1976

Questionable Corporate Payments Abroad: An Antitrust Approach

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Among the most far-reaching consequences of the Watergate inquiry have been the continuing disclosures of questionable domestic and foreign corporate payments. The revelations have shaken foreign governments, rocked American corporate management, and tarnished the image of American private enterprise both at home and abroad.

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These repercussions have spurred efforts to investigate questionable corporate payments and to devise appropriate executive and legislative responses. Landmark legislation has been enacted to curb corporate corruption of the domestic political process. The foreign aspects of the problem, however, have so far remained intractable. Despite agreement that payments by American-based firms to public and private officials overseas threaten both the foreign relations of the United States and the long-term interests of the firms themselves, no consensus on solutions has emerged.

The lack of consensus cannot be attributed to insufficient or controverted information about the mode of overseas corporate payments. Indeed, the extensive investigations undertaken by a presidential task force, the Securities and Exchange Commission (SEC), and three


8. The Task Force on Questionable Corporate Payments Abroad is a Cabinet-level group established by President Ford on March 31, 1976 "to conduct a sweeping policy review" of the overseas payments problems and "to formulate a coherent national policy" to deal with it. Bribes Hearings, supra note 1, at 81 (statement of Elliot Richardson, Secretary of Commerce and Task Force Chairman). The first major policy statement by the Task Force was embodied in a June 11, 1976 letter from the Task Force Chairman to Senator Proxmire, which is reproduced in Foreign Officials Hearing, supra note 4, at 39-67. The Task Force helped draft the Administration's bill to require corporations to report payments to the Secretary of Commerce. The bill was introduced as S. 3741, 91st Cong., 2d Sess., 122 Cong. Rec. S13807 (daily ed. Aug. 6, 1976), and H.R. 15119, 94th Cong., 2d Sess., 122 Cong. Rec. H8658 (daily ed. Aug. 10, 1976) [citations hereinafter to the Senate bill only]. See Towell, Foreign Bribes Bill Readied for Senate Action, 34 Cong. Q. Weekly Rep. 2533, 2386-37 (1976).

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congressional committees\(^\text{10}\) have painted a detailed portrait. The term
"corporate payments abroad" encompasses a variety of practices, some
legal under local law and some not, designed to influence the political
process of a foreign country—to aid a political party,\(^\text{11}\) to expedite
governmental services,\(^\text{12}\) or to shape a policy decision.\(^\text{13}\) Some payments
have been agents' or consultants' fees,\(^\text{14}\) which may be tax-deductible
business expenses.\(^\text{15}\) Some evidently have been bribes to government

against a number of American corporations to enjoin them from violating the Securities
Exchange Act of 1934, 15 U.S.C. § 78m(a) (1970), by failing to disclose questionable pay-
ments whose existence was material to investors. Lowenfels, \textit{Questionable Corporate Pay-
mants and the Federal Securities Laws}, 51 N.Y.U. L. Rev. 1, 3 (1976); SEC Report,
\textit{supra} note 7, at 2-6. The substance of the complaints filed by the SEC is described in
Solomon & Linville, \textit{supra} note 7, at 322-25. Pursuant to the consent decrees obtained by the
SEC, several corporations have issued reports on their overseas payments. The re-
ports are individually summarized in SEC Report, \textit{supra} note 7, at B-1 to B-20. Some-
what less detailed have been the filings made with the SEC by over 60 firms that
responded to the Commission's encouragement of "voluntary" disclosure of improper
payments. See Note, \textit{Disclosure of Payments to Foreign Government Officials Under the
Securities Acts}, 69 Haw. L. Rev. 1489, 1531-33 (1976). For criticism that the SEC's actions have transcended the agency's legal authority, see Lowenfels, \textit{supra} at 3-7; Note, \textit{supra}
at 1892-93.

A less sweeping investigation has been made by the Civil Aeronautics Board (CAB) to
ensure that international carriers have met the reporting and accounting requirements of the
Hearings, \textit{supra} note 6, at 80-86 (James Weldon, Jr., Acting Director, Bureau of Enforce-
ment, CAB).}

10. The congressional investigations have been spearheaded by the Senate Foreign
Relations Committee, the Senate Banking, Housing and Urban Affairs Committee, and the
House International Relations Committee. \textit{See notes 1, 4 & 6 supra} (citing congre-
ssional hearings).
11. \textit{E.g., Foreign Policy Hearings, \textit{supra} note 6, at 316-19, 329, 339-40 (Mobil Oil con-
mtributions in Italy); SEC Report, \textit{supra} note 7, at B-3 (Ashland Oil contributions in
Canada); Wall St. J., May 13, 1976, at 10, col. 2 (International Telephone and Telegraph
corporations in Chile); id., Dec. 31, 1975, at 10, col. 5 (Gulf Oil contributions in Italy
at Volvo); Foreside, May 28, 1975, at 20, col. 4 (Exxon contributions in Japan).}
12. SEC Report, \textit{supra} note 7, at 26-27. These "grease" payments are allegedly an
integral part of doing business in many countries. \textit{See Foreign Officials Hearing, \textit{supra}
note 4, at 41 (Task Force Letter); Bribes Hearings, \textit{supra} note 1, at 54 (statement of Ian
MacGregor, Chairman of United States Council of International Chamber of Commerce
(ICC), citing remarks of Lord Shavcross, Chairman of ICC Commission on Unethical
Practices).}
13. \textit{E.g., Lockheed Hearings, \textit{supra} note 4, at 2 (Lockheed payments made to secure
contracts with unidentified foreign governments); Wall St. J., May 24, 1976, at 30, col.
1 (Exxon kickbacks on natural gas contract with subsidiary of Italian government's oil
company); id., Dec. 22, 1975, at 1, col. 4 (Ashland Oil bribe made to obtain oil drilling
permits in Gabon); id., Aug. 19, 1975, at 7, col. 1 (United Brands payment made to
obtain banana tax reduction in Honduras).}
14. \textit{E.g., Foreign Policy Hearings, \textit{supra} note 6, at 107-08, 112-13, 120-22 (Northrup
Corp. paid foreign agents or consultants inflated fees or commissions, which were passed
on to officials in Saudi Arabia, NATO, and the Common Market countries); id. at 349-53,
377, 385-91 (same by Lockheed Aircraft Corp. in Saudi Arabia, Indonesia, and the
Philippines); Wall St. J., May 24, 1976, at 11, col. 1 (Otis Elevator's foreign payments in
unspecified countries often were "commission fees" and "consulting fees"); id., Aug. 8,
1975, at 8, col. 2 (Ashland Oil, Inc., paid "consultants" in Nigeria and Libya).}
15. \textit{Compare Comment, Payments to Foreign Officials by Multinational Corporations:
Bribery or Business Expense and the Effects of United States Policy, 6 CAL. W. INT'L
L. J. 360, 370-71 (1976) (payments to overseas agents tax-deductible as legitimate expense}
which are widely prohibited. Others have been political contributions, the legality of which differs from country to country. Many payments, whether legal or illegal, have been made indirectly through special funds, sales agents, or foreign subsidiaries. The flow of money has been obscured by a variety of disguises.

Though the mode of overseas corporate payments has been established, and indeed previously may have been known by certain United States officials, the motivation for such payments has been

of doing business, provided that they were reasonable compensation) with id. at 372 ("compensation" used simply as conduit for payments to government officials does not constitute deductible business expense). Cf. SEC Report, supra note 7, at 27-28 (making same distinction for purposes of imposing disclosure requirements).

16. E.g., Lockheed Hearings, supra note 4, at 2 (Lockheed Aircraft Corp. paid senior government officials in several countries); Wall St. J., Dec. 18, 1975, at 10, col. 3 (Merk & Co. paid primarily lower and middle-level bureaucrats in 36 countries); id., Apr. 14, 1975, at 1, col. 1 (United Brands Co. paid high government official in Honduras).

17. According to John J. McCloy, who chaired a special committee of the Gulf Oil Corporation's board of directors that investigated overseas payments, "[The Gulf committee] could not identify a single country where a bribe of a government official to induce a government to enter into a contract with any company for the supply of its product to that government was not illegal in that country." Bribes Hearings, supra note 1, at 6. See id. at 65 (Leonard Meeker, Center for Law and Social Policy); id. at 103 (Elliot Richardson, Secretary of Commerce).

18. See note 11 supra.

19. Compare, e.g., Foreign Policy Hearings, supra note 6, at 10, 33-35 (Gulf Oil's contributions apparently illegal under South Korean law) with id. at 320-21 (Mobil Oil's contributions apparently legal under Italian law, though provision of law requiring disclosure may have been violated) and Corporate Watergate, supra note 1, at 62 (political contributions from corporate funds legal in Canada).

20. The devious means employed to establish and maintain special funds for questionable payments abroad are described in MNC Activities Hearings, supra note 6, at 41-42 (statement of Donald Alexander, Commissioner of Internal Revenue). For an account of Northrop Corporation's intricate arrangements, see SEC Report, supra note 7, at B-17 to B-18. Foreign sales agents have been frequent conduits for payments to ranking government officials. E.g., MNC Activities Hearings, supra note 6, at 99 (Northrop Corp. in Saudi Arabia); Wall St. J., Nov. 17, 1975, at 1, col. 6 (Lockheed Aircraft Corp. in Indonesia). Payments have also been funneled through foreign subsidiaries. E.g., SEC Report, supra note 7, at B-3 (Ashland Oil, Inc., in Canada); Wall St. J., July 18, 1975, at 12, col. 2 (Mobil Oil Corp. in Italy); id., July 16, 1975, at 8, col. 3 (Exxon Corp. in Canada).

21. Virtually every questionable corporate payment has been concealed by means of falsified or inaccurate records. SEC Report, supra note 7, at 3, 13. Payments have also been masked through purported sales commissions, consulting fees, advertising expenses, insurance refunds, legal fees, and employee bonuses, MNC Activities Hearings, supra note 6, at 83 (statement of James Weldon, Jr., Acting Director, Bureau of Enforcement, CAB); through corporate lobbying "covers," Foreign Policy Hearings, supra note 6, at 124-26, 129-30, 155-67 (Northrop officer and director); through sham invoices and secret bank accounts, id. at 249, 248-49 (Archie Monroe, controller, Exxon Corp.); and through representation as entertainment expenses, Comment, supra note 15, at 361 n.4.

22. E.g., N.Y. Times, Nov. 21, 1976, at 1, col. 3 (U.S. embassy officials reportedly informed of South Korean "requests" for corporate payments); id., July 15, 1976, at 1, col. 8; id., July 18, 1976, § IV, at 2, col. 2 (Aluminum Co. of America reports to SEC that U.S. ambassador solicited $25,000 for foreign officials and political parties; country later reported to be Jamaica); id., Apr. 2, 1976, at 1, col. 1; id., Apr. 4, 1976, § IV, at 2, col. 2 (alleged CIA awareness of Lockheed bribes in Japan).
more difficult to ascertain. Most corporate representatives who admit having made payments that were illegal under local law insist that they did so in response to political pressure ranging from low-level bureaucratic stalling to high-level threats of imminent expropriation or expulsion. Available evidence suggests that such pressure is not uncommon. Yet recent disclosures make it increasingly clear that in many instances overseas payments have been made with little or no coercion by the host government. Rather, American firms have disbursed corporate funds to gain advantage over other firms seeking foreign government concessions or contracts. Indeed, notwithstanding the assertion of some American corporations that overseas payments must be made to meet foreign competition, a number of payments evidently have been made to overcome American competitors.

Payments made to influence foreign governmental decisions concerning the operations of American firms are the focus of this article. These payments can be viewed as an overseas manifestation of two interrelated problems that are of increasing domestic urgency: the problem of corporate accountability to shareholders and the gen-

23. Gulf Oil Corporation, for example, felt compelled to make $4 million in arguably illegal political contributions to the ruling party of the Republic of South Korea. Foreign Policy Hearings, supra note 6, at 9-10, 16-17, 21-26, 29-31; Report of the Special Review Committee of the Board of Directors of Gulf Oil Corporation, at 93-105, SEC v. Gulf Oil Corp., Civ. No. 75-0324 (D.D.C., filed Dec. 30, 1975) (report issued pursuant to injunctive order) (on file with Yale Law Journal). Lesser amounts may have gone to Korean politicians as a result of several commercial ventures into which Gulf was pressured. Id. at 111-22. Finally, some unascertainable portion of more than $4 million, billed as travel and entertainment expenses over a four-year period, was spent by Gulf to lubricate the "'wheels of progress'" in Korea. Id. at 105-08. One particular "'off-the-books'" fund, used to expedite routine governmental action, disbursed approximately $3,000 in three years. Id. at 108-11.

24. E.g., Foreign Policy Hearings, supra note 6, at 178-79 (Thomas Jones, president and chairman of the board, Northrop Corp.); id. at 333-56, 380-82 (D.J. Haughton, chairman of the board, Lockheed Aircraft Corp.). See SEC Report, supra note 7, at 25-26.

25. E.g., Foreign Policy Hearings, supra note 6, at 333-56, 371-72, 380-82 (D.J. Haughton, chairman of the board, Lockheed Aircraft Corp.); Lockheed Hearings, supra note 4, at 27 (statement of D.J. Haughton); Bribes Hearings, supra note 1, at 48-49 (Ian MacGregor, chairman of U.S. Council of International Chamber of Commerce). Half the businessmen replying to one survey stated that they felt such payments should be made to meet foreign competition. Kugel & Gruenberg, International Payoffs: Where We Are and How We Got There, CHALLENGE, Sept./Oct. 1976, at 13, 14.

26. Foreign Officials Hearing, supra note 4, at 42 (Task Force Letter). E.g., Bribes Hearings, supra note 1, at 39 (George Ball, Lehman Brothers, regarding Lockheed payments in Japan); Foreign Policy Hearings, supra note 6, at 136-37 (Richard Millar, director of Northrop Corp.); id. at 165-67, 178-79, (Thomas Jones, Northrop president and chairman of the board); Wall St. J., May 11, 1976, at 9, col. 1 (SEC alleges that General Tire and Rubber Co. paid agent to persuade French bank not to make loan to American competitor planning to build plant in Chile).
eral public\textsuperscript{27} and the problem of industrial concentration, which tends to encourage anticompetitive practices.\textsuperscript{28} Awareness of both aspects pinpoints the inadequacy of recent proposals for dealing with overseas corporate payments and aids evaluation of the potential effectiveness of existing remedies, both those designed to ensure corporate accountability and those designed to preserve competition.

This article examines recent proposals and notes that all neglect the anticompetitive effects of overseas payments. It observes the same shortsightedness in current efforts to initiate diplomatic solutions and to adapt existing legal mechanisms for ensuring corporate accountability. Finally, it argues that the antitrust laws provide a more effective approach to both the accountability and the anticompetitive aspects of corporate payments abroad.

I. Recent Proposals

Both the executive and the legislative branches recently made proposals for dealing with overseas payments. None of these proposals attacked the phenomenon as a threat to American competition overseas. The proposals of President Ford's Task Force on Questionable Corporate Payments Abroad seemed to conceive of overseas payments as essentially a diplomatic problem. Those of the SEC apparently

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regarded overseas payments as a problem solely of managerial accountability to shareholders. Near the close of the last term of Congress, the Senate finally recognized that neither of these conceptions provides a foundation for adequate policy. Yet it too failed to draft legislation confronting the anticompetitive character of many overseas payments.

The Task Force proposed legislation that would have treated all questionable expenditures as extortion payments and the entire problem as primarily one of foreign relations. American firms would have been required to report any payment above a certain amount to the Secretary of Commerce, who in turn would have disseminated the reports to other appropriate federal agencies. The affected foreign government would have been notified of such reports at the discretion of the Secretary of State. The reports would have been made public one year after being filed with the Secretary of Commerce, unless the Secretary of State or the Attorney General determined that disclosure would be inadvisable. Either civil or criminal penalties could have been imposed for failure to report.

If the sole motivation for overseas payments were host government coercion, the proposals of the President’s Task Force might be satisfactory. Mandatory disclosure of extortion payments, backed by stiff penalties for nondisclosure, might provide the truly victimized corporation with some incentive to resist extortion demands if the cost of resistance were low and to refer the matter to the State Department if the cost of resistance rose. By the same token, such a policy might spur diplomatic efforts to discourage would-be extorters. Intergovernmental dialogue may be the most promising means to reduce such extortion.

To characterize all overseas payments as extortion payments, and therefore as a diplomatic problem, however, is inaccurate; some payments are clearly bribes. Admittedly the line between extortion and bribery may prove illusory in many instances; corporations may readily accede to pressure because they see that competitive advantage can be gained thereby. Yet the distinction is important, because those questionable transactions in which American firms are more instiga-

29. See note 8 supra (citing sources). It should be noted that payments intended to influence the conduct of foreign governments concerning disputes with the United States could violate the Logan Act, 18 U.S.C. § 953 (1970).
31. Id. § 8(b).
32. Id. § 8(a).
33. Id. §§ 6, 7.
tors or partners than victims involved issues of managerial accountability and antitrust policy. To these issues the Task Force proposals do not effectively speak. Aggressive competitors might continue to conceal their questionable practices rather than risk disruption of profitable overseas transactions. Where such corporations did decide to disclose, they might do so only to encourage acquiescence by the executive branch, thereby involving the United States government more deeply in illicit practices abroad. Even if the executive branch did take action, diplomatic initiatives would hardly be appropriate: entreat foreign governments to keep their officials from accepting proffered payments from American corporations would be awkward at best.

In contrast to the Task Force proposals, the bill introduced at the request of the SEC focused on perceived weaknesses in the Securities Exchange Act of 1934 and sought to remedy them through amendments imposing stringent accounting requirements. The bill thus implied that the SEC, the traditional monitor of managerial improprieties, would be the appropriate body to combat questionable payments abroad. Rigorous recordkeeping would presumably restrict managerial conduct that might reduce the value of the corporation's securities.

This vision of the questionable corporate payments problem clearly differs from that of the Task Force. But it is a vision no less narrow. For the Task Force, the problem is one of diplomacy; for the SEC, it is one of accountability to shareholders. Yet owners of registered securities are not the only ones injured when their corporation bribes a foreign official, makes an improper political contribution, or pays inflated agents' fees. Indeed, even where shareholders profit from their corporation's overseas payment, competitors, other American firms in the foreign market, and the foreign government itself may suffer economic harm. Because the SEC and the Task Force failed to appreciate the anticompetitive aspects of questionable corporate payments, their proposals provide no remedies for these victims of the practice.

On their own initiative, members of the 94th Congress introduced numerous bills and amendments to combat the problem of question-

34. See p. 219 & note 26 supra.
35. See p. 218 & note 22 supra.
37. Foreign Officials Hearing, supra note 4, at 5 (Roderick Hills, SEC Chairman).
The diversity of these proposals testified more to a broad congressional desire for action than to a congressional consensus on what action to take. The most sweeping proposals to pass either House were those embodied in the bill reported by the Senate Banking, Housing and Urban Affairs Committee and introduced by the Committee chairman, William Proxmire. The bill passed the Senate unanimously but reached the House too late in the term to be considered. The bill incorporated the recordkeeping proposals of the SEC, but it went beyond the SEC’s requirements of disclosure to investors. First, it would have prohibited corporations under SEC jurisdiction from “corruptly” offering or making payments to any foreign individual or political party for the purpose of inducing the

38. Two laws enacted during the last Congress had provisions concerning questionable payments abroad. The Tax Reform Act of 1976, Pub. L. No. 94-455, [1976] U.S. Code Cong. & Ad. News (90 Stat. 1520), requires unfavorable tax treatment of such payments: § 1065(a)(1) includes as taxable income of American shareholders of a “controlled foreign corporation” their pro rata share of corporate funds expended for illegal payments under I.R.C. § 162(c) (see pp. 226-27 infra); § 1065(a)(2) includes as taxable dividends of American shareholders of a “Domestic International Sales Corporation” (DISC) their pro rata share of corporate funds expended for illegal payments under I.R.C. § 162(c) (see pp. 226-27 infra); and, § 1065(b) provides that earnings and profits of a foreign corporation cannot be reduced for tax purposes by the amount of illegal payments under I.R.C. § 162(c) (see pp. 226-27 infra). The International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, [1976] U.S. Code Cong. & Ad. News (90 Stat. 729), requires American firms to submit to the Secretary of State, and through him and the President to Congress, “a description of each payment, contribution, gift, commission, or fee” in connection with certain “sales of defense articles or defense services,” id. § 604(a), (b), and authorizes the President to prohibit, limit, or condition such payments by regulation, id. § 604(b).

A number of other congressional proposals failed to become law. Two Senate bills emphasizing public disclosure of questionable payments were introduced. S. 3133, 94th Cong., 2d Sess. (1976), reprinted in Foreign Officials Hearing, supra note 4, at 30-31; S. 3379, 94th Cong., 2d Sess. (1976), reprinted in Foreign Officials Hearing, supra note 4, at 32-36. These bills were superseded by a bill, cited at note 39 infra, that eventually passed the Senate.

In the House three bills were introduced. H.R. 7563, 94th Cong., 1st Sess., 121 Cong. Rec. H4853 (daily ed. June 3, 1975), which died in the International Relations Committee, would have required the State Department to monitor overseas activities by American firms and report federal violations to the appropriate governmental agency. H.R. 7339, 94th Cong., 1st Sess., 121 Cong. Rec. H4952 (daily ed. June 3, 1975), which died in the Judiciary Committee, would have made bribery of foreign governments, officials, or political parties a criminal violation. MNC Activities Hearings, supra note 6, at 4 (Rep. Solarz). H.R. 14681, 94th Cong., 2d Sess., 122 Cong. Rec. H7221 (July 1, 1976), which passed the House but died in the Senate, would have provided for “termination of investment insurance and guaranties issued by the Overseas Private Investment Corporation in any case in which the investor makes a significant payment to an official of a foreign government for the purpose of influencing the actions of such government.” H.R. 14681, 94th Cong., 2d Sess. preamble (1976).

42. S. 3664, 94th Cong., 2d Sess. § 1 (1976).
recipient to exert influence on a foreign government to assist in "obtaining or retaining business . . . or influencing legislation or regulations of that government." Second, it would have applied the same prohibition to all corporations beyond the reach of the 1934 Act.

Although the Proxmire bill's prohibition properly would have encompassed the thousands of corporations outside the SEC's jurisdiction, its breadth would have raised considerable administrative difficulties. The bill would have vested the SEC and the Department of Justice with vast new enforcement responsibilities, but it would not have provided them with an underlying conception of the overseas payments problem that would identify which payments are most pernicious and therefore merit greatest attention. Had the Proxmire bill, in contrast to the Task Force and SEC proposals, stressed that overseas payments injure American competition for foreign markets, it would have given both purpose and direction to the enforcement efforts of the SEC and the Department of Justice.

Both the prospects for and the desirability of enacting the various recent proposals depend largely on whether the current international and domestic legal structures prove capable of meeting the challenge posed by questionable corporate payments abroad. The State Department's belated support for the voluntary code of conduct for transnational enterprises adopted by the Organization for Economic Cooperation and Development (OECD) hardly justifies complacency. The Task Force concedes as much by outlining further international efforts being made through the General Agreement on Tariffs and

42. Id. § 3.
43. According to the Senate Banking, Housing and Urban Affairs Committee, "[s]ome 20,000 large and small U.S. based exporters are not currently subject to SEC reporting requirements." S. Rep. No. 1031, 94th Cong., 2d Sess. 9 (1976).
44. The Committee did not intend the bill to prohibit "low-level facilitating payments sometimes called 'grease payments.'" Id. at 6. The Committee did not differentiate among the remaining kinds of payments that would have been covered by the bill.
45. The OECD's Declaration on International Investment and Multinational Enterprises was endorsed by 23 of the 24 member-states in June 1976 (with Turkey abstaining). OECD Press Release A(76) 20 (June 21, 1976), reprinted in 15 INT'L LEGAL MATERIALS 967, 972 (1976). This code of conduct has been touted as one element of the "current Administration approach" to the problem of overseas corporate payments. Foreign Officials Hearing, supra note 4, at 56-57 (Task Force Letter). The code institutes no enforcement mechanism; it simply exhorts firms not to make illegal or improper payments. The purely hortatory character of the code has led one experienced international observer to describe it as "little more than a pious expression of disapproval." Bribes Hearings, supra note 1, at 40 (George Ball, Lehman Brothers).

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Trade (GATT) and the United Nations Commission on Transnational Corporations.

The present complex of United States laws, however, cannot so easily be discounted as impotent. It is appropriate to consider at length the extent to which existing remedies applicable to domestic manifestations of the problems of corporate accountability and industrial concentration can be brought to bear on their overseas counterparts. The conventional wisdom is that even outright bribery of foreign officials does not violate any American statutes. This conventional wisdom, however, merits reexamination.

II. Questionable Payments Abroad: Ensuring Corporate Accountability

A. The Inadequacy of Public Remedies

Public control over managerial conduct is presently exercised primarily through obligatory disclosure of corporate activities. Certain federal statutes and regulations require management to supply infor-

49. Foreign Officials Hearing, supra note 4, at 57 (Task Force Letter). This initiative was prompted by S. Res. 265, 94th Cong., 1st Sess. (1975), reprinted in Protecting the Ability of the United States to Trade Abroad: Hearings on S. Res. 265 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 94th Cong., 1st Sess. 4-6 (1975). The resolution noted the widespread “practices of bribery, indirect payments, kickbacks, unethical political contributions, and other such similar disreputable activities.” Id. at 5. It called on the President’s Special Representative for Trade Negotiations and other departmental officials to initiate multilateral negotiations for the purpose of incorporating into GATT “an appropriate code of conduct and specific trading obligations among governments, . . . including suitable sanctions.” Id. at 6. Prior to the adoption of the resolution, Ford Administration officials dissented from the congressional view that an agreement among the 102 nations participating in GATT would be more effective than the anticipated OECD code of conduct. See, e.g., id. at 17-18, 21-22, 29-30 (Frederick Dent, Special Representative for Trade Negotiations); id. at 31-35 (Travis Reed, Assistant Secretary of Commerce for Domestic and International Business). Nevertheless, the resolution passed by a vote of 93-0. Wall St. J., Nov. 13, 1975, at 12, col. 3.


51. This is particularly so if the government commits itself to vigorous enforcement of all applicable laws. See Foreign Officials Hearing, supra note 4, at 56 (Task Force Letter); N.Y. Times, Oct. 14, 1976, at 53, col. 1 (reporting formation of joint SEC-Justice Department task force to press criminal charges in corporate bribery cases).

52. See, e.g., CORPORATE WATERGATE, supra note 1, at 59; Comment, supra note 15, at 362, 367.
mation to governmental agencies. Others mandate the provision of information to shareholders. The common assumption is that corporate management will be reluctant to engage in illegal or improper activities if it must inform the government or shareholders about those activities.

A number of federal disclosure requirements apply to questionable corporate payments abroad. The Agency for International Development (AID), for example, requires American firms whose sales to foreign governments are financed by AID loans to report all commissions or fees paid.53 Likewise, the Export-Import Bank (Eximbank) requires the reporting of any commissions or fees paid by American firms in connection with foreign governmental purchases funded through Eximbank loans.54 The Defense Department has similar regulations applicable to foreign military sales.55 Firms that file false statements with these federal agencies may incur criminal penalties.56

If corporations characterize questionable payments as tax-deductible business expenses, they may run afoul of the Internal Revenue Service (IRS). Section 162(c)(1) of the Internal Revenue Code provides that payments to foreign governmental officials cannot be deducted if such payments would have violated federal law, had that law been appli-

53. 22 C.F.R. § 201.65(k) (1975).
54. 12 C.F.R. § 401.3(c) (1976).
55. Every Defense Department procurement contract must contain a covenant against contingent fees, 32 C.F.R. § 1-503 (1975), and every contractor must make written representations that it has complied with this prohibition, id. § 1-506.1. Misrepresentations in this regard may be penalized, inter alia, through reconsideration of the offending contractor’s eligibility for future bidding or through Justice Department action. Id. § 1-508.3.
cable to the transaction. Under § 162(c)(2), payments to persons overseas other than governmental officials are nondeductible if the taxpayer would be subject to criminal penalties or loss of business license under state or federal law. Although the IRS has not routinely required taxpayers to furnish information on the payment of bribes and kickbacks, it has begun an extensive investigation of corporate tax returns for unlawful deductions and related tax violations.

Of all the governmentally imposed disclosure requirements, only those of the SEC mandate a direct flow of information to shareholders. Corporate management has no express statutory obligation to reveal corporate payments abroad to corporate shareholders. By regulation, however, the SEC does require the disclosure to investors of all “material” information as well as all information whose concealment would make released information misleading. The SEC has taken the position that improper payments have an important bearing on the quality of a corporation's earnings. Moreover, such payments are pertinent to “an evaluation of management’s stewardship over corporate assets.” Although payments significant in amount or relating to a significant amount of business are definitely material, the SEC has refrained from making such significance the touchstone of materiality. Rather, it has decided to weigh, in each case, “the benefits of . . . disclosure against its assessment of the extent of investor interest and the cost and utility of the particular disclosure.”

This ad hoc balancing scheme is not likely to provide an effective

57. The prohibited payments need not be direct. See I.R.C. § 162(c)(1); 26 C.F.R. § 1.162-18(a)(2) (1976).
58. See generally Note, Federal Income Taxation—Public Policy and the Deductibility of Kickbacks Under § 162(c)(2), 35 Ohio St. L.J. 686 (1974). The IRS has interpreted this provision to permit deduction of foreign payments to such individuals where the payments are made (i) in keeping with locally accepted practice, (ii) with the knowledge of the recipient's employer, and (iii) without intent to corrupt. MNC Activities Hearings, supra note 6, at 43 (statement of IRS Commissioner Donald Alexander).
61. SEC Report, supra note 7, at 18-19.
62. Id. at 19-20.
63. Id. at 14-15, 29.
64. Id. at 21. This weighing process entails consideration of (i) whether the payment was made within the corporation's financial accountability system, (ii) the legality of the payment under local law, (iii) the identity of the recipient, (iv) the amount of money paid, (v) the extent of management's knowledge or participation, (vi) whether payments have become an integral part of the corporation's operations, and (vii) whether payments have ceased. Id. at 23-32. Before these official guidelines were articulated, similar ones were proposed in Lowenfels, supra note 9, at 28-33.
weapon against questionable overseas payments. Although neither the SEC nor the courts are inexperienced at defining "materiality" in instances of improper corporate payoffs, the notion remains too malleable to anchor guidelines for corporate conduct. Moreover, together, the materiality requirement and the jurisdiction of the SEC limit considerably the scope of disclosure. The SEC is not authorized to require disclosure of information important to the public but not of interest to investors. For example it does not, and arguably cannot, require disclosure of the names of payment recipients or the specific purpose of the payments. Nor can it require disclosure by any corporations that do not issue federally registered securities. The focus of SEC law enforcement efforts is simply too narrow to comprehend the problem of overseas corporate payments. The even narrower scope of the other disclosure regulations discussed above makes them all the more inadequate. These public remedies thus cannot ensure corporate accountability.

B. The Inadequacy of Private Remedies

The limited scope of public disclosure requirements enhances the importance of private remedies to ensure corporate accountability. Yet the primary vehicle for protecting shareholders from managerial

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65. See, e.g., SEC v. Kalvex, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,226 (S.D.N.Y. 1975) (failure to disclose in proxy material that officer and director received kickbacks from firm's domestic transactions held material omission); Cooke v. Teleprompter Corp., 334 F. Supp. 467 (S.D.N.Y. 1971) (failure to disclose in proxy material that chief executive officer had been convicted of bribery of municipal officials held material omission); note 9 supra.

66. See, e.g., Lowenfels, supra note 9, at 5-7 (criticizing SEC for straining notion of materiality in combating corporate payoffs); Note, Foreign Bribes and the Securities Acts' Disclosure Requirements, 74 MICH. L. REV. 1222, 1232-38 (1976) (concluding that materiality is impractical basis for disclosure requirements concerning overseas payments).

67. See Solomon & Linville, supra note 7, at 328 n.118. Evidence from shareholder meetings and empirical studies lends support to the corporations' claim that information about improper payments is not of concern to investors. See N.Y. TIMES, Oct. 5, 1975, § 6 (Magazine), at 19, col. 1, and 101, col. 5 (describing lack of shareholder interest evinced at annual meetings of United Brands Co. and Exxon Corp.); id., Nov. 12, 1976, § D, at 5, col. 1 (SEC study of 75 corporations implicated in questionable payments indicates only slight, ephemeral impact on their stock prices).

68. "[SEC] disclosure is designed to protect the interests of the prudent investor. It is, arguably, not an appropriate mechanism to deal with the full array of national concerns caused by the problem of questionable payments." Foreign Officials Hearing, supra note 4, at 56 (Task Force Letter). See Note, supra note 66, at 1239-42.

69. See Foreign Officials Hearing, supra note 4, at 52 (Task Force Letter); Murphy, supra note 9, at 482; Solomon & Linville, supra note 7, at 334-35.
improprieties—the derivative suit—faces major obstacles to its successful employment against managers involved in questionable payments abroad.

These obstacles exist despite the high fiduciary standards to which corporate officers and directors are ostensibly held. Officers and directors are duty-bound to refrain from self-dealing at the expense of the corporation,71 to ensure that their activities do not violate the law or the corporation's charter,72 and to exercise diligently their supervisory responsibilities to avoid waste of corporate assets.72 Notwithstanding these seemingly exacting duties, courts usually afford officers and directors considerable discretion in the management of a corporation's affairs, so long as they exercise reasonable business judgment in good faith.74

In practice, the business judgment rule tends to insulate management from liability to the corporation unless the conduct in question is clearly wrongful and, moreover, is actually injurious to the corporation.75 Clear wrongfulness includes violation of the law,76 contravention of public policy,77 and self-dealing.78 Actual injury is most

71. E.g., Central Ry. Signal Co. v. Longden, 194 F.2d 310, 318 (7th Cir. 1952); Diedrick v. Helm, 217 Minn. 483, 493, 14 N.W.2d 918, 919 (1944). See generally I G. Hornstein, Corporation Law and Practice § 441 (1959 & Supp. 1968); W. Knepper, Liability of Corporate Officers and Directors § 1.03, at 7 (2d ed. 1973).
76. E.g., Miller v. American Tel. & Tel. Co., 507 F.2d 759, 762 (3d Cir. 1974); Roth v. Robertson, 64 Misc. 343, 345, 118 N.Y.S. 351, 353 (Sup. Ct. 1909).
78. Self-serving disloyalty to the corporation can never be rationalized as a business judgment. Consequently, the courts do not require derivative suits alleging a breach
demonstrable where the corporation has suffered a measurable net financial loss, though damage to corporate reputation or shareholder relations may suffice to meet this requirement.\footnote{79} If both actual injury and clear wrongfulness are proven, the managers involved may be subject to claims for damages.\footnote{80}

Alternatively, a court might find that breach of managerial duty is grounds for injunctive remedy where both clear wrongfulness and actual injury are established. The recent Third Circuit decision in \textit{Miller v. American Telephone \\& Telegraph Co.}\footnote{81} is suggestive in this regard. There the court reversed the dismissal of a derivative suit seeking to compel the defendant's directors to collect a $1.5 million debt owed the corporation by an American political party. The court held that where the failure to collect the debt allegedly constituted not only a lack of due diligence but also a campaign contribution in violation of federal law, a derivative suit could be brought under New York law.\footnote{82} The unpaid debt itself met the actual injury requirement.\footnote{83}

Courts unwilling to award damages or issue an injunction might allow shareholder remedies in the form of restitution. This remedy has been employed in cases of self-dealing to recover the corporate salaries paid to or the profits realized by disloyal officers and directors.\footnote{84} Its applicability is not limited to self-dealing, however, as the old New York Supreme Court decision in \textit{Roith v. Robertson}\footnote{85} indicates. There the court held that shareholders could force the corporate manager to account for an illegal payment of $800 made to ensure the undetected operation of the corporation's amusement park on Sundays.\footnote{86} The court explicitly rejected the argument that the

\begin{itemize}
\item \textit{Id.} at 762-63.
\item \textit{Id.} at 763.
\item \textit{Id.} at 765.
\item \textit{Id.}, \textit{cit.} at 766-67.
\item \textit{Id.} at 762-63.
\item \textit{Id.} at 763.
\item \textit{Id.} at 765.
\item \textit{Id.} at 766-67.
\item \textit{Id.}, \textit{cit.} at 766-67.
\item \textit{Id.} at 763.
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\item \textit{Id.}, \textit{cit.} at 766-67.
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\item \textit{Id.}, \textit{cit.} at 766-67.
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\item \textit{Id.}, \textit{cit.} at 766-67.
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\item \textit{Id.}, \textit{cit.} at 766-67.
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\item \textit{Id.} at 765.
\item \textit{Id.}, \textit{cit.} at 766-67.
\item \textit{Id.} at 763.
\item \textit{Id.} at 766.
\item \textit{Id.} at 765.
Questionable Corporate Payments Abroad

manager was not liable because he made the payment in the interest of the corporation. 87

The difficulty with relying on Roth and Miller in a derivative suit arising from questionable corporate payments abroad, however, is twofold. First, particularly if the payment resulted in a lucrative procurement contract or a favorable regulatory decree, a court might be unwilling to find injury to the corporation. Second, even were a court willing to infer injury to corporate reputation or to hold the payment itself an injury, it might be unwilling to rule against management without a demonstration that the payment was illegal under United States law. 88 Significantly, the illegality of the alleged managerial conduct was stressed by both the Miller 89 and the Roth 90 courts. The remainder of this article argues that corporations making certain overseas payments do violate the antitrust laws. Enforcement of these laws would thus not only preserve competition but also facilitate derivative actions against corporate officers and directors who authorize such payments.

III. Questionable Payments Abroad: Preserving Competition

The applicability of the antitrust laws to the problem of overseas corporate payments has generally been ignored or discounted. 91 The recent decisions of the Federal Trade Commission to investigate allegedly anticompetitive payments by General Tire and Rubber Company in Morocco 92 and by Lockheed Aircraft Corporation in Europe and Japan 93 suggest that reconsideration of this issue is timely and worthwhile. Such a reconsideration must examine three possible characterizations of questionable payments abroad: as conspiracies in re-

87. Id.
89. 507 F.2d at 763.
90. 64 Misc. at 345, 118 N.Y.S.2d at 353.
91. See, e.g., MNC Activities Hearings, supra note 6, at 87-93 (statement of Donald Baker, Deputy Assistant Attorney General, Antitrust Division, focusing exclusively on Sherman Act, and stressing problems of sovereign immunity, act of state, foreign governmental compulsion, international comity, and substantiality); Foreign Officials Hearing, supra note 4, at 52 (Task Force Letter, asserting that antitrust laws are “generally inapplicable” and face “substantial constraints” on their “justiciable and enforceability”); Herlihy & Levine, Corporate Crisis: The Overseas Payment Problem, 8 Law & Pol. Int'l Bus. 547, 604-07 (1976) (concluding that Sherman, Robinson-Patman, and FTC Acts have “rather narrow application in the area of questionable overseas payments”).
straint of trade or attempts to monopolize under the Sherman Act,94 as brokerage fees under the Robinson-Patman Act,95 and as unfair methods of competition under the Federal Trade Commission Act.96 Before considering in turn the validity of each of these characterizations, it is important to explore several initial obstacles to the application of the antitrust laws to overseas payments.

A. Threshold Considerations: Extraterritoriality and Governmental Involvement

The two fundamental questions concerning the applicability of the antitrust laws to overseas payments are (i) whether these laws can reach anticompetitive conduct abroad and, (ii) if so, whether they can reach such conduct if foreign governments are involved. Both of these questions were implicitly raised—and answered negatively—in the landmark case of American Banana Co. v. United Fruit Co.97 In that case the Supreme Court affirmed the dismissal of a complaint arising from the defendant's instigation of the Costa Rican government's seizure of part of the plaintiff's plantation. A high Costa Rican official subsequently obtained title to the property in an irregular ex parte judicial proceeding and sold it to agents of the defendant. In an opinion by Justice Holmes, the Court held that the Sherman Act did not apply to actions occurring outside the United States or involving sovereign acts that were lawful in the country in which they were performed.98

American Banana's holding against overseas application of the Sherman Act has been gradually chipped away,99 and the extension of the major antitrust statutes to overseas conduct is now firmly established.100 The jurisdictional issue of extraterritoriality in a given case

95. Id. § 13(c) (1970).
98. 213 U.S. at 357-59. For a fascinating critique of the Holmes opinion, see J. Noonan, Persons and Masks of the Law 107-10 (1976).
100. See note 99 supra (Sherman Act §§ 1, 2); Baysoy v. Jessop Steel Co., 90 F. Supp. 303, 305 (W.D. Pa. 1950) (Robinson-Patman Act § 2(c)); Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944) (FTC Act § 5).
now turns on whether the conduct has substantial effect on American commerce at home or abroad.\footnote{101}

Whether conduct abroad is held to affect United States commerce may depend, in part, on whether the defendant is an American citizen. Where foreign nationals alone are involved, courts may be reluctant to take jurisdiction in the absence of a showing that the conduct in question had a deliberate and substantial effect on United States foreign or domestic commerce.\footnote{102} Where an American citizen is involved, in contrast, courts are more likely to assert jurisdiction and consider the effect of the citizen’s conduct on United States commerce as a question going to the merits of the antitrust claim.\footnote{103} On the merits, the substantiality requirement may vary, depending on the statutory basis for the complaint.\footnote{104}

Although \textit{American Banana}'s ban on overseas application of the antitrust laws has been effectively overruled, the case lives on through its implicit holding that anticompetitive conduct involving foreign governments does not give rise to antitrust liability.\footnote{105} Application of this aspect of \textit{American Banana} to overseas payments is likely to depend on judicial analysis of the act of state doctrine and, in rare instances, of the doctrine of sovereign immunity. These doctrines implicate two interrelated questions: the extent to which a government official’s conduct is a sovereign act and the extent to which the court’s intervention in the matter would cause friction between the United States and the foreign state or between the judicial and executive branches of government.

The doctrine of sovereign immunity shields a sovereign state from "the exercise by another state of jurisdiction to enforce rules of law."\footnote{106} Available only to a defendant foreign government or its agents, the doctrine would seem to have little applicability to litigation

\footnote{101. See, e.g., Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 647 (2d Cir.), \textit{cert. denied}, 352 U.S. 871 (1956). \textit{See generally} W. \textsc{Fugate}, \textit{supra} note 97, \S\ 2.1 at 30, \S\ 2.8.}

\footnote{102. \textit{See} United States v. \textit{Aluminum Co. of America}, 148 F.2d 416, 443-45 (2d Cir. 1945) (L. \textsc{Hand}, \textsc{J}).}

\footnote{103. \textit{See} Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 817 (D.C. Cir. 1968), \textit{cert. denied}, 393 U.S. 1093 (1969); \textit{Branch v. FTC}, 141 F.2d 31, 35 (7th Cir. 1944). \textit{See generally} W. \textsc{Fugate}, \textit{supra} note 97, \S\S\ 2.8, .9, .I0.}

\footnote{104. Whether certain conduct affects American foreign commerce is a substantive as well as a jurisdictional issue. Once it is determined that the conduct has sufficient connection with the United States to support federal jurisdiction, a court must then consider whether the conduct is sufficiently anticompetitive to come within the prohibition of the statute on which the prosecution or complaint is based. \textit{See} pp. 241-42, 248-49 \textit{infra}.}

\footnote{105. \textit{See}, e.g., notes 121, 125-26 \textit{infra} (citing cases); W. \textsc{Fugate}, \textit{supra} note 97, \S\ 2.21.}

\footnote{106. \textit{Restatement (Second) of Foreign Relations Law} \S\ 65 (1965).}
over payments abroad. Indeed, foreign governments would more likely be plaintiffs in such actions than defendants.\textsuperscript{107}

Even were a foreign government the object of a payments suit, the sovereign immunity doctrine might not be applied. Generally both the State Department and the courts have restricted the doctrine's protection to noncommercial acts of foreign states.\textsuperscript{108} Therefore, many instances of overseas payments to obtain governmental contracts or concessions would seem to fall outside the protective scope of sovereign immunity.\textsuperscript{109} The restrictive view of the doctrine, however, has so far been taken only in cases in which state-owned or state-operated commercial ventures were defendants.\textsuperscript{110} Thus, one can only speculate whether the restriction would be deemed pertinent in cases in which governments or their officials were defending acts involving improper receipts of payments.\textsuperscript{111} Since most overseas payments suits are likely

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\textsuperscript{107} Cf. Pfizer, Inc. v. Government of India, 1976-1 Trade Cas. \textsuperscript{c} 60,892 (8th Cir. 1976) (granting foreign government standing to bring treble damage antitrust action against American corporations). This case is discussed at pp. 232-33 infra. \textsuperscript{108} Alfred Dunhill of London, Inc. v. Republic of Cuba, 96 S. Ct. 1854, 1863-66 (1976) (dictum); letter from Monroe Leigh, Legal Adviser, Department of State, to Robert Bork, Solicitor General (Nov. 29, 1976), \textit{reprinted in id.} at 1867-69. Although the doctrine of sovereign immunity has long been recognized by federal courts, see The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), the restrictive view of the doctrine is a more recent development. See letter from Jack Tate, Acting Legal Adviser, Department of State, to Philip Perlman, Acting Attorney General (May 19, 1952), \textit{reprinted in 26 Dept. State Bull.} 984 (1952); National City Bank v. Republic of China, 31 U.S. 336, 361 (1955) (relying on Tate letter). Notwithstanding its general policy, the State Department has suggested that courts grant sovereign immunity in certain cases where the dispute arguably involved commercial acts. The courts have invariably deferred to the Department's suggestion in these cases. See, e.g., Southeastern Leasing Corp. v. Stern Dragger Belogorsk, 493 F.2d 1223 (1st Cir. 1974). Since Congress recently wrote the restrictive view of sovereign immunity into statutory law and stressed that claims for such immunity should be determined by the courts, deference to the State Department may diminish. See 28 U.S.C.A. \textsuperscript{c} 1602 (West Dec. 1976 Pamphlet).\textsuperscript{109} A close question might arise where the payments were made to influence military procurement decisions, since the transaction, though commercial, would stem from the sovereign state's need to support its armed forces. Compare Acotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974) (sovereign immunity bars recovery against government purchaser for money owed on contract for sale of military equipment) with Rovin Sales Co. v. Socialist Republic of Romania, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975) (sovereign immunity does not bar recovery against government for breach of wine distributorship contract). The new congressional guidelines, which state that the "nature" of the transaction, not its "purpose," is dispositive, do not unambiguously resolve this question. See 28 U.S.C.A. \textsuperscript{c} 1603(d) (West Dec. 1976 Pamphlet).\textsuperscript{110} See Alfred Dunhill of London, Inc. v. Republic of Cuba, 96 S. Ct. 1854, 1865 (1976) (citing cases).\textsuperscript{111} Conceivably, courts might be reluctant to find an exception to sovereign immunity where the acts involved were improper, because judicial resolution of the dispute might embarrass the foreign government. Cf. Heaney v. Government of Spain, 445 F.2d 501, 504 (2d Cir. 1971) (immunity granted, absent suggestion by State Department, in action based on defendant government's alleged contract with plaintiff to agitate against another government; court held that contract was potentially embarrassing political activity and rejected plaintiff's argument that impropriety of contract made it unfit for doctrine's protection). \end{flushleft}
to be brought against corporations, however, even an expansive view of the sovereign immunity doctrine would not pose a major obstacle to antitrust action against overseas payments.

In contrast, the broader act of state doctrine is likely to be raised in virtually every case of overseas payments. The core of this doctrine, which predates *American Banana*, is that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”\(^{112}\) A “principle of decision . . . compelled by neither international law nor the Constitution,”\(^{113}\) the act of state doctrine derives from the prudential judgment that judicial inquiry into the legitimacy or propriety of foreign governmental acts might generate international friction and impair the diplomatic function of the executive branch.\(^{114}\) Thus, the doctrine may apply to any alleged governmental action, whether or not it was tantamount to compulsion,\(^{115}\) and whether or not the governmental actor is a party to the lawsuit.\(^{116}\) Of course, if the foreign government itself brings the action, the act of state doctrine is an untenable defense, for the government in effect is calling for judicial inquiry. The analysis that follows focuses on the use of the act of state defense where the foreign government is not the plaintiff.

Although a court might interpret the act of state doctrine to preclude any consideration of a foreign official’s conduct,\(^{117}\) this approach seems to invoke the doctrine prematurely. The act of state doctrine is not an appropriate defense in every case involving foreign governmental conduct. Initial analysis of the character of that involvement should precede a judicial determination that the act of state doctrine applies.\(^{118}\)

Such analysis should ordinarily focus on the forcefulness and formality of the foreign government’s involvement.\(^{119}\) Under certain cir-

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116. E.g., notes 123-26 infra (citing cases).
118. Cf. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1294 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (in determining relevance of Paiket v. Brown, 317 U.S. 341 (1942), in domestic antitrust action, proposition that there was state involvement “only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter”).
119. See W. Fugate, supra note 97, § 2.21, at 76 (arguing that anticompetitive conduct should be shielded only if required by foreign law or directed by foreign executive authority).
cumstances a corporation's defense may merge the act of state doctrine with the governmental compulsion doctrine, which has developed independently but is an aspect of the broader theory. Known in its domestic context as the *Parker v. Brown* doctrine, this defense asserts that a private party does not violate the antitrust laws by performing acts required of it by a sovereign state. In defending against an antitrust suit arising from an overseas payment, a corporation might invoke the governmental compulsion defense by claiming that its payment had been extorted by the foreign government. A court's ruling on this issue would depend largely on its assessment of the degree of governmental compulsion that the doctrine presumes.

A strict test for governmental compulsion gains support from the progressive limitation of the *Parker v. Brown* doctrine in domestic cases. Recently the Supreme Court has held the doctrine inapplicable to anticompetitive conduct "'prompted'" by state action and to anticompetitive conduct that could not be terminated without state permission but that could have been avoided in the first instance by the defendant. These holdings suggest that in the foreign context courts should permit only a narrow governmental compulsion defense. The defendant should carry the burden of proving that its conduct was compelled and that the compulsion derived from the government itself.

The less forceful the governmental involvement, the more courts should insist that the alleged act of state be formal rather than casual. International comity and separation of powers, the underpinnings of the act of state doctrine, argue for applying it only where the alternative is judicial evaluation of the validity of an exercise of public authority—a judicial ruling, a legislative enactment, a regulatory decree, or an executive use of police powers. Thus, nationalization of


122. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) ("It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the state acting as a sovereign.")

123. *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3119 (1976) ("[Defendant's] participation in the decision [to engage in the anticompetitive conduct] is sufficiently significant to require that its conduct implementing the decision . . . conform to applicable federal law.")

124. The *Sabbatino* Court refers explicitly to separation of powers and implicitly to international comity. 376 U.S. at 423-24, 427-28.
property\textsuperscript{125} and assertion of territorial claims\textsuperscript{126} are properly beyond the scope of judicial inquiry. Where no such formal governmental acts are in question, however, the local legality and authoritativeness of an official’s conduct should be considered in deciding whether that conduct was an act of state.\textsuperscript{127} Since acceptance of corporate payments seems to violate foreign laws\textsuperscript{128} and, judging from the recent reactions of foreign governments,\textsuperscript{129} to overstep the limits of official authority, it would be inappropriate to invoke the act of state doctrine to protect corporations that induce such conduct by government officials.

Quite apart from the sovereign character of an official’s conduct, the Supreme Court’s recent opinion in \textit{Alfred Dunhill of London, Inc. v. Republic of Cuba},\textsuperscript{130} suggests that the act of state doctrine, like the doctrine of sovereign immunity, simply may not apply to private or commercial acts of sovereign states.\textsuperscript{131} Whether this view ultimately prevails or not, the distinction between public and private acts may nevertheless serve in conjunction with the formality and forcefulness of official conduct in determining whether to classify the conduct as an act of state. This distinction militates against classifying acceptance or solicitation of corporate payments as an act of state where those payments are made in connection with a government’s proprietary decisions.

Additional arguments for not applying the act of state doctrine to payments made to foreign officials are suggested by the Supreme Court’s decision in \textit{Banco Nacional de Cuba v. Sabbatino},\textsuperscript{132} a case that arose from Cuba’s expropriation of American property. In \textit{Sabbatino} the Court stated that the act of state doctrine is principally concerned with “the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.”\textsuperscript{133} The Court observed that “the greater the

\textsuperscript{127} See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706-07 (1962) (corporate defendant’s subsidiary, though an agent of foreign government, was acting on its own without official approval and therefore did not afford defendant a defense).
\textsuperscript{128} See note 17 \textit{supra}.
\textsuperscript{129} See note 2 \textit{supra}.
\textsuperscript{130}\textit{Id.} at 1861-67 (1976).
\textsuperscript{131}\textit{Id.} at 1861-67 (this part of the Court’s opinion, written by Mr. Justice White, was joined only by the Chief Justice, and Justices Powell and Rehnquist).
\textsuperscript{132} 376 U.S. 398 (1964).
\textsuperscript{133} \textit{Id.} at 427-28.
degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. 131 Its decision to apply the act of state doctrine in *Sabbatino* was based in part on the absence of settled international law standards governing expropriation of aliens' property. 135 Furthermore, the Court sensed that judicial intervention in the dispute over expropriated property might cause resentment among foreign states and friction with or embarrassment of the executive branch. 136

The concerns expressed in *Sabbatino* seem inapposite to cases of overseas payments. Traditional sources of international law manifest a broad consensus against bribery of government officials. Not only have international organizations recorded their opposition, 137 but virtually every sovereign state has legally proscribed such practices. 138 Resentment abroad and embarrassment at home are likely to accrue only if United States courts refuse to intervene. Foreign states may actually welcome American efforts—even judicial efforts—to control the conduct of American corporations abroad. 139 By the same token, the executive branch might well be embarrassed if its explicit position against overseas payments were judicially undermined in the eyes of foreign governments and American corporations. 140 This would seem particularly likely where payments were made without governmental compulsion, for it is in such circumstances that diplomacy has little to offer. 141

If the doctrines of sovereign immunity and act of state are held inapplicable to cases of overseas corporate payments, the effectiveness of the antitrust laws in protecting American competitors abroad will depend on judicial willingness to find that such payments fall within one or another statutory prohibition. The following three sections

134. Id. at 428.
135. Id. at 428-30.
136. Id. at 431-33.
137. See note 48 supra. Other international organizations are presently at work to the same end. See notes 49-50 supra.
138. See note 17 supra.
140. Cf. *Hunt v. Mobil Oil Corp.* , 410 F. Supp. 10, 25 (S.D.N.Y. 1975) (Weinfeld, J.: “It may well be that recent public disclosure of the dealings of multi-national corporations with foreign governments which have an adverse impact upon American interests justifies a reappraisal of the act of state doctrine to determine whether its scope should be confined.”)
141. See pp. 221-22 supra.
Consider whether the prohibitions of the Sherman, Robinson-Patman, and Federal Trade Commission Acts include questionable corporate payments abroad.

B. Overseas Payments as Conspiracies in Restraint of Trade or Attempts to Monopolize

Sections one and two of the Sherman Act have long been construed as a broad prohibition of anticompetitive corporate conduct, extending to acts occurring abroad that affect the foreign or domestic commerce of the United States. Both the spirit and the letter of these provisions argue in favor of their application to corporations that make overseas payments to gain advantage over their American competitors in foreign markets. An examination of the pertinent case law supports this view.

If the doctrinal defenses discussed in the preceding section were held inapplicable, the courts would probably consider overseas payments as analogous to other anticompetitive efforts to influence governmental acts. Some such efforts have been held unlawful under the Sherman Act, particularly where they have been directed at obtaining governmental contracts or manipulating existing regulations.

12. Section 1, 15 U.S.C. § 1 (Supp. V 1975), provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2, 15 U.S.C. § 2 (Supp. V 1975), 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 felony . . . ."

143. The breadth of the provisions' scope was stressed in the early judicial constructions of the Act. In United States v. American Tobacco Co., 221 U.S. 106, 181 (1911), the Supreme Court, citing Standard Oil Co. v. United States, 221 U.S. 1 (1911), declared: "[T]he generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." The Court subsequently attributed to the Sherman Act "a generality and adaptability comparable to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

144. See p. 232 & note 99 supra.

145. "The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes." Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972) (filing of false "nomination forecasts" with state commission so as to reduce plaintiffs' production allowables). See, e.g., Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096, 1099 (9th Cir.), cert. denied, 404 U.S. 826 (1971) (unions illegally coerced state official to issue directive forbidding sale of plaintiffs' product at state fair).

146. E.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 32-33 (1st Cir.), cert. denied, 400 U.S. 850 (1970) (allegations that pool equipment supplier's sales tactics were effort to distort state and local governments' competitive bidding process stated cause of action).
Domestic lobbying for or against the enactment of legislation or the promulgation of regulations, however, has enjoyed the protection of the Noerr-Pennington doctrine. This doctrine was developed in the context of domestic lobbying efforts by trade associations, companies, and labor unions. To safeguard First Amendment rights of petition and to preserve representative democracy in the United States, the doctrine gives corporations and other interest groups considerable latitude to try to influence their government's officials, so long as the effort is not a mere sham to cover attempted interference with a competitor's business.

On two grounds, this doctrine should not be considered applicable to cases of overseas payments. First, making payments is not a legitimate means of influencing government officials. Indeed, the Supreme Court has indicated that bribery comes under the sham exception to the Noerr-Pennington doctrine. Second, given the constitutional underpinnings of the doctrine, its protection extends only to activities within the United States. Corporations have no First Amendment right of petition overseas and the strength of representative democracy in America does not depend on corporate lobbying abroad. There-
fore, payments abroad, whether to sway a certain procurement decision or to elicit favorable legislative or executive policies, should be cognizable under the Sherman Act.

In establishing the elements of a § 1 or § 2 offense, two problems might arise. First, to prove a § 1 violation the plaintiff or prosecutor would have to demonstrate the existence of an anticompetitive conspiracy.\textsuperscript{153} If the defendant corporation had colluded with other firms to make payments in restraint of trade, the conduct clearly would be prohibited under a line of cases applying the Sherman Act to multicorporate transnational conspiracies advanced by the procurement of favorable governmental action.\textsuperscript{154} A payment agreement between a single corporation and a government official is no less a conspiracy and, in the absence of countervailing act of state considerations, it should be treated as such.\textsuperscript{155}

A more troublesome problem in establishing the elements of a § 1 or § 2 offense is the need to demonstrate the requisite effect on commerce. Beyond the effect required for United States courts to exercise extraterritorial jurisdiction,\textsuperscript{156} sufficient effect must be shown to sub-
stantiate a Sherman Act violation. Unfortunately, the case law does not provide clear guidance as to what constitutes a sufficient effect. The search for standards is complicated by the failure in some cases to distinguish between the effect necessary to establish jurisdiction and that required to establish a violation. Cases holding that allegations have stated a cause of action under the Sherman Act have invariably involved quite substantial restraints on United States foreign commerce. The head of the Antitrust Division has concluded that the "substantial effect" requirement of the Sherman Act may be a significant impediment to successful prosecution of firms that make overseas payments.

Thus, though the Sherman Act may be a potent statutory weapon against major anticompetitive payment practices abroad, other antitrust laws may be needed to reach payments with lesser anticompetitive effects. The Clayton Act and the Federal Trade Commission

157. Though substantiality of effect is not generally considered an element of a domestic §1 offense, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1940), this distinction between §1 and §2 does not seem to be drawn in discussions of the antitrust laws and American foreign commerce. See, e.g., notes 158-60 infra (citing sources). The distinctions imposed by the statutory language, however, remain. Section 1 is directed at multiparty offenses; proof of a conspiracy to restrain trade is essential to establish a §1 violation. Section 2 is directed at market domination; it requires a demonstration that the defendant attempted to obtain monopoly power in a definable geographical and product market.


160. See MNC Activities Hearings, supra note 6, at 91 (statement of Donald Baker, Deputy Assistant Attorney General, Antitrust Division). See generally REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 76 (Govt. Printing Off. 1955) ("[T]he Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anticompetitive effects on this country's 'trade or commerce . . . with foreign nations' as to constitute unreasonable restraints. . . . [C]onspiracies between foreign competitors alone should come within the Sherman Act only where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce.")

161. To establish a Sherman Act violation it might be necessary to prove allegations as substantial as those made in the FTC complaint filed against General Tire and Rubber Company for making payments to prevent competitors from entering the Moroccan market. See Wall St. J., Apr. 28, 1976, at 4, col. 2.
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Act, both originally passed to supplement the Sherman Act, are worth examining in this regard.

C. Overseas Payments as Brokerage Fees

Under certain circumstances, the limitations of the Sherman Act can be overcome by considering overseas payments under § 2(c) of the Clayton Act. The language of § 2(c) broadly prohibits the payments of brokerage fees to persons under the direct or indirect control of another party to a sale-of-goods transaction. Thus, the provision may be applicable where overseas payments are made through intermediaries such as sales agents, brokers, or “consultants” to gain governmental procurement contracts.

Section 2(c) was enacted specifically to outlaw arrangements whereby buyers exacted price concessions disguised as brokerage commissions to their agents or to themselves. Thus, like other parts of the Robinson-Patman Act amendments to the Clayton Act, § 2(c) was intended to combat price discrimination. In addition, however, the provision reflected congressional concern that false brokerage agreements undermined confidence in brokers generally, thereby impairing their important role as a market mechanism.

Since the purpose of the provision was not to discourage the pay-

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162. Section 2(c), 15 U.S.C. § 13(c) (1970), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

163. The sale-of-goods focus of § 2(c) was recently stressed in a holding that the provision does not apply to bribes unrelated to sales transactions. Redman v. Haines, 5 Trade Reg. Rep. (CCH) (1976-2 Trade Cas.) § 61,074 (S.D.N.Y. 1976).

164. For examples of this common practice, see note 14 supra.

165. Enactment of § 2(c) was a response to an investigation of chain stores by the FTC that revealed that large chain buyers were obtaining indirect price concessions by creating dummy brokers whose “fee” the buyer forced the seller to pay. But this was not the only trade practice intended to be reached by § 2(c). For example, Representative Wright Patman explained on the floor of the House:

A practice has grown up whereby large mass buyers bribe representatives of the seller . . . under the guise of a brokerage allowance. It is not a brokerage allowance at all; it is a bribe. [Section 2(c)] will not compel the use of a broker but it will prohibit one party from bribing the representative of the other under the guise of brokerage allowances or commissions.

80 Cong. Rec. 7759-60 (1936) (emphasis added).

ment of legitimate commissions for services rendered but rather to eliminate sham brokerage, § 2(c) expressly excepts from its prohibition fees paid for "services rendered." 167 Recognizing that this exception might nullify the prohibition, courts quickly limited the exception by holding that one party's representative is inherently incapable of rendering services to the other in a manner contemplated by the statute. 168 Shorn of this exception, § 2(c) constitutes an absolute prohibition of false brokerage agreements, whether made by seller or buyer. In contrast to § 2(a), 169 for example, the language of § 2(c) does not require that liability be based on a showing of price discrimination or anticompetitive effect. 170 By the same token, the language does not allow liability to be avoided by arguing that the fee was justified by costs or that it simply met the competition's fees. 171

The Supreme Court's decision in FTC v. Henry Broch & Co., 172 though best known for its dicta suggesting that across-the-board reductions of commissions on large sales might be permissible under § 2(c), 173 actually reaffirmed the provision's unqualified ban on sham brokerage. The Court indicated that there could be no cost justification for paying unearned brokerage and that the "services rendered" exception would not shield payments to another's broker unless the broker's services were in the interest of its principal. 174 In a footnote the Court expressly stated that § 2(c) prohibits certain forms of commercial bribery. 175

Thus, the thrust of the Broch Court's opinion lends support to a line of lower court cases in which private parties have successfully sued to recover treble damages for injuries incurred from the pay-
ment of bribes disguised as brokerage fees.\textsuperscript{176} Of these cases, the one most suggestive of the applicability of § 2(c) to overseas payments is \textit{Rangen, Inc. v. Sterling Nelson & Sons}.\textsuperscript{177} In that case, the Ninth Circuit held that a fish food producer could recover treble damages from a competitor and from a state official whom the competitor had bribed in order to obtain contracts to supply fish food to the state.\textsuperscript{178} Citing \textit{Broch} and other cases, the \textit{Rangen} court rejected the defendants' argument that § 2(c) applies only where a brokerage commission constitutes price discrimination.\textsuperscript{179} The court noted that both Congress at the time of enactment and the Supreme Court in \textit{Broch} had recognized the provision's coverage of commercial bribery.\textsuperscript{180} The court held that the "services rendered" exception did not include "services performed by a buyer's agent for the seller but against the interest of the buyer."\textsuperscript{181} Finally, the court concluded that although the payments involved must be made to a party to the transaction or to someone connected with that party in an agency, representative, or intermediary relationship, a state employee having no official responsibility for the state's procurement policies who nevertheless did influence the state's purchasing decisions could be regarded as an intermediary within the meaning of § 2(c).\textsuperscript{182}

Nothing in the language of § 2(c) limits the \textit{Rangen} holding to domestic bribery. Unlike § 2(a), § 2(c) is not by its terms limited to transactions involving commodities sold for "use, consumption, or resale within the United States." Since the Clayton Act defines "commerce" as "trade or commerce among the several States and with

\begin{itemize}
  \item \textsuperscript{176} See, e.g., \textit{Grace v. E.J. Kozin Co.}, 538 F.2d 170 (7th Cir. 1976); \textit{Fitch v. Kentucky-Tennessee Light & Power Co.}, 136 F.2d 12 (6th Cir. 1943) (upholding treble damage award of over $100,000). Both these cases involved suits by corporations that had made purchases after one of their officers received a payment from the seller. This suggests that foreign governments might be able to bring § 2(c) suits against firms that obtained procurement contracts by bribing government officials. Cf. pp. 252-53 \textit{infra} (Indian government successfully asserted standing to bring Sherman Act suit).
  \item \textsuperscript{177} 351 F.2d 851 (9th Cir. 1965), \textit{cert. denied}, 383 U.S. 936 (1966).
  \item \textsuperscript{178} The court correctly discounted the relevance of a Supreme Court statement relied on by the \textit{Rangen} defendants but made in a totally different context. In \textit{United States v. Boston & M.R.R.}, 380 U.S. 157, 162 (1965) (quoted in 351 F.2d at 857), the Court had asserted that bribery is "remote from an antitrust frame of reference." The \textit{Boston} Court had simply denied that receipt of kickbacks by railroad directors gave them a "substantial interest" in the railroad's supplier under the Clayton Act's conflict-of-interest prohibition, 15 U.S.C. § 20 (1964) (current version at 15 U.S.C. § 20 (1970)).
  \item \textsuperscript{179} 351 F.2d at 856-58.
  \item \textsuperscript{180} \textit{Id.} at 856-57.
  \item \textsuperscript{181} \textit{Id.} at 859.
  \item \textsuperscript{182} \textit{Id.} at 862. The Supreme Court has cited \textit{Rangen} for the proposition that bribery of a public official may constitute a violation of § 2(c). \textit{California Motor Transp. Co. v. Trucking Unlimited}, 404 U.S. 508, 513 (1972).
\end{itemize}
foreign nations," the Robinson-Patman Act, as an amendment to the Clayton Act, reaches both interstate and international business transactions. Although the international implications of the Robinson-Patman Act were once described as dormant, two district court cases suggest how easily the recent disclosures of overseas payments could activate these implications of § 2(c).

In Baysoy v. Jessup Steel Co., a citizen of Turkey sought damages for an alleged breach of a contract in which the defendant, an American corporation, had agreed, upon completion of a sale to the plaintiff of a quantity of ferrochrome, to pay the plaintiff a percentage of the purchase price as commission. The court, in granting the defendant’s motion to dismiss, held that even assuming the contract could be said to contemplate an export sale, § 2(c) applied and barred enforcement of the brokerage fee contract. In support of its holding the court noted the Clayton Act’s definition of commerce. It also cited Representative Patman’s opinion that to determine the limit and scope of the clauses other than § 2(a) of the Robinson-Patman Act, it is necessary to turn to the definition of commerce found in the Clayton Act. The court concluded that the plaintiff’s brokerage fee did not fall within the “services rendered” exception because none of the services alleged were rendered to the seller. Rather, all services rendered were for the buyer’s own benefit.

Subsequently, in Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, a foreign company sued its chief buyer and an American corporation for allegedly conspiring to extract exorbitant prices from the plaintiff under the guise of arm’s length bargaining. The court held that the commercial bribery alleged by the plaintiff was within the proscription of § 2(c). The court further held, citing Baysoy, that § 2(c) of the Robinson-Patman Act applies to export sales.

One commentator, writing before Canadian Ingersoll-Rand, speculated that Baysoy would prove “aberrational.” Since Congress had

184. The key exception to the Robinson-Patman Act’s extraterritoriality is § 2(a). See p. 245 supra.
185. F. Rowe, supra note 168, at 81.
187. Id. at 305-06.
188. Id. at 305.
189. Id. at 305-06.
190. Id. at 306-07.
192. Id. at 833.
193. Id. at 833-34.
194. F. Rowe, supra note 168, at 82.
not intended the Robinson-Patman Act to preclude American firms from making discriminatory export sales, the commentator contended, future cases might construe the jurisdictional elements of § 2(c) in pari materia with those of § 2(a), thereby excluding export transactions.\textsuperscript{195} The decision in \textit{Canadian Ingersoll-Rand}, however, suggests that the revelations of questionable brokerage commissions abroad may make \textit{Baysoy} not aberrational but precedential. Indeed, as the next section indicates, to the extent that false brokerage commissions are considered an unfair method of competition, § 2(c) should be read in pari materia with the Federal Trade Commission Act, whose extraterritorial scope is expressly established.

D. Overseas Payments as Unfair Methods of Competition

Courts consistently have held that the Federal Trade Commission Act and the Clayton Act are to be read in pari materia.\textsuperscript{196} Any violation of the Clayton Act is also a violation of § 5 of the Federal Trade Commission Act,\textsuperscript{197} which declares unfair methods of competition to be unlawful.\textsuperscript{198} Thus, payment of false brokerage may be the basis for liability not only under § 2(c) of the Clayton Act but also under § 5 of the Federal Trade Commission Act. Moreover, the expansive scope of § 5\textsuperscript{199} may make it possible to reach overseas payments whether or not they were made in the form of brokerage fees and whether or not they were made in the context of a sale-of-goods transaction. Significantly, the FTC already expressly proscribes commercial bribery in various industries as an unfair trade practice.\textsuperscript{200}

The FTC's jurisdiction over unfair methods of competition in or affecting commerce has been specifically extended by § 4 of the Webb-

\textsuperscript{195} Id. In arguing that overseas discrimination is beyond the reach of § 2(c), Rowe had in mind "dumping"—not overseas payments.
\textsuperscript{196} See, e.g., American Cyanamid Co. v. FTC, 363 F.2d 757, 770 (6th Cir. 1966); Atlantic Ref. Co. v. FTC, 344 F.2d 599, 605 (6th Cir.), cert. denied, 382 U.S. 939 (1965); FTC v. Reed, 243 F.2d 308, 309 (7th Cir.), cert. denied, 355 U.S. 823 (1957); Menzies v. FTC, 242 F.2d 81, 83 (4th Cir.), cert. denied, 353 U.S. 957 (1957).
\textsuperscript{198} Section 5, 15 U.S.C. § 45(a)(1) (Supp. V 1975), provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."
\textsuperscript{199} See, e.g., FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972) (opinion joined by all seven participating Justices holding that § 5 reaches even those unfair practices that do not infringe the letter or the spirit of the antitrust laws and do not affect competition).
\textsuperscript{200} See, e.g., 16 C.F.R. §§ 143.8, 144.14, 146.16, 147.12 (1976).
Pomerene (Export Trade) Act\textsuperscript{201} to include conduct outside the United States. Although the purpose of the Webb-Pomerene Act as a whole was to permit combinations of American companies to engage in export trade,\textsuperscript{202} its effect has been quite restrictive. As one commentator has observed, the Act is "an anomalous statute which exempts export associations from the Sherman Act upon such strict conditions that the Sherman Act appears to be actually reinforced with additional prohibitions."\textsuperscript{203}

The Seventh Circuit’s decision in \textit{Branch v. FTC}\textsuperscript{204} indicates the scope of the Webb-Pomerene Act. In that case, the court held that the FTC had jurisdiction under both the Federal Trade Commission Act and the Webb-Pomerene Act to issue a cease and desist order prohibiting a correspondence school operating in the United States from employing unfair and fraudulent practices in soliciting students in Latin American countries to the detriment of other United States firms competing in the same field. The court found it irrelevant that all the persons deceived were in Latin America.\textsuperscript{205} The FTC was not seeking to protect the school’s customers in Latin America but to protect its domestic competitors.\textsuperscript{206} Since § 4 of the Webb-Pomerene Act is a “remedial statute” designed to “free foreign commerce of unfair trade practices,” the court decided to construe it liberally in order to effectuate the congressional purpose.\textsuperscript{207}

\textit{Branch} suggests that actions brought under the Federal Trade Commission Act are not likely to be tested according to the Sherman Act’s substantial-effect standard. In \textit{Branch} the FTC’s jurisdiction to issue a cease and desist order prohibiting the deceptive overseas practices abroad of the American correspondence school was based merely on a showing that a few other American correspondence schools did business in the same region and might be injured by the defendant’s conduct.\textsuperscript{208} Similarly, the Supreme Court has held that the Lanham Act, which prohibits “unfair competition” in trademarks,\textsuperscript{209} gives federal courts jurisdiction to award an American corporation relief for

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\item\textsuperscript{201} 15 U.S.C. § 64 (1970).
\item\textsuperscript{202} W. Fugate, \textit{supra} note 97, § 7.2.
\item\textsuperscript{203} \textit{Id.} § 7.1, at 224. This paradox has not made judicial application of the Act easy. \textit{See} United States v. United States Alkali Export Ass’n, 86 F. Supp. 59, 66-71 (S.D.N.Y. 1949).
\item\textsuperscript{204} 141 F.2d 31 (7th Cir. 1944).
\item\textsuperscript{204} \textit{Id.} at 34-35.
\item\textsuperscript{206} \textit{Id.} at 35.
\item\textsuperscript{207} \textit{Id.} at 36.
\item\textsuperscript{208} \textit{Id.} at 34-35.
\end{itemize}
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trademark infringement perpetrated overseas by an American citizen.\textsuperscript{210} The only injury alleged was potential damage to the plaintiff's reputation at home and abroad.\textsuperscript{211} These cases indicate that, in applying statutes providing extraterritorial jurisdiction, courts tend to require the same showing of injury as they would if the conduct had occurred within the United States.

The \textit{Branch} holding implies that overseas payments would constitute a violation of the Federal Trade Commission Act if other American firms operated in the same foreign area.\textsuperscript{212} Extraterritorial application would be particularly justified if the payments in question were likely to subject other American firms to demands for similar "fees" or were likely to damage competition among American firms in any other way. Whether considered in pari materia with the Clayton Act or as an independent prohibition of unfair methods of competition, § 5 of the Federal Trade Commission Act seems to provide solid statutory foundation for governmental efforts to control overseas payments.\textsuperscript{213}

E. \textbf{Potential Antitrust Defendants and Plaintiffs}

If an overseas payment suit were brought under one or more of the antitrust provisions discussed in the preceding three sections, a variety of parties could be litigants. With the possible exception of the recipient foreign government,\textsuperscript{214} virtually every entity or individual involved in the payment could be a defendant in the suit. The American corporation whose funds were used to make the payment

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\textsuperscript{211} \textit{Id.} at 286.

\textsuperscript{212} Congressional testimony by a Lockheed official inadvertently demonstrated the need for a broad conception of the effect of overseas payments. \textit{See Foreign Policy Hearings, supra} note 6, at 374 (quoted note 226 \textit{infra}).

\textsuperscript{213} Although the FTC's mandate is broad and its extraterritorial authority established, it may be hampered in combating some overseas payments because of a limit on its subpoena powers. The subpoena power of the FTC is restricted to the "attendance of witnesses, and the production of . . . documentary evidence . . . from any place in the United States." 15 U.S.C. § 49 (1970 & Supp. V 1975). The same language in the Securities Act of 1933, \textit{id.} § 77s(b) (1970), has been construed to allow the compulsory production of documents situated outside the United States as long as the party directed to produce the documents is served with the subpoena within the territorial jurisdiction of the United States. \textit{See SEC v. Minas de Artemisa, S.A.}, 150 F.2d 215, 218 (9th Cir. 1915). Even this statutory construction, however, would not authorize federal courts to issue commissions or letters rogatory to obtain evidence abroad for the FTC where the custodian could not be served within the United States. In this regard the FTC has more limited evidence-gathering power than either the Department of Justice or a private litigant. \textit{See note 227 \textit{infra}}.

\textsuperscript{214} \textit{See pp. 233-35 supra}.
\end{footnotesize}
would be the most likely defendant, particularly if the payment was made either directly from corporate coffers or through a fully controlled subsidiary. An independent subsidiary or a consulting organization over which the court could obtain personal jurisdiction might be a more likely defendant if the payment was made indirectly or with little or no approval by headquarters. Finally, responsible individuals, such as corporate officers and directors, sales agents, brokers, and other intermediaries might be liable for their role in the unlawful transaction.

Whether or not the Justice Department or the FTC decides to bring an action against these potential defendants, a number of private parties could seek legal or equitable remedies for violation of the Sherman and Clayton Acts. Under § 4 of the Clayton Act a "person" has standing to sue for treble damages if, by reason of an antitrust violation, that person has suffered injury to "his business or property." The Supreme Court has not made a definitive interpretation of this injury requirement, and the lower federal courts have proposed diverse standards: requiring the injury to be a "direct" result of the violation; requiring the plaintiff to be within the "target area" of the violation; or requiring the plaintiff's interest to be within the

215. For examples of overseas payments by subsidiaries and consulting organizations, see notes 14, 20 & 21 supra.
216. For a discussion of means by which courts can obtain personal jurisdiction over a party located abroad, see ABA, ANTITRUST LAW DEVELOPMENTS 360-64 (1975).
219. By statutory definition, the term includes not only natural persons but also American and foreign corporations and associations. Id. § 12 (1970). American states have been held to have standing under § 4 in their proprietary capacities. Georgia v. Evans, 316 U.S. 159, 162 (1942) (under predecessor to § 4, state held entitled to bring treble damage action against members of alleged price-fixing conspiracy from which it had purchased asphalt). The Antitrust Improvements Act of 1976, Pub. L. No. 94-435, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 1394), amends § 4 of the Clayton Act to authorize a state to bring parens patriae actions on behalf of natural persons residing in the state who have been injured by violations of certain Sherman or Clayton Act provisions. The amendment does not authorize parens patriae actions to be brought for violations of the Robinson-Patman Act. Section 4 standing has also been granted to foreign governments. See pp. 252-53 infra.
220. The leading statement of this traditional test is Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910), which dismissed a treble damage action brought by a stockholder-creditor of an injured corporation under the predecessor to § 4. The test remains viable in the Third Circuit. See Pitchford v. PEPI, Inc., 531 F.2d 92, 97-98 (3d Cir. 1975), cert. denied, 96 S. Ct. 2651 (1976).
221. This test originated in the Ninth Circuit's decision in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 364-65 (9th Cir. 1955), which held that an automobile
zone of interests protected by the statute allegedly violated. Regardless of which of the proposed standards is applied, it is clear that § 4 suits can be brought not only by direct competitors of the defendant but also by other parties that have suffered economic injury. Furthermore, § 16 of the Clayton Act gives any "person" or "firm" threatened with injury by an impending or continuing antitrust violation the right to enjoin the lawbreaking. Standing under § 16 is broader than under § 4: a party suffering any injury cognizable in equity meets the § 16 standing requirement.

The liberal conception of standing recognized under §§ 4 and 16 is particularly appropriate for private actions to redress injuries suffered or about to be suffered by payments made abroad. Overseas pay-
ments may often adversely affect American firms operating in the same geographical area, though not competing in the same product market. If, for example, a corporation induces a foreign government to expend certain resources on "guns" rather than "butter," not only competitive manufacturers of armaments but also producers of non-military goods may be injured. Or, if one major American firm in a foreign country makes payments to government officials as a matter of course, other American firms in the country, regardless of the goods or services they produce, may be more likely than otherwise to find themselves importuned to make similar payments. Thus, in many instances of overseas payments, noncompetitors might qualify for standing to bring treble damage or injunctive suits against antitrust violators. Moreover, if the evidence to support their allegations exists, albeit in the hands of individuals or corporations abroad, there are procedures to facilitate its discovery.

A recent seminal Eighth Circuit decision raises the possibility of another class of antitrust plaintiffs: the foreign governments themselves. In *Pfizer, Inc. v. Government of India*, a foreign government brought a § 4 suit against members of an alleged price-fixing conspiracy from which it had purchased antibiotics. The court held that just as American states qualify as persons entitled to sue under § 4,

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226. The testimony of a Lockheed representative was revealing in this regard:

Senator CHURCH. . . . [W]hy do you even pay commissions or kickbacks or bribes when you don't even have a competitor for this plane?

Mr. COWDEN. Because we are frequently competing not necessarily with another airplane just like ours, but we are competing for the sales dollars that would be spent on something else.

Senator CHURCH. Such as?

Mr. COWDEN. Such as fighter airplanes, such as tanks, such as guns.

Senator CHURCH. That is an extraordinary argument. Such as Kellogg Corn Flakes. . . . [W]hat you are really saying then is if we don't get their dollars, they might spend them for something unrelated to aircraft. It is not the competition for aircraft that is involved.

Foreign Policy Hearings, supra note 6, at 374.

227. A private plaintiff, no less than the Justice Department in its civil antitrust proceedings, can call upon the panoply of powers vested in the federal courts. A federal court, for example, is empowered to compel American nationals residing abroad to appear and produce documents. See 28 U.S.C. § 1783 (1970); Fed. R. Civ. P. 45(c)(1). Or, where the testimony of a foreign national is needed, a deposition can be taken by either notice or commission, where the deponent consents or foreign law puts its judicial machinery at the disposal of alien litigants, or by letter rogatory issued by a United States court and transmitted to a foreign tribunal. See 28 U.S.C. §§ 1781(a)(2) (1970); Fed. R. Civ. P. 28(b), 32(a)(3)(B). For a discussion of various methods of obtaining evidence from abroad, see 16L J. von Kalinowski, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 94.09 (1976); Smit, International Co-operation in Civil Litigation, 9 NEDERLANDS TIJDSSCHRIFT VOOR INTERNATIONAAL RECHT 137, 112-13 (1962).

so do foreign governments. Furthermore, although the court in an earlier ruling in the same case dismissed a parens patriae claim brought by several foreign governments on behalf of their nationals injured by the alleged price-fixing conspiracy, the court indicated that where the foreign government itself was injured it might be entitled to bring a class action on behalf of any of its injured citizens. Thus, foreign governments may be permitted broad access to United States courts in antitrust actions. Such access is particularly likely to be exploited in those cases in which the cost of the corporate payment was included in the contract price to the foreign government and private purchasers.

IV. Ensuring Corporate Accountability: Private Remedies Revisited

Although the antitrust laws do not by words or implication grant a shareholder right of action against the lawbreaking management of the shareholder's own corporation, the prospect of incurring liability may enhance the success of common law derivative suits against responsible officers and directors. The clearer the illegality of overseas payments, the more likely it is that the offending corporation

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229. The reasoning of the Supreme Court case relied on in Pfizer, Georgia v. Evans, 316 U.S. 159 (1942), as well as the reasoning of the district court's opinion in Antibiotic Antitrust Actions implies that the Pfizer holding was intended to apply only to actions brought by foreign governments in their proprietary capacity. Since most overseas payments involve governments precisely in that capacity, this implicit limitation of Pfizer should not pose an obstacle to foreign government plaintiffs in payments suits. Less clear is whether courts would be reluctant to award damages to a government for proprietary losses stemming from the misdeeds of that government's officials.

The Pfizer court did not reach the question of a foreign government's standing under § 16, but analogous case law concerning American states indicates that such standing should be at least as extensive as that granted under § 4. See Hawaii v. Standard Oil Co., 405 U.S. 231, 280-81 (1972); Burch v. Goodyear Tire & Rubber Co., 420 F. Supp. 82, 87-89 (D. Md. 1976).


231. A foreign government bringing an overseas payments suit in federal court would thereby lose its sovereign immunity to related or offsetting counterclaims. See 28 U.S.C.A. § 1607(b), (c) (West Dec. 1976 Pamphlet). Whether it would also be held to have waived the act of state defense is less clear. Compare First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768-70 (1972) (Rehnquist and White, JJ., and Burger, C.J.) and id. at 770-72 (Douglas, J., concurring) with id. at 793-96 (Brennan, Stewart, Marshall & Blackmun, JJ., dissenting).

232. Testimony of Lockheed officials indicates that this may be common practice. See Foreign Policy Hearings, supra note 6, at 352, 390; Lockheed Hearings, supra note 4, at 25.

233. See, e.g., Langsan v. Beam, 1975-2 Trade Cas. § 60,552 (E.D.N.Y. 1975) (stockholder derivative suit based on antitrust violations dismissed; § 4 of Clayton Act held not to regulate relations between corporation and its management).
will be subject to public penalties, damage to reputation, and civil awards in favor of various injured parties. Moreover, once the illegality of the payments is established, inability to prove net financial loss need not foreclose recovery. A suitable restitutionary measure of damages may be derived from the amount of authorized overseas payments or the amount of compensation received by responsible corporate officials during the period of anticompetitive conduct.234

Recognizing the illegality of anticompetitive overseas payments may aid shareholders bringing derivative suits in yet another way. Under the Federal Rules,235 a derivative suit cannot normally be brought before the shareholder makes a demand that the corporate directors or shareholders bring an action.236 The directors’ decision not to do so is considered a matter of discretion; it can be challenged only on the ground that it reflected bad faith, bias, or some other impairment of business judgment.237

Application of the business judgment rule in this context can pose difficulties for shareholders bringing derivative suits against corporate officers involved in overseas payments. In Gall v. Exxon Corp.,238 for example, a district court indicated that a derivative suit arising from an Exxon subsidiary’s political contributions in Italy probably could not be maintained in the face of a decision not to sue made by a special committee of Exxon directors. The court noted the absence of shareholder allegations of fraud, collusion, illegality, or ultra vires conduct on the part of the special committee.239 It further observed that even if the payments were illegal, failure to sue the perpetrators was not itself a violation of the law.240 In fact, however, the court found “not a scintilla of evidence” that the payments were illegal

234. Courts might also approve of the derivative suit as a vehicle to challenge the enforceability of severance pay or indemnification agreements between a corporation and the officers responsible for the payments made abroad. These agreements may prove costly to firms because corporate insurance policies have begun expressly to exclude coverage for claims related to foreign payoffs. Wall St. J., July 12, 1976, at 1, col. 6. It is predicted that insurance carriers will resist settlement of existing cases concerning such payoffs. Id.
236. The demand is only excused when it would clearly be in vain. See, e.g., Cathedral Estates, Inc. v. Taft Realty Corp., 228 F.2d 85, 88 (2d Cir. 1955).
239. Id. at 516.
240. Id. at 517-18. In this way, the Gall court distinguished the Miller case, discussed at p. 230 supra, in which failure to collect a debt was held to be an illegal campaign contribution. Id. at 518 & n.19.

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under either Italian or American law.\textsuperscript{241} Having thus stressed the improbability of a successful derivative suit, the \textit{Gall} court denied the defendant's motion for summary judgment and gave the plaintiff an opportunity to test the impartiality of the special committee through discovery.\textsuperscript{242}

The reasoning in \textit{Gall}, though perhaps justified by the facts of the case, is not appropriate for most derivative suits likely to arise from anticompetitive payments abroad. To the extent that such payments constitute serious violations of the antitrust laws, the inherent antagonism between a plaintiff shareholder and managerial defendants\textsuperscript{243} is likely to be exacerbated. This is all the more probable where, as was not the case in \textit{Gall}, members of the board of directors have participated or acquiesced in the illegal practices authorized by management. As Judge Coffin of the First Circuit commented in a recent concurring opinion:

\begin{quote}
[The managerial acts attacked in the derivative suit] are alleged to be illegal under federal antitrust laws. If I were to calibrate a scale to measure the impact of varying improprieties, I would rate such an allegation fairly high. I find it hard to imagine that a director, [however] unaffiliated, who had participated, or . . . knowingly acquiesced, in a major transaction, albeit for a corporate purpose, would authorize a suit, effectively against himself, claiming that the transaction violated the federal antitrust laws.\textsuperscript{244}
\end{quote}

Judicial skepticism about directors' decisions not to sue might be appropriate even in the absence of evidence of directors' complicity in the illegal conduct. First, the failure of the directors to discover the corporation's overseas payments practices, particularly if they were massive in scale, might be so grossly negligent as to call into question their capacity to exercise good business judgment.\textsuperscript{245} Second, the typi-

\textsuperscript{241} Id. at 518.
\textsuperscript{242} Id. at 519-20. Courts are generally reluctant to dismiss a derivative suit before the plaintiff shareholder has had an opportunity to pursue discovery. See, e.g., Lasker \textit{v.} Burks, 404 F. Supp. 1172, 1179-80 (S.D.N.Y. 1975); Bernstein \textit{v.} Mediobanca Banca di Credito Finanziario, 69 F.R.D. 592, 597 (S.D.N.Y. 1974).
\textsuperscript{243} See Smith \textit{v.} Sperling, 354 U.S. 91, 95 (1957).
\textsuperscript{244} In re \textit{Kauffman Mutual Fund Actions}, 479 F.2d 257, 269 (1st Cir.), \textit{cert. denied}, 414 U.S. 857 (1973) (concurring opinion).
\textsuperscript{245} Cf. Harman \textit{v.} Willbern, 374 F. Supp. 1149, 1161 (D. Kan. 1974), \textit{aff'd}, 529 F.2d 1333 (10th Cir. 1975) (dictum) ("[T]he directors of a corporation may not totally abandon their duties to the corporation or close their eyes to what is going on about them . . . ."); Heit \textit{v.} Bixby, 276 F. Supp. 217, 231 (E.D. Mo. 1967) (directors negligent for not discovering self-dealing by inside directors; failure characterized as total abdication of managerial duties).
cally close association of a corporation's directors with its executives might color the directors' views of the desirability of suing executives who allegedly violated the law to the corporation's detriment. Finally, the clearer the illegality and the larger the potential recovery, the more the directors' decision not to sue would be tantamount to a breach of trust. Any one of these considerations might cause a court to override the decision of the directors and sustain a share-

Conclusion

In the wake of the controversial disclosures of questionable payments abroad, the response of both the private and the public sectors has been slow and insufficient. With a few notable exceptions, members of the business community do not seem animated by a conviction that overseas payments must be halted. The cautious approach of the President's Task Force, the limited enforcement efforts of the SEC, and the inconclusive action in Congress testify to the inadequacy of present governmental approaches to the problem.

The antitrust approach endorsed in this article is an attractive alternative for two reasons. First, it focuses on those payments that have the most serious economic consequences for American firms and, thereby, for American investors, consumers, and free enterprise gen-

246. See Fleishacker v. Blum, 109 F.2d 543, 547 (9th Cir.), cert. denied, 311 U.S. 665 (1940) (derivative suit maintainable where refusal to sue amounted to breach of trust; directors "made common cause" with wrongdoing officer and tried to justify his breach of duty); Pomerantz v. Clark, 101 F. Supp. 341, 344 (D. Mass. 1951) (expressing doubt whether majority of directors can be "expected to weigh impartially a charge against their accused colleagues"); M. FEUER, PERSONAL LIABILITIES OF CORPORATE OFFICERS AND DIRECTORS 175 (2d ed. 1974) ("The usual ties between all members of a management group may, and perhaps should, induce a court to view [a decision not to sue] with a degree of skepticism . . . .")

247. Compare Findley v. Garrett, 109 Cal. App. 2d 166, 177-78, 240 P.2d 421, 428 (1952) (derivative suit not maintainable where directors' decision not to sue was based on fair weighing of possibility of recovery against cost of litigation in time, money, and disruption of business) with Groel v. United Electric Co., 70 N.J. Eq. 616, 624, 61 A. 1061, 1064 (Ch. 1905) (directors who deem it "inexpedient" to bring good cause of action on behalf of corporation only "emphasize the breach of trust they are committing by not doing so") and Epstein v. Schenck, 35 N.Y.S.2d 969, 981 (Sup. Ct. 1939) (dictum) ("Where there is a clear cause of action, a refusal to enforce it may constitute a breach of trust on the part of the directors.")

248. See Bribes Hearings, supra note 1, at 18-19 (Ralph Nader, Center for the Study of Responsive Law, referring to Stanley Marcus, chairman of the executive committee, Neiman-Marcus Co., and Fred Allen, chairman of the board, Pitney-Bowes, Inc.).

249. See Wall St. J., July 9, 1976, at 1, col. 6. Indeed, Northrup Corporation, which settled an SEC suit in 1975 by agreeing not to make further overseas bribes, subsequently admitted that $129,000 had been spent on payoffs after the consent decree was signed. Id.
Second, it places in the hands of those most willing and able to attack overseas payments effective legal weapons that can be wielded without new legislation. It brings the broad powers of the Justice Department and the FTC to bear on the problem, supplementing the narrower authority of the SEC. Even more significantly, it enables private parties to seek redress for injuries suffered as a result of questionable payments. American corporations that once saw no alternative but to emulate the practices of the least scrupulous among them, foreign governmental purchasers that ultimately shouldered the costs of payoffs to their officials, and American shareholders who were stunned by the improper expenditures authorized by their corporation's management—all may readily transform their concern into lawsuits. Perhaps when officers and directors are forcefully reminded that overseas payments are not a victimless wrong they too will come to view the practice as questionable.