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A Comparison of the Foreign Corrupt Practices Act and the Draft international Agreement on Illicit Payments

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A COMPARISON OF THE FOREIGN CORRUPT PRACTICES ACT AND THE DRAFT INTERNATIONAL AGREEMENT ON ILLICIT PAYMENTS

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I. INTRODUCTION

Congress advocates the position that foreign bribery in a commercial context contributes to foreign relations problems, a perception of corporate immorality, and erosion of the free market system.[1] By enacting the Foreign Corrupt Practices Act of 1977 (FCPA),[2] the United States initiated a unilateral attack on the problem of commercial bribery abroad. Commentators frequently

1. CONFERENCE REPORT FROM THE COMMITTEE OF CONFERENCE TO ACCOMPANY S. 305, FOREIGN CORRUPT PRACTICES ACT OF 1977, H.R. REP. No. 831, 95th Cong., 1st Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 4121 [hereinafter cited as CONF. REP.].

2. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (Supp. II 1978) (amending scattered sections of Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976)).

criticize the FCPA's unilateral approach, noting that it places United States companies at a competitive disadvantage overseas.[3]

It is generally recognized that multilateral support is necessary before significant progress can be made in halting the prevalent practice of payments to foreign officials for business advantages.[4] In fact, one of the purposes of the FCPA was "to strengthen the United States position in negotiations concerning bilateral and multilateral antibribery agreements."[5] By promulgating a Draft International Agreement on Illicit Payments (Agreement),[6] the United Nations has presented a vehicle whereby a concerted attack on questionable payments can be launched. The FCPA and the Agreement have the same basic aim—to discourage illicit payments in an international context. Additionally, both use a combination of disclosure and criminalization to achieve their goal. There are, however, significant differences between the Agreement and the FCPA. These possible areas of conflict must be examined and weighed against the need for an international approach before the United States extends its support of the Agreement.

This Note will provide an overview of both the FCPA and the Agreement. Additionally, it will examine the interface between the two measures, giving special attention to possible areas of contention.

II. Overview of Foreign Corrupt Practices Act

A. *Background and Legislative History*

The problem of corporate bribery in a foreign setting first came to light during the Watergate Committee Hearings and the Special Prosecutor's investigation of illegal domestic campaign contributions.[7] Upon discovering questionable foreign payments and

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3. North, *The Economics of Extortion*, 10 Wash. Monthly, Nov. 1978, at 30.

4. *See* 78 Dep't State Bull. 27 (1977).

5. 123 Cong. Rec. S19,399 (daily ed. Dec. 6, 1977) (remarks of Sen. Williams).

6. Draft International Agreement on Illicit Payments, Report of the Committee on an International Agreement on Illicit Payments on Its First and Second Sessions, U.N. ESCOR, (2d regular session, agenda item 9), U.N. Doc. E/1979/104 (1979) [hereinafter cited as Agreement].

7. Securities and Exchange Commission, Report on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976, at 2 [hereinafter cited as

concomitant corporate record falsification,[8] the Securities and Exchange Commission (SEC) developed both enforcement[9] and voluntary disclosure[10] programs to control corporate bribery abroad. Over 400 corporations came forward and admitted making questionable or illegal payments to foreign politicians, political parties, and government officials.[11]

In view of the disclosures made to the SEC, various congressional committees held hearings on the subject of foreign bribery by United States corporations.[12] Responding to the need for modification of United States corporate behavior abroad, the House passed H.R. 3815,[13] which took a criminalization approach to foreign corporate bribery. The Senate adopted S.305,[14] which included disclosure and accounting requirements in addition to prohibitions against certain overseas payments by domestic companies. Upon contemplation of the two bills, the conference committee produced a modified version of S.305.[15] Both the Senate and the House adopted the new proposal,[16] which utilized a combination of accounting requirements[17] and criminal sanctions[18] to

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SEC REPORT].

8. *Id.*

9. The SEC enforcement program consisted of injunctive actions in which corporations, without denying or admitting the charges against them, agreed to a judgment of permanent injunction. *Id.* at 4.

10. Under the voluntary disclosure program, independent parties conducted an investigation, answered to a committee of impartial board members, and filed a report with the SEC. *Id.* at 6-13.

11. REPORT FROM THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, TOGETHER WITH MINORITY VIEWS TO ACCOMPANY H.R. 3815, UNLAWFUL CORPORATE PAYMENTS ACT OF 1977, H.R. REP. No. 640, 95th Cong., 1st Sess. 4 (1977).

12. *See generally, Prohibiting Bribes to Foreign Officials: Hearings Before the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976); *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcommittee on Multinational Corporations of the Senate Committee on Foreign Relations*, 94th Cong., 1st Sess., Part 12, 1 (1975).

13. 123 CONG. REC. H11,930 (daily ed. Nov. 1, 1977).

14. 123 CONG. REC. S7,193 (daily ed. May 5, 1977). S. 305, Title I, is similar to S. 3664, which was reported to the House Interstate and Foreign Commerce Committee in Sept. 1976, but was not considered before the end of the 94th Session.

15. CONF. REP., *supra* note 1.

16. 123 CONG. REC. H12,826 (daily ed. Dec. 7, 1977); 123 CONG. REC. S19,398 (daily ed. Dec. 6, 1977).

17. 15 U.S.C. § 78m(b)(2)(Supp. II 1978).

18. *Id.* §§ 78dd-1, 78dd-2.

combat United States corporate bribery abroad. On December 19, 1977, President Carter signed the FCPA into law.[19]

B. *Accounting Provisions*

Section 102 of the FCPA[20] contains accounting provisions requiring both the maintenance of accurate records[21] and internal accounting controls.[22] These provisions only apply to issuers subject to either section 15(d) or section 12 of the Securities Exchange Act of 1934 (Exchange Act).[23] Congress enacted section 102 to prevent off-the-book slush funds, often used to make questionable payments abroad.[24] It should be noted, however, that these accounting provisions are applicable to the specified companies regardless of whether they have foreign dealings.[25]

The accurate records provisions of section 102 require reporting companies to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[26] There is support for the proposition that this records requirement also pertains to an issuer's equity, liability, income, and expense accounts, even though the precise wording only refers to an issuer's assets.[27]

Section 102 of the FCPA also requires that issuers "devise and maintain a system of internal accounting controls."[28] Issuers

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19. *See* 78 DEP'T STATE BULL. 27 (1978).
20. 15 U.S.C. § 78m(b)(2) (Supp. II 1978).
21. *Id.* § 78m(b)(2)(A).
22. *Id.* § 78m(b)(2)(B).
23. *Id.* § 78m(b)(2).
24. CONF. REP., *supra* note 1, at 10.
25. Note, *In Search of an International Solution to Bribery: The Impact of the Foreign Corrupt Practices Act of 1977 on Corporate Behavior*, 12 VAND. J. TRANSNAT'L L. 359, 369 (1979).
26. 15 U.S.C. § 78m(b)(2)(A) (Supp. II 1978).
27. SEC Release No. 34-13185, Questionable or Illegal Corporate Payments and Practices, 42 Fed. Reg. 4854, 4856 n.7 (1977) (to be codified in 17 C.F.R. § 240).
28. 15 U.S.C. § 78m(b)(2)(B). Additionally, section 102 provides:

> (b) [The internal accounting control system must] provide reasonable assurances that —
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> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted ac-

should base their form of internal accounting control systems upon a cost/benefit analysis.[29] Factors to be considered include the diversity of company operations, the degree of upper-level management contact with daily operations, the size of the company, and the extent of management centralization.[30]

The accounting provisions exempt national security matters when the head of an agency or department dealing which such an area issues a written directive pursuant to presidential authority.[31] Commentators have noted that this national security exemption results in a loophole which may be used "to immunize the very aerospace and other defense-related enterprises whose improper activities abroad led to congressional passage of the statute."[32]

Section 102 does not include specific sanctions for violations of the accounting provisions.[33] SEC Chairman Williams, however, has stated that the section can be enforced "by the same tools as the balance of the federal securities laws."[34] Thus far, the SEC has focused on civil injunctive actions.[35]

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counting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

29. S. REP. No. 114, 95th Cong., 1st Sess. 6 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4106.

30. *Id.*

31. 15 U.S.C. § 78m(b)(3)(A) (Supp. II 1978).

32. Note, *A Congressional Response to the Problem of Questionable Corporate Payments Abroad,* 10 L. & POL'Y INT'L BUS. 1265 (1978).

33. 15 U.S.C. § 78m(b)(2) (Supp. II 1978).

34. Address by SEC Chairman Harold M. Williams Before the American Accounting Association in Denver, at 16 (Aug. 22, 1978), *reprinted in* 10 L. & POL'Y INT'L BUS. 1261 (1978).

35. *See, e.g.,* SEC v. Katy Indus., Inc., No. 78-3476 (N.D. Ill. Aug. 30, 1978), *discussed in* [1978] 469 SEC. REG. & L. REP. (BNA) at A-1; SEC v. Page Airways, Inc., [1978] FED. SEC. L. REP. (CCH) ¶ 96,393 (D.D.C. Apr. 12, 1978); SEC v. Aminex Resources Corp., [1978] FED. SEC. L. REP. (CCH) ¶ 96,352 (D.D.C. Mar. 9, 1978).

C. *Antibribery Provisions*

Sections 103[36] and 104[37] of the FCPA contain antibribery provisions criminalizing certain types of foreign payments. Although similar in language and scope, the two sections are applicable to different categories of companies and individuals. Section 103 applies to issuers required to file under section 15(d) or register under section 12 of the Exchange Act.[38] On the other hand, section 104 applies to domestic concerns,[39] which include any United States citizen, national, or resident, and any partnership, corporation, joint-stock company, association, unincorporated organization, business trust, or sole proprietorship which is either organized under the laws of a State of the United States or has its principal place of business within the United States.[40] Both sections 103 and 104 also apply to officers, directors, employees, agents, and stockholders acting on behalf of an issuer or domestic concern.[41]

Sections 103 and 104 make it unlawful to use the mails or any instrumentality of interstate commerce "corruptly in furtherance of" an offer, payment, promise, gift, or authorization of money or anything of value.[42] The term "interstate commerce" is defined as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof."[43] Additionally, "interstate commerce" expressly includes the intrastate use of an interstate means of communication or any other interstate instrumentality.[44]

Payments covered under the antibribery provisions are prohibited if made to foreign officials,[45] or foreign political parties, party officials, or political candidates.[46] The FCPA defines a "foreign official" as "any officer or employee of a foreign government of any department, agency, or instrumentality thereof, or any person

36. 15 U.S.C. § 78dd-1 (Supp. II 1978).
37. *Id.* § 78dd-2.
38. *Id.* § 78dd-1(a).
39. *Id.* § 78dd-2(a).
40. *Id.* § 78dd-2(d)(1).
41. *Id.* §§ 78dd-1(a), 78dd-2(a).
42. *Id.*
43. *Id.* § 78dd-2(d)(3).
44. *Id.*
45. *Id.* §§ 78dd-1(a)(1), 78dd-2(a)(1).
46. *Id.* §§ 78dd-1(a)(2), 78dd-2(a)(2).

acting in an official capacity for or on behalf of such government or department, agency or instrumentality."[47] Additionally, the prohibited payments cannot be made to persons who the issuer or domestic concern knows or has reason to know will directly or indirectly offer, promise, or give the payment for prohibited purposes.[48]

Payments are illegal if they are intended to influence the recipient's official decision or act.[49] The antibribery provisions also prohibit payments intended to induce the payee to influence or affect any act or decision of a foreign instrumentality or government.[50] It is important to note, however, that sections 103 and 104 incorporate a "business purpose" test: payments are only illegal if they are made for the purpose of aiding the issuer or domestic concern in "obtaining or retaining business for or with, or directing business to any person."[51]

Jurisdiction under the FCPA is not as limited as a first reading of the statute might imply. Although jurisdiction arises when there is a use of the mails or other instrumentality or means of interstate commerce, the statute provides that the means need only be used "in furtherance" of making an illicit payment.[52] Additionally, even though jurisdiction does not extend to a United States company's foreign subsidiary that does not fit within the definition of an issuer or domestic concern,[53] the United States parent business would incur liability under the antibribery provisions if it uses its foreign subsidiary to make pro-

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47. *Id.* § 78dd-1(b).

48. *Id.* §§ 78dd-1(a)(3), 78dd-2(a)(3). This provision covers commercial agents and consultants employed by United States companies overseas and encourages management's careful scrutiny of its agents' actions. S. REP. No. 114, 95th Cong., 1st Sess. 10 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4098, 4108.

49. Payments are also prohibited if they are intended to influence the recipient to fail to perform official functions. 15 U.S.C. § 78dd-2(a)(1)(A), (a)(2)(A), (a)(3)(A); § 78dd-2(a)(1)(A), (a)(2)(A), (a)(3)(A) (Supp. II 1978).

50. *Id.* § 78dd-1(a)(1)(B), (a)(2)(B), (a)(3)(B); § 78dd-2(a)(1)(B), (a)(2)(B), (a)(3)(B).

51. *Id.* § 78dd-1(a)(1),(2),(3); § 78dd-2(a)(1),(2),(3). CONF. REP., *supra* note 1, at 12.

52. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. II 1978). *See* Note, *The Foreign Corrupt Practices Act: Problems of Extraterritorial Application,* 12 VAND. J. TRANSNAT'L L. 689, 695 (1979).

53. *See* 123 CONG. REC. S19,399 (daily ed. Dec. 6, 1977).

hibited payments on its behalf.[54] The term "corruptly" also serves as a limitation on jurisdiction. According to the legislative history, the word implies an evil motive or purpose, indicating an intent to improperly influence the payee.[55] Finally, the antibribery provisions of section 103 and section 104 do not extend to payments made for the purpose of facilitating ministerial duties of lower-level officials. Aimed at preventing bribes that are intended to affect discretionary decisions, the FCPA specifically excludes "any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical."[56] The legislative history recognizes that these "grease payments" are generally accepted in many countries and are unlikely to be significantly reduced by unilateral United States action.[57] Therefore, the FCPA does not prohibit payments such as those to expedite the processing of documents or the granting of licenses.

Sections 103 and 104 provide tough penalties for violators. Upon conviction, an issuer or domestic concern can be fined up to one million dollars.[58] An individual who is a domestic concern, or an officer, director, or stockholder acting on behalf of an issuer or domestic concern, can be fined up to ten thousand dollars and/or

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54. CONF. REP., *supra* note 1, at 13-14. *See* Note, *supra* note 52, at 696; Note, *supra* note 32, at 1276. Even if a United States company were immune from suit under the antibribery provisions, the SEC might be able to bring action under § 102.

> For instance, although a foreign subsidiary of a United States company makes a foreign payment without the requisite nexus with United States interstate commerce, the SEC can argue that the parent corporation failed to devise and maintain accounting controls adequate to expose the payment of the foreign subsidiary. Under the FCPA, the parent company cannot raise the defense that they were ignorant of bribes made by the foreign subsidiary by looking the other way.

Note, *supra* note 25, at 369. *See* S. REP. No. 114, 95th Cong., 1st Sess. 11 (1977).

55. H. REP. No. 640, 95th Cong., 1st Sess. 7-8 (1977). It also appears that Congress intended to exclude payments given as a result of extortion. SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, REPORT TO ACCOMPANY S 305, FOREIGN CORRUPT PRACTICES ACT OF 1977 AND DOMESTIC AND FOREIGN INVESTMENTS IMPROVEMENT DISCLOSURE ACT OF 1977, TOGETHER WITH ADDITIONAL VIEWS, S. REP. No. 144, 95th Cong., 1st Sess. 10-11 (1977).

56. 15 U.S.C. § 78dd-2(d) (Supp. II 1978). Payment to an official with discretionary duties is exempt from the FCPA if made only to speed performance of a ministerial act. CONF. REP., *supra* note 1, at 12.

57. H.R. REP. No. 640, 95th Cong., 1st Sess. 8 (1977).

58. 15 U.S.C. §§ 78ff(c)(1), 78dd-2(b)(1)(A) (Supp. II 1978).

be imprisoned for up to five years if he wilfully violated section 103 or 104.[59] Additionally, upon a finding of a company's violation of the antibribery provisions, an employee or agent of the company who wilfully carries out a prohibited action may be fined up to ten thousand dollars, imprisoned for up to five years, or both.[60] An employee or agent faces penalty under this provision only if he is subject to the jurisdiction of the United States.[61] It is important to note, however, that the United States company cannot pay, directly or indirectly, any fine levied against a director, officer, employee, stockholder, or agent.[62]

Both the SEC and the Justice Department have enforcement responsibilities under the FCPA antibribery provisions. The Justice Department handles all criminal prosecutions[63] and investigates alleged acts of foreign corrupt payments by domestic concerns.[64] The SEC is responsible for all investigations, administrative proceedings, and civil injunctive actions pertaining to reporting companies.[65] Additionally, the FCPA empowers the Attorney General to bring civil injunctive actions whenever it appears that any domestic concern or its officer, director, agent, stockholder, or employee is engaged, or about to engage, in a violation of the antibribery provisions.[66] Further, although not specifically provided for in the FCPA, the SEC contemplates a private right of action for persons injured by prohibited foreign payments.[67]

III. Overview of Draft International Agreement on Illicit Payments

On May 18, 1979, the Committee on an International Agreement on Illicit Payments (Committee) adopted the draft report

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59. 15 U.S.C. §§ 78dd-2(b)(1)(B), 78dd-2(b)(2), 78ff(c)(2) (Supp. II 1978).

60. *Id.* §§ 78dd-2(b)(3), 78ff(c)(3).

61. *Id.*

62. *Id.* §§ 78ff(c)(4), 78dd-2(b)(4).

63. S. Rep. No. 114, 95th Cong., 1st Sess. 11-12 (1977); H.R. Rep. No. 640, 95th Cong., 1st Sess. 9-10 (1977).

64. H.R. Rep. No. 114, 95th Cong., 1st Sess. 9 (1977).

65. *Supra* note 63.

66. 15 U.S.C. § 78dd-2(c) (Supp. II 1978).

67. *See* H.R. Rep. No. 640, 95th Cong., 1st Sess. 10 (1977). *See generally* Note, *The Foreign Corrupt Practices Act of 1977: A Private Right of Action*, 12 Vand. J. Transnat'l L. 735 (1979).

on its first and second sessions.[68] The Committee's report contains both the text of the Agreement[69] and notes concerning delegations' views on controversial provisions.[70] The Agreement, in its present draft form, utilizes both disclosure and criminalization approaches to combat illicit payments in an international context.[71]

A. *Records Provisions*

Article 6 of the Agreement[72] contains records provisions pertaining to payments in connection with international transactions. The Agreement defines an "international commercial transaction" as follows:

> [*inter alia*] any sale, contract or any other business transaction, actual or proposed, with a national, regional or local government or any [public or governmental authority or agency] or any business transaction involving an application for governmental approval of a sale, contract or any other business transaction, actual or proposed, relating to the supply or purchase of goods, services, capital or technology emanating from [another State].[73]

Additionally, an "international commercial transaction" includes any acquisition of or application for production rights or proprietary interests from a government by a foreign enterprise or national.[74]

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68. Report of the Committee on an International Agreement on Illicit Payments on Its First and Second Sessions (2d regular session, agenda item 9) 21, U.N. ESCOR, U.N. Doc. E/1979/104 (1979) [hereinafter cited as Report].

69. Agreement, *supra* note 6.

70. Notes on the Draft International Agreement on Illicit Payments, U.N. ESCOR, Report of the Committee on an International Agreement on Illicit Payments on Its First and Second Sessions (2d regular session, agenda item 9) U.N. Doc. E/1979/104 (1979) [hereinafter cited as Notes]. After being reported to the Economic and Social Council and the Commission on Transnational Corporations, Report, *supra* note 68, at 2, the Draft Agreement was to have gone to a conference of plenipotentiaries to be concluded. Notes, 8 n.1.

71. *See* Agreement, *supra* note 6.

72. *Id.* art. 6, at 5.

73. *Id.* art. 2(b), at 3. The article 2(b) definition of "international commercial transaction" begins with "[*inter alia*]," indicating that the examples given are not exclusive. It should be noted, however, that the words *"inter alia"* are bracketed, signifying disagreement over their inclusion in the final text. *See* Report, *supra* note 68, at 2.

74. Agreement, *supra* note 6, art. 2(b), at 3.

Article 6 is applicable to enterprises or other juridical persons established within the territory of a contracting state.[75] Under penalty of law,[76] the covered businesses must maintain accurate records of payments made by them to an intermediary, or received by them as an intermediary, in connection with an international commercial transaction.[77] The Agreement defines an "intermediary" as any enterprise or other natural or juridical person who, in connection with an international commercial transaction, deals or negotiates with a public official on behalf of any other enterprise or natural or juridical person.[78] Article 6 also provides that the records must include the names and addresses of any intermediary or intermediaries receiving payments.[79] Additionally, covered companies must record the date and amount of such payment.[80]

Article 10 of the Agreement[81] provides that records maintained pursuant to article 6 must be produced when they will aid in another contracting state's investigations or proceedings under the antibribery provisions discussed below.[82] Production of records to assist another contracting state is limited, however, by the requested state's law, essential national interests, and need of confidentiality.[83]

B. *Antibribery Provisions*

Article 1 of the Agreement[84] contains antibribery provisions prohibiting certain types of payments in an international context. Contracting states must prohibit the following actions:

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75. *Id.* art. 6, at 5.

76. The Agreement does not specify the form of penalty for violations of article 6.

77. Agreement, *supra* note 6, art. 6, at 5.

78. *Id.* art. 2(c), at 3.

79. *Id.* art. 6, at 5. One delegation felt that the following information should also be required under the records provisions: "and, to the extent known by the party concerned, the name and address of any public official who is retained by or has a financial interest in the intermediary." Notes, *supra* note 70, at 12.

80. Agreement, *supra* note 6, art. 6, at 5.

81. *Id.* art. 10, at 6.

82. *Id.* art. 10(3).

83. *Id.* The "essential national interests" limitation on production of records is bracketed, signalling dissension among Committee members. *See* Report, *supra* note 68, at 2.

84. Agreement, *supra* note 6, art. 1, at 3.

> the offering, promising or giving of any payment, gift or other advantage by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or natural, to or for the benefit of a public official as undue consideration for performing or refraining from the performance of his duties in connection with an international commercial transaction.[85]

Additionally, article 1 prohibits a public official from directly or indirectly soliciting, accepting, demanding, or receiving any gift, payment, or other advantage as undue[86] consideration for performing or refraining from performing his duties in connection with any international commercial transaction.[87] According to the Agreement, a "public official" includes the following: (1) any appointed or elected official at the local, regional, or national level holding a judicial, military, administrative, or legislative office;[88] (2) any government employee; (3) any public or governmental agency or authority employee; and (4) any other person performing a public function.[89]

Article 1 of the Agreement takes a criminalization approach to the problem of international bribery.[90] Contracting states must punish offending public officials and natural persons by "appropriate criminal penalties under its national law."[91] Additionally, the Agreement requires criminal sanctions for violations by juridical persons.[92] If, however, a contracting state's national law does not recognize criminal responsibility of a juridical person, the state must take appropriate measures aimed at achieving deterrent effects comparable to that of criminal liability.[93]

Article 3 of the Agreement provides that contracting states must "take all practicable measures"[94] to prevent violations of the

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85. *Id.* art. 1(a). *See* note 73 *supra* and accompanying text.

86. Some delegations state that the term "undue" should not be inserted to qualify the word "consideration." Notes, *supra* note 70, at 8.

87. Agreement, *supra* note 6, art. 1(b), at 3.

88. Both temporary and permanent officials are subject to the antibribery provisions. *Id.* art. 2(a).

89. *Id.* art. 2(a).

90. *Id.* art. 1(1).

91. *Id.*

92. *Id.* art. 1(2).

93. *Id.*

94. One delegation noted that "the word 'practicable' is subject to differing interpretations and might be viewed as meaning that federal States shall carry out their obligations under article 3 in accordance with their respective constitutional systems." Notes, *supra* note 70, at 10.

antibribery provisions.[95] Although article 3 expressly limits itself to measures aimed at preventing article 1 offenses,[96] one delegation advocated drafting the prevention provision in such a manner that violations under the Agreement not specified in article 1 could also be covered.[97]

Article 4 of the Agreement contains jurisdictional requirements.[98] Under article 4 paragraph 1, each contracting state must take measures to establish its jurisdiction over article 1 antibribery violations when the offense is committed within its territory[99] or has effects within the state.[100] Article 4 paragraph 1 also requires a contracting state to establish its jurisdiction over article 1 offenses when the recipient is a public official of the state[101] or when the payment if proffered by one of its own nationals,[102] provided that an element of the violation, or an act aiding and abetting the violation, is connected with the territory of the state.[103] Additionally, article 4 paragraph 3 requires that contracting states take measures to establish their jurisdiction over any other offenses that might fall within the Agreement's scope

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95. Agreement, *supra* note 6, art. 3, at 4.

96. *Id.*

97. Notes, *supra* note 70, at 10.

98. Agreement, *supra* note 6, art. 4, at 4.

99. *Id.* art. 4(1)(a).

100. *Id.* art. 4(1)(d). This provision is bracketed, indicating lack of agreement among delegations. *See* Report, *supra* note 68, at 2.

101. Agreement, *supra* note 6, art. 4(1)(b), at 4.

102. The text of this requirement states that:

> [a Contracting State must establish its jurisdiction] over the offense . . . relating to any payment, gift or other advantage in connection with [the negotiation, conclusion, retention, reversion or termination of] an international commercial transaction when the offense is committed by a national of that State, provided that any element of that offense, or any act aiding or abetting that offense, is connected with the territory of that State.

Id. art. 4(1)(c). It should be noted that some delegations advocated inclusion of juridical persons, in addition to natural persons, to make the article 4 jurisdictional requirements more closely parallel the article 1 offenses. Notes, *supra* note 70, at 11. Additionally, certain delegations stated that the bracketed language qualifying the words "international commercial transaction" unduly limited the scope of jurisdiction. *Id.* Other delegations, however, stated that the bracketed language was necessary to comply with their states' law of jurisdiction, since their legal systems do not assert jurisdiction based solely on nationality. *Id.*

103. Agreement, *supra* note 6, art. 4(1)(c), at 4.

when that violation is committed by a public official of the state, in the territory of the state, by a juridical person established within the state, or by a national of the state.[104]

Article 5 of the Agreement contains mandatory prosecution provisions.[105] The Agreement states that if a contracting state has article 4 paragraph 1 jurisdiction over an article 1 bribery offender found within its territory, it must, without exception, submit the case to its appropriate authorities for prosecution.[106] Further, the Agreement expressly provides that prosecution is mandatory, whether or not the contracting state extradited the alleged offender.[107] One delegation noted that the prosecution requirement should have been extended to any offense within the scope of the Agreement over which the contracting state has jurisdiction under article 4 paragraph 3, regardless whether the offense falls within the article 1 antibribery provisions.[108]

Article 11 of the Agreement contains provisions relating to extradition.[109] Under article 11, "offenses [referred to in article 1 / within the scope of this Agreement][110] shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States."[111] Future extradition treaties between contracting states must also include article 1 violations as extraditable offenses.[112] Additionally, for purposes of extradition, the offense must be treated "as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with

104. *Id.* art. 4(3). This requirement is bracketed, signifying a lack of consensus on its inclusion. *See* Report, *supra* note 68, at 2. It should also be noted that the Agreement "does not exclude any criminal jurisdiction exercised in accordance with the national law of a Contracting State." Agreement, *supra* note 6, art. 4(2), at 4.

105. Agreement, *supra* note 6, art. 5, at 4-5.

106. *Id.* art. 5(1), at 4.

107. *Id.* art. 5(3), at 5.

108. Notes, *supra* note 70, at 11.

109. Agreement, *supra* note 6, art. 11, at 7.

110. Delegations were in disagreement concerning which of the bracketed phrases should be incorporated. The "article 1" language would limit the extradition provisions to bribery offenses, while the words "within the scope of the Agreement" would extend article 11 to the records provisions. Notes, *supra* note 70, at 13.

111. Agreement, *supra* note 6, art. 11(1), at 7.

112. *Id.*

article 4, paragraph 1."[113]

If a contracting state's national law makes extradition conditional upon the existence of a treaty, it "[may at its option/ shall]"[114] consider the Agreement to be the legal basis for the alleged offender's extradition when it receives an extradition request from another contracting state with which it does not have such a treaty.[115] Extradition in such a case, however, is subject to any conditions provided by the requested state's national law.[116] Under circumstances in which contracting states do not make extradition conditional on the existence of a treaty, they "[shall/ may at their option]"[117] recognize the violation as an extraditable offense between their countries, subject to any conditions required by the requested state's law.[118]

The Agreement contains mutual assistance provisions to aid in its enforcement.[119] Under article 10, contracting states must give each other "the greatest possible measure of assistance in connection with criminal investigations and proceedings[120] brought in respect to any of the offenses [referred to in article 1/within the

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113. *Id.* Agreement, art. 11(4).

114. "Several States that do not make extradition conditional on the existence of a treaty . . . insisted on the need to retain the word 'shall' . . . in order to ensure that States could extradite without a treaty and those that could not extradite without a treaty made an equal commitment." Notes, *supra* note 70, at 14.

115. Agreement, *supra* note 6, art. 11(2), at 7.

116. *Id.*

117. Numerous delegations asserted that the "may at their option" language should be deleted. Notes, *supra* note 70, at 13-14. Another delegation, however, noted that systems of extradition vary greatly from state to state, and advocated the position that it is "necessary to retain the possibility of using the Agreement as an optional legal basis for extradition in line with the precedents in numerous other agreements." *Id.* at 14.

118. Agreement, *supra* note 6, art. 11(3), at 7.

119. *Id.* art. 10, at 6.

120. One delegation pointed out that, owing to the broadening of the scope of the applicability of the draft agreement by the introduction of the article 1 provisions for punishment of juridical persons, the mutual assistance contracting states should lend to one another ought not only refer to criminal proceedings and investigations that would be launched against the alleged offender, but should also cover proceedings and investigations of an administrative or civil nature and, since a number of delegations were unable to agree to that interpretation, that delegation reserved its position with respect to the ultimate acceptance of article 10. Notes, *supra* note 70, at 13.

scope of this Agreement]."[121] The extent to which assistance must be provided is determined by the law of the requested state.[122] As far as permissible under the requested state's national law, mutual assistance should also be given to aid in investigations and proceedings[123] concerning article 1 violations committed by juridical persons.[124] Under the Agreement, mutual assistance includes the following types of aid: (1) production of records maintained pursuant to the requirements of article 6; (2) production of documents and other needed information; (3) taking of evidence; (4) service of documents germane to court proceedings or investigations; and (5) notice of the initiation and result of public criminal proceedings under the article 1 antibribery provisions.[125] This last type of assistance need only be given to other contracting states that may, under article 4, also have jurisdiction over the same violations.[126] It should be noted, however, that the requirement for mutual assistance is limited by the requested state's laws, essential national interests, and need to preserve the confidential nature of documents and other information.[127]

The Agreement provides that any information or evidence obtained pursuant to article 10 must be used solely for the purpose of enforcing the Agreement.[128] All evidence and information must be kept confidential, except to the extent that disclosure is mandatory in enforcement proceedings.[129] The Agreement states that any other use of the information is permitted only with the approval of the requested state.[130]

Further, upon mutual agreement, contracting states shall enter into negotiations towards bilateral agreements to facilitate mu-

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121. Agreement, *supra* note 6, art. 10(1), at 6.

122. *Id.*

123. One delegation reserved its position on this clause because the French language text only referred to "mutual judicial assistance." Notes, *supra* note 70, at 13.

124. Agreement, *supra* note 6, art. 10(2), at 6.

125. *Id.* art. 10(3).

126. *Id.* art. 10(3)(b).

127. *Id.* art. 10(3).

128. *Id.* art. 10(5). Various delegations felt that this provision would be considered applicable only to proceedings of a judicial nature in their states. Conversely, other delegations advocated the position that the provision's scope should extend to non-judicial proceedings, such as those of an administrative nature. Notes, *supra* note 70, at 13.

129. Agreement, *supra* note 6, art. 10(5), at 7.

130. *Id.*

tual assistance under article 10.[131] The article 10 mutual aid provisions, however, will not affect systems governing mutual assistance in criminal matters under any other bilateral or multilateral treaty.[132]

C. *Miscellaneous Provisions*

1. Southern Africa Provisions

Article 7 of the Agreement prohibits nationals and enterprises of contracting states from having certain types of business contacts with "illegal minority regimes" in southern Africa.[133] It should be noted, however, that the entire article is bracketed in the text of the Agreement, signifying delegation disagreement over its inclusion.[134] The Committee agreed to retain the article for further consideration by the conference of plenipotentiaries to be convened at a later date.[135]

In its present form, article 7 prohibits a contracting state's nationals or enterprises from paying royalties or taxes to illegal minority regimes in southern Africa.[136] Enterprises and nationals paying royalties or taxes in contravention of article 7 must report the payments to their contracting states.[137] Additionally, contracting states must prohibit their enterprises and nationals from "knowingly tranferring any assets or other financial resources in contravention of United Nations resolutions to facilitate trade with, or investment in a territory occupied by an illegal minority regime in southern Africa."[138] Finally, contracting states must submit annual reports to the Secretary-General of the United Nations concerning any activities of its transnational corporations collaborating directly or indirectly with the aforementioned regimes in disregard of United Nations resolutions.[139]

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131. *Id.* art. 10(4).
132. *Id.* art. 10(6).
133. *Id.* art. 7.
134. *Id.*; *see* Report, *supra* note 68, at 2.
135. Notes, *supra* note 70, at 12.
136. Agreement, art. 7(1), *supra* note 6, at 5.
137. *Id.* art. 7(2).
138. *Id.* art. 7(1).
139. *Id.* art. 7(3).

2. Voidability Provisions

Article 8 requires contracting states to recognize the voidability of any international commercial transaction when an offense within the scope of the Agreement is decisive in procuring the consent of one of the parties to the transaction.[140] Further, a contracting state must ensure that its national law enables the party to institute judicial proceedings to obtain damages, have the transaction declared null and void, or both.[141] It should be noted, however, that article 8 is bracketed in the text of the Agreement to signify disagreement over its inclusion.[142]

3. Free Flow of Information Provisions

Article 9 contains provisions pertaining to the free flow of information among contracting states.[143] When requested to do so, contracting states must inform each other of the measures they have taken to implement the Agreement.[144] Each contracting state must also furnish the Secretary-General of the United Nations with the following information concerning its implementation of the Agreement: (1) legislative measures; (2) administrative regulations; (3) judicial proceedings; and (4) other measures taken pursuant to the implementing laws and regulations.[145] Further, whenever final convictions have been obtained under laws promulgated pursuant to the Agreement, contracting states must furnish information concerning the case, the decision, and the sanctions imposed.[146] Finally, the Secretary-General is responsible for circulating a summary of this information to the other contracting states.[147]

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140. *Id.* art. 8. Several delegations noted that article 8 would pose serious constitutional, legislative, or juridical problems for them, especially since the article would affect the area of private law which was not otherwise within the scope of the Agreement. Notes, *supra* note 70, at 12.

141. Agreement, *supra* note 6, art. 8, at 5. Several delegations indicated that article 8 would provide a strong deterrent against bribery in an international context and felt the provision should be retained. Notes, *supra* note 70, at 12.

142. *See* Report, *supra* note 68, at 2.

143. Agreement, *supra* note 6, art. 9, at 5.

144. *Id.* art. 9(1), at 5.

145. *Id.* art. 9(2), at 6.

146. *Id.* The Agreement requires this information only to the extent it is not viewed as confidential under the law of the requested contracting state. *Id.*

147. *Id.* art. 9(3), at 6.

IV. Interface Between the FCPA and the Agreement

The FCPA and the Agreement were both drafted to combat commercial bribery in the international arena. Consequently, they should be compared to expose areas of interface. This examination reveals significant differences, as well as similarities, between the two measures.

A. *Records Provisions*

The types of businesses covered under the records provisions of the FCPA and the Agreement vary significantly. The article 6 provisions of the Agreement pertain to all enterprises and other juridical persons established within the territory of a contracting state.[148] By contrast, the FCPA accounting provisions only apply to issuers subject to either section 15(d) or section 12 of the Exchange Act.[149] Thus, the FCPA would have to be expanded, or other legislation would have to be passed, to bring United States law into line with the Agreement's records provisions.

The type of transactions falling within the scope of the records provisions of the Agreement and the FCPA also vary. The FCPA records provisions cover all transactions and dispositions involving assets.[150] There is no requirement of any interstate or foreign commerce nexus.[151] In comparison, the Agreement only requires records to be kept of payments made to intermediaries in connection with international commercial dealings.[152] Therefore, it is apparent that the type of transaction covered under the FCPA is significantly broader than the coverage required under the Agreement.

The amount of detail required under the records provisions of the two measures does not vary to a large degree. Under the Agreement, records must be accurate and must include the date and amount of payment and the names and addresses of intermediaries receiving payment.[153] The FCPA accounting provisions require reasonably detailed records that accurately and fairly reflect transactions.[154] Thus, although the FCPA does not

148. *Id.* art. 6, at 5.
149. 15 U.S.C. § 78m(b)(2) (Supp. II 1978).
150. *Id.* § 78m(b)(2)(A).
151. *See id.* § 78m(b)(2).
152. Agreement, *supra* note 6, art. 6, at 5.
153. *Id.*
154. 15 U.S.C. § 78m(b)(2)(A) (Supp. II 1978).

specify what constitutes "reasonable detail," the two measures appear to have the same basic requirement—detailed, accurate records.

The records provisions of the FCPA and the Agreement are both under penalty of law. The FCPA accounting requirements are enforceable by the same measures applicable to other Exchange Act violations.[155] As the Agreement does not specify the nature of the required penalties, it is unlikely that conflict will occur in this area.

Finally, the FCPA specifically provides for internal accounting controls.[156] In comparison, the Agreement does not require the institution of such a system. Therefore, as the FCPA is broader than the Agreement in this respect, additional legislation would not have to be passed if the United States became a contracting state under the Agreement in its present form.

B. *Antibribery Provisions*

There are significant differences between the FCPA and the Agreement concerning the scope of individuals falling within the category of recipients to whom covered individuals and businesses are prohibited from offering payments. The FCPA prohibits the giving of bribes to foreign officials, foreign political parties, foreign political party officials, and candidates for foreign political office.[157] Additionally, the FCPA's coverage extends to payment to any person knowing, or having reason to know, that the payment is for any of the aforementioned individuals or parties.[158] On the other hand, the Agreement prohibits only illicit payments to, or for the benefit of, public officials.[159]

The differing definitions of recipients under the FCPA and the Agreement lead to two problems. First, the FCPA specifies that payments cannot be made to *foreign* officials, in contrast to the Agreement's prohibitions against bribes to *any* public official. Therefore, the Agreement could be interpreted as prohibiting illicit payments to both foreign and domestic officials. This issue is alleviated, however, by the existence of United States statutes prohibiting the bribery of domestic officials and government em-

155. *See* note 34 *supra* and accompanying text.
156. 15 U.S.C. § 78m(b)(2)(B) (Supp. II 1978).
157. *Id.* § 78dd-1(a)(1),(2); § 78dd-2(a)(1),(2).
158. *Id.* §§ 78dd-1(a)(3), 78dd-2(a)(3).
159. Agreement, *supra* note 6, art. 1(1)(a), at 3.

ployees.[160] Second, the FCPA and the Agreement differ in their treatment of "grease payments." Although the Agreement does not exempt payments to expedite routine functions, the FCPA specifically excludes payments to facilitate ministerial or clerical actions.[161] An argument could be made that the Agreement's prohibition against "undue consideration" for the performance of official duties[162] would serve to exempt "grease payments" in states where they are the norm, and are therefore "due." In light of the lack of a specific exemption, however, it is unlikely that this was the drafters' intent. Therefore, if the United States became a contracting state to the Agreement in its present form, the FCPA exemption for "grease payments" would have to be amended.

The FCPA has jurisdiction only when there is a use of the mails or other means or instrumentality of interstate commerce in furtherance of the prohibited payment.[163] In contrast, the Agreement does not have any corresponding restriction on the means used in connection with the offering of the bribe. Although the interstate instrumentality nexus language appears to put an added limitation on FCPA jurisdiction over foreign bribery, it is unlikely that a situation would arise in which there was no use of the telephone or mails in furtherance of the illegal act.

The FCPA is broader than the Agreement concerning the types of persons and businesses prohibited from making illicit payments. Domestic concerns and certain categories of issuers fit within the FCPA antibribery provisions.[164] The definition of a domestic concern includes United States citizens, nationals, and residents, in addition to virtually all forms of businesses organized under United States laws or having their principal place of business within its territory.[165] The FCPA also covers officers, directors, employees, agents, and stockholders acting on behalf of an issuer or domestic concern.[166] In comparison, the Agreement prohibits payments "by any natural person, on his own behalf or on behalf of any enterprise or any other person whether juridical or

160. *See, e.g.*, 18 U.S.C. § 201(b) (1976). Similar statutes can also be found at the state and local level.

161. 15 U.S.C. § 78dd-1(b) (Supp. II 1978).

162. Agreement, *supra* note 6, art. 1(1)(a), at 3.

163. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. II 1978).

164. *Id.* §§ 78dd-1(a), 78dd-2(a).

165. *Id.* § 78dd-2(d)(1).

166. *Id.* §§ 78dd-1(a), 78dd-2(a).

natural."[167] As the Agreement is not broader than the FCPA in this regard, the United States would not have to amend this aspect of its legislation should it become a contracting state to the Agreement in its present form.

The FCPA and the Agreement have similar provisions concerning the form of prohibited bribes. The Agreement prohibits "the offering, promising or giving of any payment, gift or other advantage."[168] Likewise, the FCPA prohibits any payment, offer, promise to pay, or authorization to pay money.[169] Additionally, the FCPA proscribes any gift, offer, promise to give, or authorization to give anything of value.[170] The Agreement's prohibition against the giving of any "advantage" can be equated with the FCPA's prohibition against the giving of "anything of value." Therefore, the only real discrepancy pertains to the FCPA proscription against the "authorization" of any bribe. This prohibition, however, is in addition to the Agreement's requirements and therefore presents no problem.

Both the FCPA and the Agreement incorporate "business-purpose" tests. The Agreement prohibits illicit payments to public officials as undue consideration for performing or refraining from performing his duties in connection with any international commercial transaction.[171] On the other hand, the FCPA prohibits bribes intended to influence the payee in his official capacity or to induce him to use his influence to affect the acts of any government or its instrumentality.[172] Furthermore, these payments are only prohibited under the FCPA if their purpose is either to direct business to anyone or to assist a company in obtaining or retaining business.[173] Thus, there are two primary differences between the FCPA and the Agreement regarding the prohibited purpose of the illicit payments. First, the FCPA contains "inducement" language, which is not present in the Agreement. As this "inducement" proscription is in addition to the other prohibited purposes, the FCPA is broader than the Agreement in this area. Second, the Agreement specifically limits its prohibitions to illicit

167. Agreement, *supra* note 6, art. 1(1)(a), at 3.
168. *Id.*
169. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (Supp. II 1978).
170. *Id.*
171. Agreement, *supra* note 6, art. 1(1)(a), at 3.
172. 15 U.S.C. §§ 78dd-1, 78dd-2 (Supp. II 1978).
173. *Id.*

payments in connection with an "international commercial transaction." The FCPA, in contrast, contains no comparable language. This problem is remedied, however, by the fact that the FCPA only extends to bribes made to "foreign" officials, political parties, and candidates for political office.[174] Therefore, any illicit payment made by a United States individual or company to such a foreign personage or party would most likely be for the purpose of affecting an "international commercial transaction."

The Agreement and the FCPA are in sharp contrast in the area of bribe solicitations. The FCPA extends only to the offering or payment of bribes. Conversely, the Agreement explicitly prohibits "[t]he soliciting, demanding, accepting or receiving, directly or indirectly, by a public official of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of his duties in connexion with an international commercial transaction."[175] This apparent conflict is alleviated, however, by the existence of other United States legislation prohibiting the solicitation or acceptance of bribes by domestic officials and government employees.[176]

There are no significant problems pertaining to penalties and enforcement under the FCPA and the Agreement. The Agreement only specifies that violations of its antibribery provisions must be punished by criminal penalties.[177] As the FCPA provides for criminal sanctions, including fines, imprisonment, or both,[178] it would comply with the requirements of the Agreement in this respect. The Justice Department fulfills the criminal enforcement function under the FCPA.[179] It should be noted, however, that the FCPA also makes provision for civil injunctive actions.[180]

The Agreement's southern Africa provisions have no counterpart within the FCPA or other United States legislation. Under the Agreement, a contracting state's enterprises and nationals are prohibited from paying royalties or taxes to "illegal minority regimes" in southern Africa.[181] If taxes or royalties are paid in con-

174. *Id.*

175. Agreement, *supra* note 6, art. 1(1)(b), at 3.

176. *See, e.g.*, 18 U.S.C. § 201(c) (1976). Similar statutes are present at the state and local level.

177. Agreement, *supra* note 6, art. 1(1), at 3.

178. 15 U.S.C. § 78dd-2(b) (Supp. II 1978).

179. *See* note 63 *supra* and accompanying text.

180. *See* notes 65 & 66 *supra* and accompanying text.

181. Agreement, *supra* note 6, art. 7(1), at 5.

travention of this prohibition, the offending businesses or individuals must report the payments to their governments, and in turn the contracting state must issue reports on the prohibited activities to the Secretary-General of the United Nations.[182] Additionally, the Agreement prohibits the transfer of assets or other financial resources to facilitate trade or investment with the aforementioned territories if those actions are in violation of United Nations resolutions.[183] In contrast, there are no similar prohibitions against non-military commercial dealings with minority regimes in southern Africa in the FCPA or other United States legislation. As the Agreement's southern Africa provisions are bracketed, however, it is evident that there is delegation dissension over their inclusion and there is a possibility they will not be included in the final text.

It should be noted that since the publication of the draft Agreement's southern Africa provisions both the United States and the United Nations have lifted their bans on trade with Rhodesia.[184] With reference to the Republic of South Africa, however, the United Nations' stance has been much more stringent that that of the United States.[185] It appears, though, that the United States support of South Africa is slowly lessening. In 1978, the United States imposed an embargo on exports to South African military and police forces "to strengthen U.S. implementation of United Nations Security Resolutions" pertaining to embargoes against South Africa.[186] Additionally, the Senate Foreign Relations Subcommittee on Africa has advocated an end to United States encouragement of commercial ventures in South Africa.[187]

The Agreement requires contracting states to take "all practicable measures" to prevent violations of the criminal bribery provisions.[188] The United States probably would not experience any problems complying with this provision, providing it adequately enforces both the FCPA and concomitant revisions made to bring the FCPA in line with the Agreement. Additionally, the United

182. *Id.* art. 7(2),(3).

183. *Id.* art. 7(1).

184. 39 FACTS ON FILE 960, 976 (1979).

185. The United Nations has passed innumerable resolutions against South Africa, aimed particularly at its system of apartheid. The United States, France, and Great Britain frequently have voted in opposition to these resolutions.

186. 38 FACTS ON FILE 135 (1978).

187. *Id.*

188. Agreement, *supra* note 6, art. 3, at 4.

States would have to exhibit strong enforcement of existing legislation pertaining to the solicitation of bribes by public officials and employees.

An examination of jurisdiction under the FCPA and the Agreement is crucial to an understanding of the interaction between the two measures. The Agreement requires a contracting state to establish its jurisdiction over article 1 offenses committed either within its territory[189] or by its public officials.[190] A contracting state must also assert jurisdiction over certain types of payments[191] when the offense is "committed by a national of that State, provided that any element of that offense, or any act aiding or abetting that offense, is connected with the territory of that State."[192] In addition, signatories must establish their jurisdiction over any article 1 bribery offense having effects within its territory.[193] It must be noted, however, that this "effects" provision is bracketed, and therefore might not be included in the final text. Finally, the Agreement provides that each contracting state must establish its jurisdiction over any other offense falling within the scope of the international measure, providing that the offense is committed by one of its nationals, public officials, or juridical persons, or when it is committed within the state's territory.[194] This last provision makes no reference to jurisdiction based on effects within a nation's borders.

The FCPA is an amendment to the Securities Exchange Act and its jurisdiction must be discussed in that context.[195] While an in-depth analysis of FCPA legislative jurisdiction is beyond the scope of this Note,[196] a cursory examination follows. Extraterritorial jurisdiction under the securities laws has consistently been interpreted in light of international law.[197] Under the principle of territorial jurisdiction, if an essential element of a crime occurs within a sovereign's territory, it may assert jurisdiction over the offender.[198] This theory of jurisdiction, recognized by the United

189. *Id.* art. 4(1)(a).
190. *Id.* art. 4(1)(b).
191. *Id.* art. 4(1)(c).
192. *Id.*
193. *Id.* art. 4(1)(d).
194. *Id.* art. 4(3).
195. *See* note 2 *supra.*
196. *See generally,* Note *supra* note 52.
197. *E.g.,* Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).
198. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED

States, would fulfill the Agreement's requirements concerning a contracting state's jurisdiction over offenses committed within its territory. The nationality theory of jurisdiction under international law states that a country may exert jurisdiction over its nationals, regardless of where the offense occurred.[199] Under this theory, the Agreement's requirements concerning jurisdiction over both public officials and other nationals would be met. Thus, the remaining issue is whether the United States can assert jurisdiction over offenses having effects within its territory, as required by the Agreement. United States courts recognize the international law principle of objective territoriality, which states that jurisdiction can be based on the presence of "effects" within a nation's territory resulting from a violation of its laws.[200] The nature and extent of the required "effects" varies, however, between different judicial circuits.[201] Therefore, although the United States could comply with this jurisdictional requirement of the Agreement, the interpretation of "effects" may lack uniformity within the United States court system.

The Agreement provides that contracting states must recognize the voidability of international commercial transactions when a violation of the Agreement is decisive in procuring one of the party's consent.[202] Additionally, contracting states must ensure that a party has the right to institute judicial proceedings to have the transaction declared null and void, obtain damages, or both.[203] Under the Exchange Act, to which the FCPA is an amendment, every contract made or performed in violation of its provisions are void "as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract."[204] Also, the rights and remedies under the Exchange Act are in addition to other rights and remedies in equity or at law.[205] Therefore, it is unlikely that problems will arise in this area of overlap

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STATES § 17 (1965).

199. *Harvard Research on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 520 (Supp. 1935).

200. Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968).

201. *Compare* Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973) *with* Bersch v. Drexel Firestone Inc., 519 F.2d 974 (2d Cir. 1975).

202. Agreement, *supra* note 6, art. 8, at 5.

203. *Id.*

204. 15 U.S.C. § 78cc(b) (1976).

205. *Id.* 78bb.

between the Agreement and the FCPA. All contracting states will undoubtedly recognize the effective deterrent effects of the Agreement's voidability provisions.

The Agreement provides for the free-flow of information and cooperation in investigations and proceedings by contracting states.[206] This cooperation requirement is limited by the law of the state requested to give assistance.[207] Thus, records falling within the FCPA accounting provision national security exemption would be protected under the Agreement. Additionally, the Agreement requires negotiations toward bilateral treaties for mutual aid.[208] As the assistance provisions would aid in enforcement of the FCPA, it is unlikely that the United States would voice any objections over their inclusion in the Agreement.

The Agreement requires any contracting state where an offender is found to submit the violator to competent authorities for prosecution.[209] Furthermore, the Agreement includes far-reaching extradition provisions.[210] These measures would aid the United States in its enforcement of the FCPA and therefore will probably receive full United States support.

V. CONCLUSION

Upon signing the FCPA into law, President Carter made the following statement: "[The FCPA] can only be fully successful in combating bribery and extortion if other countries and business itself take comparable action. Therefore, I hope progress will continue in the United Nations toward the negotiation of a treaty on illicit payments."[211] The United States is not alone in its desire for a multilateral approach to the problem of bribery in an international context. In addition to the United Nations efforts that culminated in the Agreement, the Organization of American States has passed a resolution condemning foreign bribery.[212]

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206. Agreement, *supra* note 6, art. 10, at 6.
207. *Id.* art. 10(3).
208. *Id.* art. 10(4).
209. *Id.* art. 5(1), at 4.
210. *Id.* art. 11, at 7.
211. 78 DEP'T STATE BULL. No. 2010, at 27 (Jan. 1978).
212. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, GUIDELINES FOR MULTINATIONAL ENTERPRISES (1976), *reprinted in* 75 DEP'T STATE BULL. 83 (1976); COMMISSION ON ETHICAL PRACTICES, INTERNATIONAL CHAMBER OF COMMERCE, RECOMMENDATIONS TO COMBAT EXTORTION AND BRIBERY IN BUSINESS

Also, both the Organization for Economic Cooperation and Development and the International Chamber of Commerce have drafted guidelines for corporate conduct that prohibit illicit payments.[213]

The United States has a special interest in a multilateral effort to combat foreign corrupt practices. First, United States businesses subject to the FCPA are at a disadvantage in overseas competition when foreign companies do not face similar prohibitions.[214] Second, if facing the possibility of prosecution in a foreign country, United States corporations would be less likely to risk making illicit payments. Third, a joint effort would aid in enforcement of the FCPA, since any international agreement would most likely contain mutual assistance provisions.

Thus, presented with the United States desire for a multilateral approach, the next issue is whether the Agreement constitutes an acceptable tool with which to fight foreign bribery in a commercial context. As examined earlier, there are several obvious problems with United States support of the Agreement in its present form. The type of businesses covered under the FCPA accounting provisions would have to be expanded. Furthermore, the permissibility of "grease payments" under the FCPA would have to be eliminated. Finally, United States foreign policy is not in alignment with the Agreement's southern Africa provisions. The last objection is mitigated, however, by the significant dissension over inclusion of the provisions in the final text and by the changing attitude of the United States towards South Africa. On the other hand, the Agreement would provide the United States with several benefits. First, the mutual assistance provisions would aid in investigations and proceedings against FCPA offenders. Second, extradition would be facilitated. Third, many of the Agreement's provisions would serve as added deterrents against overseas bribery by United States businesses. Last, if a sufficient number of nations become signatories, the free market system would be less impaired by illicit payments.

A balancing of the positive and negative aspects of United States support of the Agreement militates in favor of its acceptance. This is especially true in light of the fact that there is still time for the United States to bring pressure on the United Na-

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TRANSACTIONS (1977), *reprinted in* 17 INT'L LEGAL MAT. 417, 418 (1978).

213. CP/RES. 154 (167-75).

214. North, *supra* note 3.

tions to make desired changes on various issues before the text is finalized.

Margaret Helen Young