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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.¹ The revelations have shaken foreign governments,² rocked American corporate management,³ and tarnished the image of American private enterprise both at home and abroad.⁴

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1. As Senator William Proxmire has observed, "[The] wave of disclosures [of overseas payments] is really the result of some threads that began unraveling when the Watergate Special Prosecutor got into domestic bribery." *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as *Bribes Hearings*]. See INVESTOR RESPONSIBILITY RESEARCH CENTER, INC., *THE CORPORATE WATERGATE* 1, 27-29, 59-63, A-1 to A-55 (1975) [hereinafter cited as *CORPORATE WATERGATE*]. The number of disclosures continues to grow. By mid-September 1976, over 200 firms had admitted making questionable payments abroad. *Wall St. J.*, Sept. 16, 1976, at 7, col. 1.

2. *E.g.*, *Wall St. J.*, Oct. 18, 1976, at 5, col. 3 (interim report by Japanese government on Lockheed Aircraft Corp.'s multimillion-dollar payoff cites indictment of 15 persons, including former Prime Minister Kakuei Tanaka and other high-level officials); *id.*, Aug. 27, 1976, at 4, col. 3 (Prince Bernhard of the Netherlands quits his public posts following investigation of charges that he accepted \$1.1 million from Lockheed Aircraft Corp.); *id.*, Apr. 23, 1975, at 38, col. 2 (President Oswaldo Lopez ousted from office by Honduran Supreme Military Council because of alleged receipt of \$1.25 million from United Brands Co.).

3. The disclosures have toppled corporate managers from office or board membership, forced them to reimburse their firms for unrecoverable payments and corporate fines, and subjected them to criminal penalties. See *CORPORATE WATERGATE*, *supra* note 1, at A-3 to A-46; *N.Y. Times*, June 5, 1976, at 26, col. 4; *id.*, May 29, 1976, at 1, col. 5; *id.*, Jan. 14, 1976, at 1, col. 2. Many executives also have lost their positions on other corporations' boards of directors, *id.*, May 7, 1976, § D, at 3, col. 1, though most have retained their substantial pensions, *id.*, Aug. 24, 1975, § 3, at 1, col. 2, and 7, col. 1.

A number of firms have reorganized their management to vest more power in outside directors or to strengthen auditing capabilities of the boards of directors. See *CORPORATE WATERGATE*, *supra* note 1, at A-7, -12, -41, -42, -46.

4. See, e.g., *Prohibiting Bribes to Foreign Officials: Hearing on S. 3133, S. 3379 & S. 3418 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 43 (1976) (letter from Elliot Richardson, Secretary of Commerce and Chairman of Task Force on Questionable Corporate Payments Abroad, to Senator William Proxmire) [letter hereinafter referred to as Task Force Letter; hearing hereinafter cited as *Foreign Officials Hearing*]; *Lockheed Bribery: Hearings Before the Senate Comm. on Banking,*

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.⁵ 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 States⁶ and the long-term interests of the firms themselves,⁷ 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,⁸ the Securities and Exchange Commission (SEC),⁹ and three

Housing and Urban Affairs, 94th Cong., 1st Sess. 11 (1975) (statement of William Simon, Secretary of the Treasury) [hereinafter cited as *Lockheed Hearings*]; *Bribes Hearings*, *supra* note 1, at 68 (statement of Leonard Meeker, Center for Law and Social Policy); *Wash. Post*, June 13, 1976, § C, at 3, col. 4 (quoting Lloyd Cutler, Wilmer, Cutler & Pickering); *FORTUNE*, Mar. 1976, at 27, 28.

5. See Federal Election Campaign Act Amendments of 1976, 2 U.S.C.A. § 441b (West Sept. 1976 Pamphlet).

6. See, e.g., *Foreign Officials Hearing*, *supra* note 4, at 42 (Task Force Letter); Department of State News Release on the International Problem of Bribery (Mar. 5, 1976) (statement of Deputy Secretary Robert Ingersoll) (on file with *Yale Law Journal*); *Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on International Economic Policy of the House Comm. on International Relations*, 94th Cong., 1st Sess. 1-3 (1975) (Rep. Robert Nix) [hereinafter cited as *MNC Activities Hearings*]; *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess., pt. 12, at 386 (1975) (D.J. Haughton, chairman of the board, Lockheed Aircraft Corp.) [hereinafter cited as *Foreign Policy Hearings*].

7. See, e.g., *Foreign Officials Hearing*, *supra* note 4, at 42-43 (Task Force Letter); SEC Report on Questionable and Illegal Corporate Payments and Practices, CCH FEDERAL SECURITIES LAW REPORTS No. 642, pt. II, at 15 (May 19, 1976) [hereinafter cited as SEC Report]; Solomon & Linville, *Transnational Conduct of American Multinational Corporations: Questionable Payments Abroad*, 17 B.C. INDUS. & COM. L. REV. 303, 318 (1976) (summarizing public statements of SEC Commissioners); *Bribes Hearings*, *supra* note 1, at 19 (Ralph Nader, Center for the Study of Responsive Law, quoting Fred Allen, chairman of the board, Pitney-Bowes, Inc.).

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, 94th Cong., 2d Sess., 122 CONG. REC. S13807 (daily ed. Aug. 6, 1976), and H.R. 15149, 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. 2333, 2336-37 (1976).

9. See Murphy, *Payoffs to Foreign Officials: Time for More National Responsibility*, 62 A.B.A.J. 480 (1976). On the basis of its investigation, the SEC has brought suit

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congressional committees¹⁰ 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,¹¹ to expedite governmental services,¹² or to shape a policy decision.¹³ Some payments have been agents' or consultants' fees,¹⁴ which may be tax-deductible business expenses.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 payments whose existence was material to investors. Lowenfels, *Questionable Corporate Payments and the Federal Securities Laws*, 51 N.Y.U. L. REV. 1, 3 (1976); SEC Report, *supra* note 7, at 2-6. The substance of the complaints filed by the SEC is described in Solomon & Linville, *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 reports are individually summarized in SEC Report, *supra* note 7, at B-1 to B-20. Somewhat 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, *Disclosure of Payments to Foreign Government Officials Under the Securities Acts*, 89 HARV. L. REV. 1848, 1851-53 (1976). For criticism that the SEC's actions have transcended the agency's legal authority, see Lowenfels, *supra* at 3-7; Note, *supra* at 1862-63.

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 Federal Aviation Act, 49 U.S.C. § 1377 (1970 & Supp. V 1975). See *MNC Activities Hearings*, *supra* note 6, at 80-86 (James Weldon, Jr., Acting Director, Bureau of Enforcement, 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. See notes 1, 4 & 6 *supra* (citing congressional hearings).

11. E.g., *Foreign Policy Hearings*, *supra* note 6, at 316-19, 323, 339-40 (Mobil Oil contributions in Italy); SEC Report, *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 contributions in Chile); *id.*, Dec. 31, 1975, at 10, col. 5 (Gulf Oil contributions in Italy and Bolivia); *id.*, Nov. 20, 1975, at 20, col. 4 (Exxon contributions in Japan).

12. SEC Report, *supra* note 7, at 26-27. These "grease" payments are allegedly an integral part of doing business in many countries. See *Foreign Officials Hearing*, *supra* note 4, at 41 (Task Force Letter); *Bribes Hearings*, *supra* note 1, at 54 (statement of Ian MacGregor, Chairman of United States Council of International Chamber of Commerce (ICC), citing remarks of Lord Shawcross, Chairman of ICC Commission on Unethical Practices).

13. E.g., *Lockheed Hearings*, *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. E.g., *Foreign Policy Hearings*, *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. 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

officials,¹⁶ which are widely prohibited.¹⁷ Others have been political contributions,¹⁸ the legality of which differs from country to country.¹⁹ Many payments, whether legal or illegal, have been made indirectly through special funds, sales agents, or foreign subsidiaries.²⁰ The flow of money has been obscured by a variety of disguises.²¹

Though the mode of overseas corporate payments has been established, and indeed previously may have been known by certain United States officials,²² 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 (Merck & 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 (Northrup 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 243, 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. 3; *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).

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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.²³ 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.²⁴ Indeed, notwithstanding the assertion of some American corporations that overseas payments must be made to meet foreign competition,²⁵ a number of payments evidently have been made to overcome American competitors.²⁶

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 \$33,000 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 353-56, 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 353-56, 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 3, 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 public²⁷ and the problem of industrial concentration, which tends to encourage anticompetitive practices.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

27. See R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 75-77, 79-80 (1976) (payoffs reflect management's unrestrained control of corporations). See generally A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 128-31 (rev. ed. 1968) (means of shareholder control of management has weakened, leaving management with almost complete discretion); Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 698-701 (1974) (criticizing tendency of management to seek freedom from shareholders, government, and public opinion); Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 253-55 (1969) (lack of shareholder control over management and corporate policy); Rostow, *To Whom and For What Ends is Corporate Management Responsible?*, in THE CORPORATION IN MODERN SOCIETY 46, 51-56 (E. Mason ed. 1959) (discretion of corporate directors and managers virtually unfettered by shareholders).

28. "Since oligopoly markets are characterized by lack of price competition, international payoffs become a kind of nonprice competition . . ." Kugel & Gruenberg, *supra* note 25, at 19. See generally C. KAYSEN & D. TURNER, ANTITRUST POLICY 104-06 (1965) (detailing methods by which firms in concentrated markets engage in anticompetitive practices); R. NADER, M. GREEN & J. SELIGMAN, *supra* note 27, at 213-14 (concentration enables firms to engage in parallel pricing and price leadership); White House Task Force Report on Antitrust Policy (July 5, 1968), reprinted in BNA ANTITRUST & TRADE REGULATION REPORT No. 411 Special Supp., pt. II, at 3 (1969) (current level of economic concentration "precludes effective market competition and interferes with the optimum use of economic resources"); Weiss, *The Concentration-Profits Relationship and Antitrust*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 184, 231-33 (H. Goldschmid, H. Mann & J. Weston eds. 1974) (surveying over 40 studies of profits and concentration and concluding that opportunity for collusion or mutual restraint in concentrated industries results in higher prices and profits).

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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.²⁹ 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.³⁰ The affected foreign government would have been notified of such reports at the discretion of the Secretary of State.³¹ 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.³² Either civil or criminal penalties could have been imposed for failure to report.³³

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).

30. S. 3741, 94th Cong., 2d Sess. §§ 3, 8(a) (1976) (mentioning Departments of Justice and State, IRS, and SEC).

31. *Id.* § 8(b).

32. *Id.* § 8(a).

33. *Id.* §§ 6, 7.

tors or partners than victims³⁴ involve 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.³⁵ Even if the executive branch did take action, diplomatic initiatives would hardly be appropriate: entreating 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.³⁶ 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.³⁷ 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*.

36. S. 3418, 94th Cong., 2d Sess. (1976), reprinted in *Foreign Officials Hearing*, *supra* note 4, at 36-37. The bill's nominal sponsor described it as "the Commission's own proposal." *Id.* at 1 (Sen. Proxmire). The bill sought to amend 15 U.S.C.A. § 78m(b) (West June 1976 Pamphlet).

37. *Foreign Officials Hearing*, *supra* note 4, at 5 (Roderick Hills, SEC Chairman).

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able overseas payments.³⁸ 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.³⁹ The bill passed the Senate unanimously⁴⁰ but reached the House too late in the term to be considered.⁴¹ The bill incorporated the recordkeeping proposals of the SEC,⁴² but it went beyond the SEC's requirements of disclosure to investors.⁴³ 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. 7539, 94th Cong., 1st Sess., 121 CONG. REC. H4852 (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).

39. S. 3664, 94th Cong., 2d Sess., 122 CONG. REC. S11768 (daily ed. July 19, 1976).

40. 122 CONG. REC. S15682 (daily ed. Sept. 15, 1976).

41. Wall St. J., Oct. 4, 1976, at 4, col. 2.

42. S. 3664, 94th Cong., 2d Sess. § 1 (1976).

43. *See* S. REP. NO. 1031, 94th Cong., 2d Sess. 5 (1976).

recipient to exert influence on a foreign government to assist in "obtaining or retaining business . . . or influencing legislation or regulations of that government."⁴⁴ Second, it would have applied the same prohibition to all corporations beyond the reach of the 1934 Act.⁴⁵

Although the Proxmire bill's prohibition properly would have encompassed the thousands of corporations outside the SEC's jurisdiction,⁴⁶ 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.⁴⁷ 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.⁴⁸ The Task Force concedes as much by outlining further international efforts being made through the General Agreement on Tariffs and

44. S. 3664, 94th Cong., 2d Sess. § 2 (1976).

45. *Id.* § 3.

46. 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).

47. 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.

48. 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).

A more strongly worded statement against questionable overseas payments was unanimously approved nearly a year earlier by the Organization of American States (OAS). See OAS: Permanent Council Resolution on the Behavior of Transnational Enterprises, O.A.S. Doc. OEA/Ser. G, CP/RES. 154 (167/75) (July 10, 1975), reprinted in 14 INT'L LEGAL MATERIALS 1326, 1328 (1975).

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Trade (GATT)⁴⁹ and the United Nations Commission on Transnational Corporations.⁵⁰

The present complex of United States laws, however, cannot so easily be discounted as impotent.⁵¹ 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.⁵² 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.

50. *Foreign Officials Hearing*, *supra* note 4, at 57-58 (Task Force Letter). At the second session of the U.N. Commission in March 1976, the United States proposed negotiation of a treaty on corrupt practices. The proposal was taken up by the United Nations Economic and Social Council (ECOSOC) during its 61st session in July and August. ECOSOC passed a resolution establishing an ad hoc intergovernmental work group of member-states from five continents to examine corruption in international commercial transactions and to draft an international agreement to eliminate such corruption. E.S.C. Res. 2041 (LXI), 61 U.N. ESCOR, Supp. (No. 1), U.N. Doc. E/RES/2041 (LXI) (1976). The work group is scheduled to report at the 63d ECOSOC session in mid-1977. *U.N. MONTHLY CHRONICLE*, Aug.-Sept. 1976, at 35, 38-39.

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.

The covenant, reproduced at *id.* § 7-103.20, prohibits defense contractors from employing sales agents on a contingent fee basis to secure governmental business by "improper influence." *Id.* § 1-505.4(e). "Improper influence" is defined in terms of inducing unmerited consideration or action by officials of the United States government. *Id.* § 1-504. In practice, the Defense Department has employed the same covenant for contractors for foreign military sales, thereby requiring such contractors to represent that they have not paid contingent fees to sales agents that have improperly influenced foreign officials. See *MNC Activities Hearings*, *supra* note 6, at 115-16 (colloquy between Rep. Stephen Solarz and Benjamin Forman, Assistant General Counsel for International Affairs, Department of Defense).

This de facto approach was given legislative sanction in 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). The Act provides that contracts for American arms cannot include a fee or commission that "induces or attempts to induce consideration or action by any employee or officer of a purchasing foreign government or international organization with respect to such purchase on any basis other than such consideration of merit as [is] involved in comparable United States procurements." *Id.* § 604(b).

56. 18 U.S.C. § 1001 (1970). See, e.g., *United States v. Olin Mathieson Chem. Corp.*, 368 F.2d 525 (2d Cir. 1966) (failure to disclose to AID information about improper payments).

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cable to the transaction.⁵⁷ 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.⁵⁸ 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.⁵⁹

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.⁶⁰ The SEC has taken the position that improper payments have an important bearing on the quality of a corporation's earnings.⁶¹ Moreover, such payments are pertinent to "an evaluation of management's stewardship over corporate assets."⁶² Although payments significant in amount or relating to a significant amount of business are definitely material,⁶³ 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."⁶⁴

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 45 (statement of IRS Commissioner Donald Alexander).

59. See Internal Revenue News Release IR-1590 (Apr. 7, 1976), *reprinted in* [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6567; Internal Revenue News Release IR-1574 (Mar. 16, 1976), *reprinted in* [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6506; Department of the Treasury News Release (Feb. 10, 1976), *reprinted in* [1976] 9 STAND. FED. TAX REP. (CCH) ¶ 6426.

60. 17 C.F.R. §§ 230.408, 240.12b-20, .14a-9 (1976).

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,⁶⁵ the notion remains too malleable to anchor guidelines for corporate conduct.⁶⁶ 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.⁶⁷ Nor can it require disclosure by any corporations that do not issue federally registered securities.⁶⁸ The focus of SEC law enforcement efforts is simply too narrow to comprehend the problem of overseas corporate payments.⁶⁹ The even narrower scope of the other disclosure regulations discussed above makes them all the more inadequate.⁷⁰ 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

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). The actions of certain corporations are cogent evidence of the ambiguity of the materiality standard. Several firms that had admitted making extensive questionable payments abroad have told the SEC that they do not consider the payments to be material. 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 incidents indicates only slight, ephemeral impact on their stock prices).

67. *Foreign Officials Hearing*, *supra* note 4, at 53 (Task Force Letter).

68. This limitation is quite significant. See note 46 *supra*.

69. "[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.

70. 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.

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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.⁷³ 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 913, 919 (1944). *See generally* 1 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).

72. *E.g.*, *Leppaluoto v. Eggleston*, 57 Wash. 2d 393, 402-03, 357 P.2d 725, 731 (1960). *See generally* 3 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 1021, 1022 (rev. perm. ed. 1975).

73. *E.g.*, *Graham v. Allis-Chalmers Mfg. Co.*, 41 Del. Ch. 78, 84, 188 A.2d 125, 130 (1963); *Lutz v. Boas*, 39 Del. Ch. 585, 609-10, 171 A.2d 381, 395-96 (1961); *Lake Harriet St. Bank v. Venie*, 138 Minn. 339, 346-47, 165 N.W. 225, 228-29 (1917); *General Rubber Co. v. Benedict*, 215 N.Y. 18, 21, 23, 109 N.E. 96, 97 (1915); N.Y. BUS. CORP. LAW § 717 (McKinney 1963).

74. "The sound business judgment rule . . . expresses the unanimous decision of American courts to eschew intervention in corporate decision-making if the judgment of directors and officers [is] uninfluenced by personal considerations and is exercised in good faith." *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 762 (3d Cir. 1974). *See, e.g.*, *Herald Co. v. Seawell*, 472 F.2d 1081, 1094 (10th Cir. 1972) (Colo. law); *Burt v. Irvine Co.*, 237 Cal. App. 2d 828, 852-53, 47 Cal. Rptr. 392, 407-08 (1965); *Cheff v. Mathes*, 41 Del. Ch. 494, 504, 199 A.2d 548, 554 (1964); *Seder v. Gibbs*, 333 Mass. 445, 453, 131 N.E.2d 376, 380 (1956); *Casey v. Woodruff*, 49 N.Y.S.2d 625, 643 (Sup. Ct. 1944). *See generally* W. KNEPPER, *supra* note 71, § 1.05, at 11.

75. *E.g.*, *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 763 n.5 (3d Cir. 1974) ("Under New York law, allegation of breach even of a federal statute is apparently insufficient to state a cause of action unless the breach caused independent damage to the corporation.") *See Harris, Derivative Actions Based Upon Alleged Antitrust Violations: Trap for the Unwary*, 37 BROOKLYN L. REV. 337, 347-50 (1971). *See generally* 13 W. FLETCHER, *supra* note 72, § 5947 (rev. perm. ed. 1970).

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).

77. *Abrams v. Allen*, 297 N.Y. 52, 55-56, 74 N.E.2d 305, 306-07 (1947) (closing factories to intimidate workers).

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.⁷⁹ If both actual injury and clear wrongfulness are proven, the managers involved may be subject to claims for damages.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 *Miller v. American Telephone & Telegraph Co.*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.⁸² The unpaid debt itself met the actual injury requirement.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.⁸⁴ Its applicability is not limited to self-dealing, however, as the old New York Supreme Court decision in *Roth v. Robertson*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.⁸⁶ The court explicitly rejected the argument that the

of fiduciary duty by self-dealing to show actual damage to the corporation. *See, e.g.*, *Bailey v. Jacobs*, 325 Pa. 187, 194-95, 189 A. 320, 324 (1937). Nevertheless, courts sometimes do indicate, explicitly or implicitly, that the corporation suffered injury. *Compare* *Diamond v. Oreamuno*, 24 N.Y.2d 494, 498-99, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 81 (1969) (dictum) *with* *Guth v. Loft*, 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (1939).

79. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 499, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 81-82 (1969) (dictum).

80. *E.g.*, *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1285-86 (10th Cir. 1969); *Clayton v. Farish*, 191 Misc. 136, 148-49, 153-54, 73 N.Y.S.2d 727, 740, 744-45 (Sup. Ct. 1947) (management liable for antitrust damages paid by corporation where illegal business arrangement benefiting third party amounted to corporate waste and, thereby, breach of duty).

81. 507 F.2d 759 (3d Cir. 1974).

82. *Id.* at 762-63.

83. *Id.* at 763.

84. *E.g.*, *Anderson Corp. v. Blanch*, 340 Mass. 43, 50-51, 162 N.E.2d 825, 830-31 (1959); *Bailey v. Jacobs*, 325 Pa. 187, 194-95, 189 A. 320, 324 (1937).

85. 64 Misc. 343, 118 N.Y.S. 351 (Sup. Ct. 1909), *cited in* *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 762 (3d Cir. 1974).

86. 64 Misc. at 345, 118 N.Y.S. at 353 ("[P]ayments of corporate funds for such purposes . . . must be condemned, and officers of a corporation making them held to a strict accountability, and . . . compelled to refund the amounts so wasted for the benefit of stockholders . . .")

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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 Morocco⁹² and by Lockheed Aircraft Corporation in Europe and Japan⁹³ 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.*

88. *Cf. Simon v. Socony-Vacuum Oil Co.*, 179 Misc. 202, 203, 38 N.Y.S.2d 270, 273 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944) (derivative suit dismissed on grounds that managers reasonably could have believed conduct was not antitrust violation and that they acted in what they believed to be best interests of corporation).

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 87-95 (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 "justiciability 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").

92. Wall St. J., Apr. 28, 1976, at 4, col. 2.

93. *Id.*, Aug. 24, 1976, at 3, col. 2.

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

94. 15 U.S.C. §§ 1, 2 (Supp. V 1975).

95. *Id.* § 13(c) (1970).

96. *Id.* § 45(a)(1) (Supp. V 1975).

97. 213 U.S. 347 (1909). See generally W. FUGATE, *FOREIGN COMMERCE AND THE ANTI-TRUST LAWS* § 2.7 (2d ed. 1973).

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).

99. The erosion can be traced in *United States v. American Tobacco Co.*, 221 U.S. 106, 134 (1911); *United States v. Pacific & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105-06 (1913); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927); *United States v. National Lead Co.*, 332 U.S. 319, 327-28 (1947); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598-99 (1951); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05 (1962).

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).

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now turns on whether the conduct has substantial effect on American commerce at home or abroad.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.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.¹⁰³ On the merits, the substantiality requirement may vary, depending on the statutory basis for the complaint.¹⁰⁴

Although *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.¹⁰⁵ Application of this aspect of *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."¹⁰⁶ Available only to a defendant foreign government or its agents, the doctrine would seem to have little applicability to litigation

101. See, e.g., *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir.), cert. denied, 352 U.S. 871 (1956). See generally W. FUGATE, *supra* note 97, § 2.1 at 30, § 2.8.

102. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945) (L. Hand, J.).

103. See *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 817 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969); *Branch v. FTC*, 141 F.2d 31, 35 (7th Cir. 1944). See generally W. FUGATE, *supra* note 97, §§ 2.8, .9, .20.

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. See pp. 241-42, 248-49 *infra*.

105. See, e.g., notes 121, 125-26 *infra* (citing cases); W. FUGATE, *supra* note 97, § 2.21.

106. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 65 (1965).

over payments abroad. Indeed, foreign governments would more likely be plaintiffs in such actions than defendants.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.¹⁰⁸ Therefore, many instances of overseas payments to obtain governmental contracts or concessions would seem to fall outside the protective scope of sovereign immunity.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.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.¹¹¹ Since most overseas payments suits are likely

107. *Cf. Pfizer, Inc. v. Government of India*, 1976-1 Trade Cas. ¶ 60,892 (8th Cir. 1976) (granting foreign government standing to bring treble damage antitrust action against American corporations). This case is discussed at pp. 252-53 *infra*.

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. 26, 1975), *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), *reprinted in* 26 DEP'T STATE BULL. 984 (1952); *National City Bank v. Republic of China*, 348 U.S. 356, 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. § 1602 (West Dec. 1976 Pamphlet).

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 Aerotrade, 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. § 1603(d) (West Dec. 1976 Pamphlet).

110. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854, 1863 (1976) (citing cases).

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).

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-

112. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

113. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

114. *Id.* at 423-24, 427-28. Since *Sabbatino* the Supreme Court has had difficulty applying the doctrine. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S. Ct. 1854 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972).

115. See Calvani, Book Review, 74 MICH. L. REV. 164, 169-74 (1975).

116. See, e.g., notes 125-26 *infra* (citing cases).

117. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298-99 (D. Del. 1970).

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 *Parker 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,¹²⁰ this defense asserts that a private party does not violate the antitrust laws by performing acts required of it by a sovereign state.¹²¹ 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 action¹²² 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.¹²³ 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,¹²⁴ 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

120. *Parker v. Brown*, 317 U.S. 341 (1942). See generally Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976).

121. See *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-99 (D. Del. 1970); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132-40, 142-44 (1967).

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.

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property¹²⁵ and assertion of territorial claims¹²⁶ 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.¹²⁷ Since acceptance of corporate payments seems to violate foreign laws¹²⁸ and, judging from the recent reactions of foreign governments,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 *Alfred Dunhill of London, Inc. v. Republic of Cuba*,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.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 *Banco Nacional de Cuba v. Sabbatino*,¹³² a case that arose from Cuba's expropriation of American property. In *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."¹³³ The Court observed that "the greater the

125. See, e.g., *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10, 23-24 (S.D.N.Y. 1975).

126. See, e.g., *Occidental of Umm Al Qaywayn, Inc. v. Cities Serv. Oil Co.*, 396 F. Supp. 461, 468-70 (W.D. La. 1975); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108-11 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

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).

128. See note 17 *supra*.

129. See note 2 *supra*.

130. 96 S. Ct. 1854 (1976).

131. *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).

132. 376 U.S. 398 (1964).

133. *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."¹³⁴ 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*.

139. Cf. SEN. REP. NO. 1031, 94th Cong., 2d Sess. 4-5 (1976) (quoting Attorney General of Botswana: "Certainly, no self-respecting African nation would consider U.S. legislation aimed at curbing corrupt practices of American transnational enterprises in their foreign host states to be 'presumptuous' or in any way 'an interference'.")

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*.

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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 Act¹⁴² have long been construed as a broad prohibition of anticompetitive corporate conduct,¹⁴³ extending to acts occurring abroad that affect the foreign or domestic commerce of the United States.¹⁴⁴ 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,¹⁴⁵ particularly where they have been directed at obtaining governmental contracts¹⁴⁶ or manipulating existing regula-

142. 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).

tions.¹⁴⁷ Domestic lobbying for or against the enactment of legislation or the promulgation of regulations, however, has enjoyed the protection of the *Noerr-Pennington* doctrine.¹⁴⁸ 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.¹⁴⁹

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.¹⁵⁰ Second, given the constitutional underpinnings of the doctrine, its protection extends only to activities within the United States.¹⁵¹ Corporations have no First Amendment right of petition overseas and the strength of representative democracy in America does not depend on corporate lobbying abroad.¹⁵² There-

147. *E.g.*, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-13 (1972) (allegations that large trucking firms instituted state and federal proceedings to defeat operating rights applications of smaller competitors stated cause of action); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 279 (D.C. Cir. 1972) (allegations that competitors precluded fair FDA consideration of plaintiff's drug applications stated cause of action); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1292-98 (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 violated Act).

148. *See* *United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-38 (1961).

149. *See* note 148 *supra* (citing cases).

150. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). *Trucking Unlimited* renders doubtful the precedential value of a line of earlier cases holding that a corporation's bribery or other improper influence of a government official does not give a competitor a cause of action under the Sherman Act. *See* *Norville v. Globe Oil & Ref. Co.*, 303 F.2d 281, 282-83 (7th Cir. 1962); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 804-05 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 400 (D. Idaho 1964), *aff'd on other grounds*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). *But cf.* *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 687-88 (9th Cir.), *cert. denied*, 97 S. Ct. 355 (1976). The *Calnetics* court held that "commercial bribery, standing alone" does not violate the Sherman Act. Although the case did not involve governmental action, the court cited the district court opinion in *Rangen* as its chief support. It also referred to *Norville*, a Clayton Act case, and *United States v. Boston & M.R.R.*, 380 U.S. 157 (1965), another Clayton Act case. In citing *Boston* on this point the Ninth Circuit was less perceptive than it had been 11 years earlier. *See* note 178 *infra*.

151. *See* *Downes v. Bidwell*, 182 U.S. 244, 270 (1901) (Constitution inapplicable to foreign states); *The "City of Panama"*, 101 U.S. 453, 460 (1879) (Constitution is co-extensive with political jurisdiction of U.S.).

152. *See* *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 108 (C.D. Cal. 1971), *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir.), *cert.*

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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.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 multi-corporate transnational conspiracies advanced by the procurement of favorable governmental action.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.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,¹⁵⁶ sufficient effect must be shown to sub-

denied, 409 U.S. 950 (1972); Comment, *Corporate Lobbyists Abroad: The Extraterritorial Application of Noerr-Pennington Antitrust Immunity*, 61 CALIF. L. REV. 1254, 1277 (1973) (concluding that "none of the rationales behind the Noerr-Pennington doctrine [is] directly applicable to foreign petitioning," though diplomatic considerations may argue in favor of its extension). But see P. AREEDA, *ANTITRUST ANALYSIS* ¶ 192, at 130 (1974) (asserting that doctrine applies to petitioning of foreign democracies).

153. See 15 U.S.C. § 1 (Supp. V 1975).

154. See, e.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-07 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 273-74 (1927).

The *Continental Ore* decision also supports the proposition that subsidiaries can be coconspirators. One of the corporate defendants was held not immune from the Sherman Act, though it was a subsidiary of another of the defendants. Courts have generally been reluctant to accept the argument that subsidiaries should not be liable for § 1 violations because they are not separate corporations. See, e.g., *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951); *Sanib Corp. v. United Fruit Co.*, 135 F. Supp. 764, 766 (S.D.N.Y. 1955). See generally W. FUGATE, *supra* note 97, §§ 10.2-4.

155. Government officials have been among the alleged conspirators in several complaints found cognizable under the Sherman Act. See, e.g., *Duke & Co. v. Foerster*, 521 F.2d 1277, 1282 (3d Cir. 1975) ("Where the complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable."); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 274 (D.C. Cir. 1972); *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964). After the Supreme Court rulings in *Noerr* and *Pennington*, but before that in *Trucking Unlimited*, the Ninth Circuit questioned whether *Harman* correctly applied the Sherman Act to a conspiracy between a corporation and a governmental official. *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 342-43 (9th Cir. 1969). The *Pennington* opinion cited in *Sun Valley* does not support the view that a corporation and a governmental official cannot constitute a § 1 conspiracy. Indeed, in *Pennington* the Court expressly noted that no governmental official was claimed to be a coconspirator. See *id.* at 344 (Browning, J., concurring in part) (citing *Pennington*).

156. See pp. 232-33 *supra*.

stantiate a Sherman Act violation.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

Thus, though the Sherman Act may be a potent statutory weapon against major anticompetitive payment practices abroad,¹⁶¹ 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.

158. *See* Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187, 191-93 (1966); Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 523 (1974). *Compare* *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102-03 (C.D. Cal. 1971), *aff'd per curiam on other grounds*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972) (noting confusion in case law and suggesting that substantial anticompetitive effect is criterion for violation, not jurisdiction) *with* *United States v. R.P. Oldham Co.*, 152 F. Supp. 818, 822 (N.D. Cal. 1957) ("direct and substantial" effect necessary for jurisdiction) *and* *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. ¶ 70,600 at 77,457 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. ¶ 71,352 (S.D.N.Y. 1965) ("substantial and material" effect necessary for jurisdiction).

159. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (monopolization of exports of ferrovanadium and vanadium oxide to Canada); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (monopolization of imports of sisal from Mexico).

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 (Gov. 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.¹⁶² 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.¹⁶³ 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.¹⁶⁴

Section 2(c) was enacted specifically to outlaw arrangements whereby buyers exacted price concessions disguised as brokerage commissions to their agents or to themselves.¹⁶⁵ 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.¹⁶⁶

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

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. *Rodman 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).

166. See *id.* at 8112; S. REP. NO. 1502, 74th Cong., 2d Sess. 7-8 (1936); H.R. REP. NO. 2287, 74th Cong., 2d Sess. 14 (1936).

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-

167. 15 U.S.C. § 13(c) (1970).

168. *Webb-Crawford Co. v. FTC*, 109 F.2d 268, 270 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667, 673-75 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940). See F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 350 (1962).

169. 15 U.S.C. § 13(a) (1970).

170. See *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 671, 696 (9th Cir.), *cert. denied*, 97 S. Ct. 355 (1976); F. ROWE, *supra* note 168, at 331.

171. See *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39, 43-44 (9th Cir. 1959); F. ROWE, *supra* note 168, at 337.

172. 363 U.S. 166 (1960).

173. *Id.* at 176. The actual holding of the Court was that § 2(c) had been violated when *Broch*, a brokerage firm for a number of sellers, agreed to reduce its standard commission on sales to one customer so that a seller could offer the customer a lower price. Such an agreement, the Court found, had the same effect as making payments directly to the buyer. *Id.* at 174-75.

174. *Id.* at 173-74. See *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 174 (7th Cir. 1976) ("services rendered" defense inapplicable where an agent violates his fiduciary duty to his principal).

175. 363 U.S. at 169-70 n.6.

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ment of bribes disguised as brokerage fees.¹⁷⁶ Of these cases, the one most suggestive of the applicability of § 2(c) to overseas payments is *Rangen, Inc. v. Sterling Nelson & Sons*.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.¹⁷⁸ Citing *Broch* and other cases, the *Rangen* court rejected the defendants' argument that § 2(c) applies only where a brokerage commission constitutes price discrimination.¹⁷⁹ The court noted that both Congress at the time of enactment and the Supreme Court in *Broch* had recognized the provision's coverage of commercial bribery.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."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).¹⁸²

Nothing in the language of § 2(c) limits the *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

176. See, e.g., *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *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 *infra* (Indian government successfully asserted standing to bring Sherman Act suit).

177. 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

178. The court correctly discounted the relevance of a Supreme Court statement relied on by the *Rangen* defendants but made in a totally different context. In *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 *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)).

179. 351 F.2d at 856-58.

180. *Id.* at 856-57.

181. *Id.* at 859.

182. *Id.* at 862. The Supreme Court has cited *Rangen* for the proposition that bribery of a public official may constitute a violation of § 2(c). *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

foreign nations,"¹⁸³ the Robinson-Patman Act, as an amendment to the Clayton Act, reaches both interstate and international business transactions.¹⁸⁴ Although the international implications of the Robinson-Patman Act were once described as dormant,¹⁸⁵ 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.*,¹⁸⁶ 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.¹⁸⁷ In support of its holding the court noted the Clayton Act's definition of commerce.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰

Subsequently, in *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons*,¹⁹¹ 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).¹⁹² The court further held, citing *Baysoy*, that § 2(c) of the Robinson-Patman Act applies to export sales.¹⁹³

One commentator, writing before *Canadian Ingersoll-Rand*, speculated that *Baysoy* would prove "aberrational."¹⁹⁴ Since Congress had

183. 15 U.S.C. § 12 (1970), as amended by Antitrust Improvements Act of 1976, Pub. L. No. 94-435, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 1394).

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.

186. 90 F. Supp. 303 (W.D. Pa. 1950).

187. *Id.* at 305-06.

188. *Id.* at 305.

189. *Id.* at 305-06.

190. *Id.* at 306-07.

191. 227 F. Supp. 829 (N.D. Ohio 1964).

192. *Id.* at 833.

193. *Id.* at 833-34.

194. F. ROWE, *supra* note 168, at 82.

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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.¹⁹⁵ The decision in *Canadian Ingersoll-Rand*, however, suggests that the revelations of questionable brokerage commissions abroad may make *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*.¹⁹⁶ Any violation of the Clayton Act is also a violation of § 5 of the Federal Trade Commission Act,¹⁹⁷ which declares unfair methods of competition to be unlawful.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 § 5¹⁹⁹ 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.²⁰⁰

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

195. *Id.* In arguing that overseas discrimination is beyond the reach of § 2(c), Rowe had in mind "dumping"—not overseas payments.

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).

197. See, e.g., *American News Co. v. FTC*, 300 F.2d 104, 108 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962) (Clayton Act § 2(d)); *United States v. St. Regis Paper Co.*, 285 F.2d 607, 610 n.4 (2d Cir. 1960), *aff'd on other grounds*, 368 U.S. 208 (1961) ("any violation of the Sherman and Clayton Acts").

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."

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).

200. See, e.g., 16 C.F.R. §§ 143.8, 144.14, 146.16, 147.12 (1976).

Pomerene (Export Trade) Act²⁰¹ 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,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."²⁰³

The Seventh Circuit's decision in *Branch v. FTC*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.²⁰⁵ The FTC was not seeking to protect the school's customers in Latin America but to protect its domestic competitors.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.²⁰⁷

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 *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.²⁰⁸ Similarly, the Supreme Court has held that the Lanham Act, which prohibits "unfair competition" in trademarks,²⁰⁹ gives federal courts jurisdiction to award an American corporation relief for

201. 15 U.S.C. § 64 (1970).

202. W. FUGATE, *supra* note 97, § 7.2.

203. *Id.* § 7.1, at 224. This paradox has not made judicial application of the Act easy. See *United States v. United States Alkali Export Ass'n*, 86 F. Supp. 59, 66-71 (S.D.N.Y. 1949).

204. 141 F.2d 31 (7th Cir. 1944).

205. *Id.* at 34-35.

206. *Id.* at 35.

207. *Id.* at 36.

208. *Id.* at 34-35.

209. 15 U.S.C. § 1127 (1970 & Supp. V 1975).

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trademark infringement perpetrated overseas by an American citizen.²¹⁰ The only injury alleged was potential damage to the plaintiff's reputation at home and abroad.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 *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.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.²¹³

E. 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,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

210. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). The Court cited *Branch* in support of its extraterritorial application of the Lanham Act. *Id.* at 286.

211. *Id.* at 286.

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

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, *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. See *SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215, 218 (9th Cir. 1945). 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. See note 227 *infra*.

214. See pp. 233-35 *supra*.

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 organization²¹⁵ over which the court could obtain personal jurisdiction²¹⁶ 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.²¹⁷ Under § 4 of the Clayton Act²¹⁸ a "person"²¹⁹ 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;²²⁰ requiring the plaintiff to be within the "target area" of the violation;²²¹ 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).

217. The Federal Trade Commission Act generally has been held not to imply a private cause of action. *E.g.*, *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). *But see* *Guernsey v. Rich Plan*, 408 F. Supp. 582, 586-88 (N.D. Ind. 1976) (finding private cause of action where acts complained of by consumers had been object of prior FTC cease and desist order).

218. 15 U.S.C. § 15 (1970).

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.²²² 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.²²³ Furthermore, § 16 of the Clayton Act²²⁴ 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.²²⁵

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-

polish manufacturer had standing to sue a producer of petroleum products for entering into exclusive contracts with independent gasoline stations for accessories not including plaintiff's polish. The test was recently reaffirmed by the Ninth Circuit, and it has been adopted by other courts of appeals. See *Blankenship v. Hearst Corp.*, 519 F.2d 418, 425-26 (9th Cir. 1975); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 418 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

222. This test was recently proposed in *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1149-51 (6th Cir. 1975), which held that three real estate investment companies had standing to sue a gasoline supplier for failure to comply with an oral agreement to finance their acquisition of gasoline stations. For a critique of *Malamud* and a review of the case law on § 4 standing, see Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976).

223. See, e.g., *Perkins v. Standard Oil Co.*, 395 U.S. 642, 645-46 (1969) (loss of profits due to price discrimination by plaintiff's supplier, which was also supplier, three times removed, of plaintiff's competitor, held actionable under § 4). Shareholders, however, have been held not to be persons with standing to sue under § 4 for injuries sustained by their corporation because of the anticompetitive conduct of other firms. E.g., *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

224. 15 U.S.C. § 26 (1970), as amended by Antitrust Improvements Act of 1976, Pub. L. No. 94-435, [1976] U.S. CODE CONG. & AD. NEWS (90 Stat. 1394).

225. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-61 (1972) (state not entitled to bring § 4 *parens patriae* suit for damage to its general economy; dicta suggest § 16 might not be so limited); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 129-31 (1969) (party incapable of proving actual injury required by § 4 may still be entitled to § 16 injunction if "significant threat of injury" is demonstrable); *Burch v. Goodyear Tire & Rubber Co.*, 420 F. Supp. 82, 87-90 (D. Md. 1976) (state entitled to bring § 16 *parens patriae* suit for damage to its general economy).

Although § 16 standing is broader than § 4 standing, a corporation bringing a § 16 suit to enjoin another firm's questionable payments might be met successfully with a defense generally not allowed under § 4: the "unclean hands" defense. Compare *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951) (alleged antitrust violations by plaintiff did not immunize defendants from § 4 suit) with *Heldman v. United States Lawn Tennis Ass'n*, 354 F. Supp. 1241, 1249, 1252 (S.D.N.Y. 1973) (injunctive relief under § 16 denied plaintiff who had not acted in good faith in situation that gave rise to claim). The "unclean hands" defense would likely be raised if the plaintiff in the overseas payments suit had itself been involved in questionable payments.

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.²²⁶ 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 anti-trust 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.²²⁷

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*,²²⁸ 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,

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)(2). 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 TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 137, 112-13 (1962).

228. 1976-1 Trade Cas. ¶ 60,892 (8th Cir. 1976), *aff'g In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971).

so do foreign governments.²²⁹ 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.²³⁰ Thus, foreign governments may be permitted broad access to United States courts in antitrust actions.²³¹ 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.²³²

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,²³³ 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

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. 251, 260-61 (1972); *Burch v. Goodyear Tire & Rubber Co.*, 420 F. Supp. 82, 87-90 (D. Md. 1976).

230. *Pfizer, Inc. v. Lord*, 522 F.2d 612, 620 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (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.*

235. FED. R. CIV. P. 23.1. See generally 3B MOORE'S FEDERAL PRACTICE ¶ 23.1.19 (2d ed. 1976).

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).

237. See, e.g., *Ashwander v. TVA*, 297 U.S. 288, 343 (1936) (Brandeis, J., concurring); *Ash v. International Bus. Mach., Inc.*, 353 F.2d 491, 493 (3d Cir. 1965), cert. denied, 384 U.S. 927 (1966).

238. 418 F. Supp. 508 (S.D.N.Y. 1976).

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.²⁴¹ Having thus stressed the improbability of a successful derivative suit, the *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.²⁴²

The reasoning in *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 defendants²⁴³ is likely to be exacerbated. This is all the more probable where, as was not the case in *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:

[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.²⁴⁴

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.²⁴⁵ Second, the typi-

241. *Id.* at 518.

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 v. Burks*, 404 F. Supp. 1172, 1179-80 (S.D.N.Y. 1975); *Bernstein v. Mediobanca Banca di Credito Finanziario*, 69 F.R.D. 592, 597 (S.D.N.Y. 1974).

243. *See Smith v. Sperling*, 354 U.S. 91, 95 (1957).

244. *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 269 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973) (concurring opinion).

245. *Cf. Harman v. Willbern*, 374 F. Supp. 1149, 1161 (D. Kan. 1974), *aff'd*, 520 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 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.²⁴⁶ 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.²⁴⁷ Any one of these considerations might cause a court to override the decision of the directors and sustain a shareholder derivative suit for damages, injunction, or restitution.

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,²⁴⁸ members of the business community do not seem animated by a conviction that overseas payments must be halted.²⁴⁹ 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 *Fleishhacker 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.*

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erally. 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.