws of host countries and remain clear of subversive activities.<sup>209</sup> Kissinger urged that all host nations treat enterprises equitably and without discrimination and that all governments create conditions which will ensure that contracts are negotiated openly and fairly.<sup>210</sup>

Deputy Secretary of State, Robert S. Ingersoll, appeared before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee on March 5, 1976.<sup>211</sup> At that time Ingersoll announced that the United States is now proposing a multilateral agreement on corrupt practices of corporations.<sup>212</sup> This treaty would apply to international trade and investment transactions with governments and would apply equally to those who offer or make improper payments and to those who request or accept them. This multilateral agreement would obligate host or importing governments: (1) to establish clear guidelines concerning the use of agents in connection with government procurement and other covered transactions; and (2) to establish appropriate criminal penalties for bribery and extortion by enterprises and officials.<sup>213</sup> While this proposed multilateral treaty would only deal with corrupt financial practices which undermine the integrity of host governments, the type of cooperation which could follow from this area would serve as a model for cooperation in dealing with other illegal and subversive activities of multinational companies.<sup>214</sup>

For the most part, the United States is prepared to leave the enforcement of host country criminal laws and prosecutions of subversive activity to the country in which the criminal acts occur or which are affected by criminal activity.<sup>215</sup> The Report of the Presi-

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208. Kissinger, *Global Consensus and Economic Development*, 73 DEPT. STATE BULL. 425-41 (1975).

209. *Id.* at 432-33.

210. *Id.* at 433.

211. Ingersoll, *Department Proposes Two New Actions to Deal With International Problem of Bribery*, 74 DEPT. STATE BULL. 412-15 (1976).

212. *Id.* at 414.

213. *Id.*

214. *Id.* at 415.

215. Leigh, *The Challenge of Transnational Corporate "Wrongdoing" to the Rule of Law*, 74 DEPT. STATE BULL. 642-47 (1976).

dential Task Force suggested the propriety of endorsement of a "code of conduct for multinational corporations" established by multilateral agreement which would go beyond prohibiting bribes and corrupt payments to specially establish that multinational corporations should "abstain from any improper involvement in local political activities."<sup>216</sup> Nevertheless, the United States recognition of extraterritorial application of criminal and regulatory laws does provide a basis for host country prosecution. By exercise of in personam jurisdiction and the invocation of extradition treaties with the United States, all nations have the basis for the enforcement of their laws against corporations which the United States recognizes as obligated to conform to local laws of the host country.

### CONCLUSION

The last decade has seen the rise of a growing concern about the activities of American based multinational corporations and their effects on revenue, capital movements, and labor. At the same time, the activities of American corporations operating abroad directly, or indirectly through subsidiaries, have created a concern about the effect of the activities on the competitive market, investor confidence, and American foreign policy. The use of criminal sanctions against corporations in order to compel compliance with American laws and public policy is one fully recognized in domestic law. Moreover, the extension of enforcement of regulatory law and laws having penal sanctions through extraterritorial application of American laws has been progressively broadened to the point that conduct resulting in direct and foreseeable consequences has been deemed subject to American regulatory and penal laws.

The most developed area of American law providing a basis for control of multinational activity is the antitrust laws, which have used both criminal and civil sanctions to maintain the competitive market. More recently, the conduct of American based firms which has concerned investors is that of bribes and corrupt payments to foreign officials. This conduct has led to proposals to penalize those corporations making such bribe payments and, in addition, compelling fuller disclosure of such payments. Finally, the activities of American corporations which have been subversive of foreign governments have given rise to congressional and State Department concern. This latter concern has resulted in proposals for multilateral treaties to control subversive activities of multinational corporations by host countries and by international organizations.

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216. REPORT OF THE SECRETARY OF COMMERCE, *supra* note 177, at 39-55, 57, 60-67.

A principal concern of the United States is to maintain a world competitive market with firms operating to maintain investor confidence. Moreover, there is concern that the activities of American based multinational corporations not interfere with internal politics of host countries or counteract official American foreign policy. Vigorous enforcement of American laws with the application of penal sanctions to maintain competition and honest business practices is valid and proper. Nevertheless, effective United States government action requires coordination with foreign host countries and the development of international understanding and treaty-code systems to complement domestic law.