

BRIBERY OF FOREIGN OFFICIALS - A CALL FOR CHANGE IN THE LAW OF CANADA

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Bribery of public officials is an immoral, and in Canada, an illegal practice. However, in international business, it is often encountered as a business tool. Though most countries have laws which prohibit bribery of domestic officials, only the U.S. has specific laws which prohibit bribery of foreign officials. This article explores the effects of bribery and the laws in Canada as they relate to bribery of public officials outside of Canada. It argues that the existing Canadian laws are defective and require change. It also examines the tough U.S. legislative response to the problem of international bribery, and reviews the attempts taken in the international sphere to develop a cohesive international solution to combat bribery of foreign officials.

La corruption des membres de l'Administration est immorale et au Canada, une pratique illégale. Cependant, dans le commerce international, elle est souvent utilisée comme un outil de travail. Malgré le fait que la plupart des pays ont des lois contre la corruption au plan interne, les États-Unis sont les seuls qui ont des lois spécifiques interdisant la corruption de membres étrangers de l'Administration. Cet article examine les effets de la corruption et des lois canadiennes dans leur application à la corruption de membres de l'Administration à l'extérieur du Canada. L'auteur soutient que les lois existantes au Canada sont déficientes et doivent être changées. Il examine aussi la réaction législative vigoureuse des États-Unis au problème de la corruption internationale et il passe en revue les tentatives de la communauté internationale de mettre sur pied une solution mondiale pour combattre la corruption de membres étrangers de l'Administration.

When an American, in order to clinch a large sale to a Chinese state-owned corporation, pays a local municipal official the sum of \$500.00 cash, they commit a crime in the United States which is punishable by five years imprisonment. However, if the person were Canadian, likely no offence would have been committed. While Canadian law does prohibit the making of bribes to Canadian public officials,¹ it does not contain provisions dealing with corrupt practices and illicit payments to foreign officials.² This article reviews the strong foreign anti-bribery laws in the United States, the status of existing Canadian laws, the development of anti-bribery codes internationally, and poses the question whether or not the Canadian government should start telling its business people that bribery, wherever it occurs, is unacceptable business conduct.

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¹ See ss. 118-123 of the *Criminal Code*, R.S.C. 1970, c. C-34.

² J.G. Castel, *Extraterritoriality in International Trade* (Toronto: Butterworths, 1988) at 146.

1. *What is Bribery?*

The legal term "bribery" is well-known in the penal laws of most countries. The basic elements in the definition of bribery that appear in these laws are as follows: one party gives or offers, another party, who is a public official, either directly or through an intermediary, any reward, advantage or benefit of any kind, in order to improperly influence the making or not making or implementation of a decision or act by the official concerned.³

Francis Bacon's notorious trial in 1621,⁴ determined bribery to be an evil practice. Now, virtually every nation treats bribery of its officials as a crime.⁵ Traditionally however, only the nation whose official received an illegal payment or the nation in which the bribe occurred imposed sanctions on the briber, and further, most nations do not effectively enforce such domestic legislation.⁶

In the international sphere, there is general agreement that the use of bribery and other illicit or corrupt practices in commercial transactions across national borders is harmful. These practices distort the economies of developing and transitional economies by inducing the purchase of goods and services which would not be purchased absent a bribe, or by leading to the award of contracts for reasons other than best price and quality. They unfairly disadvantage companies which, because of legal constraints or corporate practice, refuse to pay bribes. In addition, they undermine democratic institutions by making government a source of private profit for corrupt officials.⁷ The United Nations has made it clear that the prevention and avoidance of such practices would substantially contribute to an improved international business climate.⁸ Notwithstanding these noble sentiments, no nation other than the U.S. prohibits bribery of another country's officials or bribery occurring outside its territory.⁹

³ United Nations Economic and Social Council, *Report of the Commission on Transnational Corporations on its Seventeenth Session, Addendum, Efforts by the United Nations to Address the Issue of Corrupt Practices, Report of the Secretary-General*, UN Doc. E/1991/31/Add.1 UN Doc. E/C.10/1991/17/Add.1 (1991).

⁴ Albeit philosopher and man of letters, the Lord Chancellor of England was convicted of taking bribes from litigants in chancery. His defense of "Everybody does it" was not accepted, although a general pardon was passed by Parliament in October, 1621. See J. T. Noonan, "Bribery" (1987) 2 J. of Law, Ethics & Public Policy 741 at 742.

⁵ J.T. Noonan, *Bribes* (New York: Macmillan Publishing, 1984) at 702.

⁶ F. A. Gevurtz, "Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade" (1987) 27 Va. J. Int'l L. at 211.

⁷ From December 1992 report of the French Commission on Bribery and the April 1993 founding statements of Transparency International, a German non-profit organization headquartered in Berlin, (excerpted from Remarks by Assistant Secretary Daniel K. Tarullo to the OECD Executive Committee in Special Session, News Release (26 October 1993).

⁸ *Supra* footnote 3.

⁹ *Supra* footnote 5 at 680.

There is no question that bribery within the boundaries of the United States has, in the last thirty years, been seen as a scourge which the U.S. legislative system has sought to eliminate. This has been accomplished by enactment of legislation against wire fraud, mail fraud, income tax evasion, conspiracy and racketeering, and by the aggressive prosecution of bribe-takers under these statutes.¹⁰ As a result of this active prosecution, many thousands of American office-holders, including several governors and federal judges, Senators and Congressmen have been sent to jail.¹¹ Thus it should not be of surprise that the United States should be the first nation to make its harsh standard effective throughout the world through the enactment of the *Foreign Corrupt Practices Act*.¹² This extension of American bribery concepts to control the conduct of businesses overseas has been heralded as the internationalization of what is already the strongest enforcement of the anti-bribery ethic in recent history.¹³

2. *The Foreign Corrupt Practices Act*

The *Foreign Corrupt Practices Act* (the "FCPA") was first enacted in 1977 in response to a series of foreign bribery scandals¹⁴ involving large U.S. corporations and foreign officials. These scandals initially came to light during the Watergate Committee Hearings and the Special Prosecutor's investigation of illegal domestic campaign contributions. Upon discovering questionable foreign payments and concomitant corporate record falsification, the Securities and Exchange Commission developed a voluntary disclosure program to control corporate bribery abroad. Unexpectedly, over 400 corporations came forward.¹⁵ Of the ninety-seven corporations which were subsequently

¹⁰ J.T. Noonan, *Bribery*, *supra* footnote 4 at 749.

¹¹ *Ibid.*

¹² 15 U.S.C.A. §§78(b), 78dd-1, 78dd-2.

¹³ D. H. Lowenstein, "For God, for Country, or for Me?", Review of "*Bribes*" by J. T. Noonan" (1986) 74 Cal. L. Rev. 1479 at 1491.

¹⁴ In 1975, a U.S. Senate Committee held hearings on illegal payments by the Lockheed Corporation to the Prime Minister of Japan. Senator Proxmire (one of the drafters of the FCPA) recounted the developments of that scandal in a speech on the Senate floor:

The Japanese discovered that the Lockheed Corporation had paid a \$1.4 million bribe to their Prime Minister. The Prime Minister - the top elected official in Japan - was convicted. He was sent to jail. His life was ruined. His Government, friendly to the United States, fell No Lockheed official went to jail. No Lockheed official was fined. The corporation was actually rewarded big for paying the bribe. The bribe was a brilliant investment. For that \$1.4 million bribe Lockheed paid the Prime Minister, the firm made tens of millions of dollars of profits in return for that bribe. This was a shocking, shameful development that sullied the reputation of our country.

See G. H. Mazzarantani, "Foreign Corrupt Practices Act" (1989) 26 Am. Crim. L. Rev. 855 excerpt from *Lockheed Bribery: Hearings before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (1975).

¹⁵ M. H. Young, "A Comparison of the Foreign Corrupt Practices Act and the Draft International Agreement on Illicit Payments" (1980) 13 Vand. J. Transnat'l L. 795 at 797.

investigated, seventy-seven were found to have actually made questionable or illegal payments to foreign politicians, political parties and government officials.¹⁶ The FCPA was therefore the U.S. government's response to the damage done to public trust and foreign relations inflicted by corrupt American business practices.¹⁷

The original FCPA was subject to wide criticism in that it was overly burdensome and vague and that zealous compliance with its requirements reduced the ability of American corporations to compete effectively in foreign marketplaces.¹⁸ As a result of the discontent, the FCPA was amended in 1988.¹⁹

Under the FCPA, U.S. firms are prohibited from bribing a foreign official, foreign political party, party official, or candidate in order to obtain or retain business.²⁰ The 1988 amendments further clarified that U.S. Corporations are prohibited from giving, or promising to give, anything of value to foreign officials or foreign political parties to influence any act within their "official capacity" or to entice foreign officials to violate their "lawful duty".²¹ The *Act* carries heavy penalties — corporations convicted under the anti-bribery provisions are subject to a fine up to two million dollars (individuals up to one million), and where fines are imposed upon corporate officers, they may not be paid directly or indirectly by their companies. As a result, companies cannot indemnify their officers against FCPA liability.²² While there are not frequent prosecutions under the FCPA, there have been several fairly high profile cases,

¹⁶ C. Gillen et al. Project, "Sixth Survey of White Collar Crime: Perjury" (1991) 28 Am. Crim. L. Rev. at 541-558.

¹⁷ *Ibid.* at 542.

¹⁸ See *The Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Securities and the Subcomm. on Int'l Finance and Monetary Pol'y of the Comm. on Banking, Housing and Urban Aff.*, 97th Cong., 1st Sess. (1981) (citing *Foreign Corrupt Practices Act: Reports from the Foreign Service*, in which Foreign Service posts opined that the FCPA acts detrimentally to the interest of American corporations doing or intending to do business overseas.

¹⁹ These amendments were signed into law by President Reagan as part of the Omnibus Trade and Competitiveness Act of 1988. (*Foreign Corrupt Practices Act Amendments of 1988*, Pub. L. No. 100-418, tit. V, ss. [1]001-5003, 102 Stat. 1415 (codified at 15 U.S.C.A. §§ 78(b), 78dd-1, 78dd-2).

²⁰ The FCPA requires the following elements to prove a criminal violation:

- (1) that the domestic firm or individual has made use of some means of interstate commerce,
- (2) corruptly,
- (3) in furtherance of an offer, payment, gift, promise to pay or to give, or an authorization of an offer, payment or giving of money or anything of value,
- (4) to a foreign official political party or official of a foreign political party or a candidate,
- (5) for the purpose of influencing any official act or inducing the official to use his influence to assist the domestic firm or individual to obtain or retain business.

15 U.S.C. §§ 78dd-1, 2 (1982).

²¹ *Supra* footnote 16 at 548.

²² *Ibid.* at 557.

involving, amongst others, payments to a foreign political organization in the Cook Islands,²³ payments to officials in the Mexican national oil company, Pemex,²⁴ and payments to the Trinidad and Tobago Racing Authority.²⁵

The underlying concept behind the FCPA is that a payment is made "corruptly" in furtherance of an offer or payment of money or anything of value to a "foreign official". The term "corruptly" is defined as "that offer, payment, promise, or gift that is intended to induce the recipient to abuse his official capacity to unlawfully direct business to the payor or client, or to provide a favourable legislative or regulatory outcome."²⁶ It is not material who initiates or suggests the payment of the gift or offer, and the defense that a payment or offer was required by a foreign official in order to conduct business is inadequate, since at some point the U.S. company must make a "conscious decision" to pay the bribe. Much of the confusion surrounding the application of the FCPA is over the determination of whether a payment is made "corruptly",²⁷ for example where a payment is made to a foreign agent.²⁸ However, the FCPA does recognize that an extortionary payment request, such as payment in order to keep an oil rig from being dynamited, would not be held to contain the requisite corrupt purpose.²⁹

The FCPA also covers indirect bribes, such as those made to agents or other intermediaries.³⁰ The original Act had a very broad standard which made it difficult for U.S. businessmen to comply. Liability was imposed if a payment was made to a person "while knowing or having reason to know" that it would be used by a third party as a bribe, or for a purpose contrary to the intent of the FCPA.³¹ Because of the open-endedness of the "reason to know" standard, it was removed in the 1988 amendments — the "knowing" standard remains.³²

²³ *United States v. Kenny International Corp.*, No. 00372 (D.D.C. 1979).

²⁴ *United States v. C.E. Miller Corp.*, No. 788 (C.D. Cal. 1982).

²⁵ *United States v. Sam P. Wallace Co.*, No. 83-0034 (D.P.R. filed Feb. 23, 1983).

²⁶ FCPA U.S.C. §§78dd-1, 78dd-2. This would include, for example, a payment to a foreign government to enforce unused laws, if by such enforcement, a competitive advantage would be obtained by the payor.

²⁷ *Supra* footnote 16 at 547.

²⁸ See DeCosse and Katcher, "Newly Amended Foreign Corrupt Practices Act" (1990) 63 Wis. Law. 23 at 61.

²⁹ *Supra* footnote 16 at 547.

³⁰ *Ibid.* at 549.

³¹ *Ibid.*

³² Article (2) is as follows:

"(A) A person's state of mind is "knowing" with respect to conduct, or circumstances or result if -

- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
- (ii) such person has a firm belief that such circumstance exists or is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of the high probability of the

The *Act* defines "knowing" to cover the inaction of corporate officials when reasonable signal of an FCPA violation exists. Thus, the standard is one of "conscious disregard" or "willful blindness". In addressing this standard, both the courts and the commentators have deemed blameworthy claims by corporate officers of no actual knowledge of an illegal payment by a third party.³³

There is an interesting exception in the FCPA, permitting some payments to foreign officials. A "grease payment" — one made "to expedite or to secure the performance of a routine governmental action", is permissible. However, the exception only covers non-discretionary actions which are routinely performed by a government official. It was not intended to include situations, for example, in which a foreign official's decision may determine the awarding of new business or the retention of a continuing business relationship. Actions intended to be exempted under this exception include obtaining permits, licenses or documents necessary to do business in a foreign country, processing papers (such as visas and work orders), scheduling inspections, providing police protection, mail pick-up or delivery, phone, power and water service, or other actions of a "similar nature".³⁴ It is noteworthy however that the FCPA failed to limit this exclusion to those minor officials who would be expected to be carrying out such routine action.³⁵ Theoretically, a large payment to a foreign prime minister to expedite routine government action would be exempt from the FCPA, though this was surely unintended.³⁶ Likely the size of the payment would be found to evidence a corrupt purpose and thus be subject to the FCPA.

Notwithstanding that the FCPA broadly captures just about every payment made to a foreign official, it provides businessmen with two positive defences. The first is that the bribe was lawful under the laws of the foreign country.³⁷ There are few countries, if any, where such laws exist. The second defence is where the payment or gift constitutes a "reasonable and bona fide expenditure" associated with the execution of a contract and its performance. These expenses

existence of such circumstance, unless the person actually believes that the circumstance does not exist." FCPA U.S.C. §§78dd-2(2), (4) 1982.

See also Hirschhorn, *The Revised Foreign Corrupt Practices Act*, reprinted in *Foreign Corrupt Practices Act Rep.* 166.13 (1988); Hirschhorn, "Foreign Corrupt Practices Act Narrowed, Significantly Clarified" (1988) *Nat'l. L.J.* at 16.

³³ *Supra* footnote 16 at 550.

³⁴ *Ibid.*

³⁵ A. Fremantle and S. Katz, "The Foreign Corrupt Practices Act Amendments of 1988" (1989) 23 *Int'l Lawyer* 755 at 762. See also R. S. Levy, "The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?" (1985) 10 *Delaware J. Corp. L.* 71.

³⁶ M. A. Pierce, "The Foreign Corrupt Practices Act of 1977" (1980) 8 *Int'l Bus. Lawyer* 13 at 15.

³⁷ This provision was included in the amendments to the FCPA in 1988, in response to a Report by the Association of the Bar of the City of New York pointing out that the original FCPA truly put U.S. businessmen at a disadvantage in some countries. *Report on Questionable Foreign payments by Corporations: The Problem and Approaches to a Solution* §§II.A.1 (1977), as cited by Fremantle and Katz, *op cit.*, footnote 35 at 763.

were intended to be those associated with reimbursement for a foreign official's reasonable and bona fide expenses and require a "common sense" approach."

One of the difficulties which the FCPA does not directly approach is gifts given as a courtesy, a token of esteem or in return for hospitality.³⁸ No positive defence was provided in the FCPA for these types of gifts. Evidently, the drafters intended the courts to address each individual case on the basis of whether the value of such nominal gifts is appropriate in the context of the specific transaction, and the local laws, custom and business practices in the host country.³⁹

The FCPA does not cover overseas corrupt payments made independently by a foreign subsidiary with no "nexus" to U.S. interstate commerce, where the payment was made by a foreign national solely on behalf of the subsidiary, and where the U.S. parent had no knowledge of the payment. However, it is often difficult to determine whether a particular activity is adequately "independent" to remove it from the reach of the Act.⁴⁰ Where a U.S. Issuer owns less than 50 percent of a foreign subsidiary, its responsibilities for accounting of the subsidiary are met if the Issuer proceeds in good faith to use its influence to cause the subsidiary to comply with the accounting requirements of the FCPA.

To capture corrupt payments, the FCPA mandates U.S. corporations to maintain accurate records⁴¹ and internal accounting controls⁴² to prevent "off-the-books accounts" or "slush funds" which were kept by major corporations for the making of questionable payments.⁴³ These provisions only apply to "issuers"⁴⁴ governed by the U.S. *Securities Act*,⁴⁵ which was amended in light of the passing of the FCPA.⁴⁶ While there has been substantial debate on the

³⁸ As to whether or not these "gifts" should be considered to be true bribes, see M. Philips, "Bribery" (1984) Ethics 621.

³⁹ *Supra* footnote 16 at 551.

⁴⁰ J. O. Gerald, "How U.S. Laws Affect American Companies in the Middle East" (1992) 15 Middle East Exec. Rep. 16.

⁴¹ 15 U.S.C. §§78m(b)(2)(A).

⁴² 15 U.S.C. §§78m(b)(2)(B).

⁴³ Fremantle and Katz, *supra* footnote 35 at 757.

⁴⁴ *Securities Exchange Act of 1934*, 15 U.S.C. §§78a (1982), s. 3(a)(8) - An issuer is defined to mean "any person who issues or proposes to issue any security."

⁴⁵ *Ibid.*

⁴⁶ 15 U.S.C. §§78m(b), §§102, (1982).

Every issuer required to file reports pursuant to section 15(d) of the Securities Act of 1934 shall:

"(A) make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuers; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that -

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary;

interpretation of what requirements are necessary to comply with the FCPA. As a policy statement however, the SEC has acknowledged that "the goal is to allow a business, acting in good faith, to comply with the FCPA's accounting provisions in an innovative and cost effective way and with a better sense of its legal responsibilities.⁴⁷ Technical or insignificant infractions will not invite penalties. To incur liability, a firm must "knowingly circumvent" a system of internal accounting controls, or "knowingly falsify" records kept pursuant to the accounting requirements.⁴⁸

In sum, the FCPA ends up being a fairly complex and difficult piece of legislation for businessmen to comply with. While it is fairly easy to determine that direct bribes are inappropriate, the indirect approach of the *Act* requires businessmen to constantly be on the lookout for potential FCPA breaches. A corporation wishing to avoid liability under the FCPA must consider avoiding countries where bribery is reportedly required in order to do business; it must incur the cost of investigating any rumour that an agent was involved in making payments to foreign officials; it must consider whether or not to comply with an agent's request to route the agents fees to a third country or to a third party; and finally, it must consider whether it should be even engaging agents who have close government ties (and who are often the best choice as agent).⁴⁹ As a minimum, U.S. businessmen routinely are required to seek legal advice on the application of the FCPA to their international business activities.⁵⁰ For those executives requiring greater certainty, the U.S. Attorney General is required under the FCPA to provide an advisory opinion within thirty days of a request. Few requests have ever been made.⁵¹

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- (iii) to permit preparation of financial statements in conformity with general accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets;
 - (iv) access to assets is permitted only in accordance with management's general or specific authorization; and
 - (v) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference."

⁴⁷ *Statement of Policy Concerning the Foreign Corrupt Practices Act*, Exchange Act Release No. 17,500, 21 SEC Docket 1466, 1467, 1471, reprinted in 46 Fed. Reg. 11,544 (1988). See also Fremantle and Katz, *op cit.* footnote 35 at 758.

⁴⁸ FCPA amendments, Pub. L. No. 100-418, 102 Stat. 1415 (1988), §§5002. It is not expected that any actions will ever be brought solely on the basis of FCPA accounting provisions. These charges will be brought in connection with related charges of bribery, fraud or other reporting violations. See "Foreign Corrupt Practices Act" (1984) 22 Am. Crim. L. Rev. 510 at 517.

⁴⁹ R. A. Porrata-Doria, Jr., "Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the Past?" (1985) 38 Rutgers L. Rev. 29 at 44.

⁵⁰ Statement to the author by Kenneth Reisenfeld, Vice-Chairman, American Bar Association Section of International Law and Practice, January 22, 1994. See also J. E. Impert, "A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents" (1990) 24 Int'l Lawyer 4 1009 at 1017.

⁵¹ Fremantle and Katz, *supra* footnote 35 at 763.

3. Canadian Law

Under Canadian law, is bribery *per se*, of a foreign official, illegal? Surprisingly, the answer appears to be in the negative. The Canadian *Criminal Code*⁵² contains a very complete legal regime covering the corrupt practices of persons doing business with the government of Canada and with provincial governments.⁵³ Sections 118-123 clearly cover corrupt practices committed in Canada. But, they do not appear to effectively or clearly address corrupt practices between a Canadian firm or person and a foreign governmental official. The operative provisions of the *Criminal Code* are discussed below.

(a) *Frauds on the Government - Section 121*

Under section 121,⁵⁴ any bribes made to an official to exercise influence or an act of omission in connection with government business is subject to a

⁵² R.S.C. 1970, c. C-34.

⁵³ S. A. Williams and J.-G. Castel, *Canadian Criminal Law - International and Transnational Aspects* (Toronto: Butterworths, 1981) at 271. Note that in addition to bribery of public officials, the *Criminal Code* also sets out an offence relating to payment of secret commissions (or bribes) as between principal and agent.

⁵⁴ In particular, Section 121

(1) Every one commits an offence who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) ...

a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) ...

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be; ...

(b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies on him; ...

(e) gives, offers or agrees to give or offer to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) ...

(3) Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

penalty of up to five years imprisonment. This section is perhaps the broadest of all of the bribery provisions in the *Criminal Code* as it also deals with influence peddling. These provisions prohibit unauthorized payments to or for the benefit of government officials by or on behalf of those who have dealings with the government.⁵⁵

The operative provision of the offence is the requirement for a bribe to be made or accepted by an "official". However, the *Criminal Code* narrowly defines "official" to mean a person who holds an "office" or "is appointed to discharge a public duty". The word "office" is further defined as "including" an office or appointment (a) under the government, (b) a civil or military commission, and, (c) a position or employment in a public department. As the wording suggests, these three categories may not be inclusive. However, based on the definitions given in the *Criminal Code* to these terms, they all clearly relate to Canadian offices. For example, the word "government" is narrowly defined as meaning the Government of Canada, the government of a province, or Her Majesty in right of Canada or in right of a province.⁵⁶ Likewise, the phrase "public department" is narrowly and inclusively defined as a department of the Government of Canada or a branch thereof.⁵⁷ Finally, the word "military" is defined to mean the Canadian Forces.⁵⁸ Presumably, the phrase "civil commission" refers to a commission under the auspices of Canada. This would fit within the tenor of the balance of the section. This leaves open the possibility that in defining the word "office", the drafters of the *Criminal Code* deliberately used the word "including" to not limit possible other categories of offices, such as holders of foreign governmental offices, although this is unlikely. There is currently no case law on the use of this provision pertaining to bribes made to non-Canadian office holders.

⁵⁵ Tremeeear's *Criminal Code* 1992, (Toronto: Carswell, 1992).

⁵⁶ *Supra* footnote 52, s. 118.

⁵⁷ *Ibid.*, s. 2(1). Note that the *Criminal Code* does not define the term "public duty". There is an argument that if the phrase "public department" specifically means a department of the Canadian government, then the term "public duty" could be inferred also to be a duty to the Canadian government.

⁵⁸ *Ibid.*, s. 2(1).

(b) *Bribes Accepted by Holders of Judicial Offices - Section 119*

Under section 119⁵⁹ of the *Criminal Code*, every one who "being the holder of a judicial office",⁶⁰ corruptly accepts any money or other valuable consideration in respect of anything to be done in his official capacity, commits bribery. This offence is punishable by imprisonment up to fourteen years. This offence is directed solely at the acceptance of bribes by holders of judicial offices.

(c) *Bribes to a Public Officer - Section 120*

Under section 120⁶¹ of the *Criminal Code*, any one who offers a bribe to a justice, police commissioner, peace officer, public officer, officer of a juvenile court, or employee in the administration of criminal law, to facilitate the commission of an offence, is guilty of an indictable offence. The punishment

⁵⁹ See in particular, Section. 119(1):

"Every one who

- (a) being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, corruptly,

- (i) accepts or obtains,

- (ii) agrees to accept, or

- (iii) attempts to obtain,

any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity, or

- (b) gives or offers, corruptly, to a person mentioned in paragraph (a) any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

⁶⁰ This provision also captures members of Parliament or of a legislature.

⁶¹ Section 120. Every one who

- (a) being a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law, corruptly

- i) accepts or obtains,

- ii) agrees to accept, or

- iii) attempts to obtain,

for himself or any other person any money, valuable consideration, office, place or employment with intent

- iv) to interfere with the administration of justice,

- v) to procure or facilitate the commission of an offence, or

- vi) to protect from detection or punishment a person who has committed or who intends to commit an offence, or

- (b) gives or offers, corruptly, to a person mentioned in paragraph (a) any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (a)(iv), (v) or (vi),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

is imprisonment up to fourteen years. Again, as with section 121, the operative definitions limit the bribees to those involved in Canada, with the possible exception of a “public officer”. Clearly the intent of the provision is to make bribery of Canadian office holders subject to penalty.

(d) *Conspiracy - Section.465(3)*

There is an argument that section 465(3) of the *Criminal Code*⁶² could be used to combat corruption of foreign officials.⁶³ This provision captures two kinds of conspiracies relating to foreign bribery — a conspiracy made “outside Canada” to bribe a Canadian official in Canada,⁶⁴ and a conspiracy made “in Canada” to bribe a foreign official outside of Canada.⁶⁵

To a certain extent, the question of when a conspiracy is “made in Canada” has already been explored by the Supreme Court of Canada in *Libman v. The Queen*.⁶⁶ Although this case did not involve payment of a bribe to a foreign

⁶² *Supra* footnote 52. Section 465 provides:

- (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,
 - (a) every one who conspires with any one to commit murder ...
 - (b) every one who conspires with any one to prosecute a person for an alleged offence, ...
 - (c) Repealed.
 - (d) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a), (b) or (c) is guilty of an indictable offence ...
- (2) Every one who conspires with any one
 - (a) to effect an unlawful purpose, or
 - (b) to effect a lawful purpose by unlawful means,
 is guilty of an indictable offence and is liable to imprisonment for two years.
- (3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) or (2) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do in Canada that thing.
- (4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) or (2) in Canada shall be deemed to have conspired in Canada to do that thing.
- (5) Where a person has conspired to do anything that is an offence by virtue of subsections (3) or (4), the offence is within the competence of and may be tried and punished by the court having similar jurisdiction in respect of similar offences in the territorial division where he is found in the same manner as if the offence had been committed in that territorial division.

⁶³ In response to a question from the author, Kimberly Prost, Senior Counsel, Department of Justice, indicated that this would be the route taken by the Justice Department in prosecuting a case of bribery of a foreign official by a Canadian firm. “International White-Collar Crime”, program held by the International Section, Canadian Bar Association (Ontario), May, 1993.

⁶⁴ *Supra* footnote 62, s. 465(4).

⁶⁵ *Ibid.*, s. 465(3).

⁶⁶ [1985] 2 S.C.R. 178.

official, the Court did consider the extra-territorial application of the conspiracy provisions of the *Criminal Code*.

Under international law, five general principles are applied to determine whether a nation may validly exercise criminal jurisdiction beyond its borders:

- i) the territorial principle, which focuses on the place where the offense is committed;
- ii) the nationality principle, which looks to the nationality or national character of the person who committed the offense;
- iii) the protective principle, under which jurisdiction is determined by reference to the national interest injured by the offense;
- iv) the universality principle, which looks to the custody of the offender; and
- v) the passive personality principle, which determines jurisdiction by reference to the nationality or national character of the person injured by the offence.⁶⁷

Canadian law tends to apply the territorial principle and defer to international comity, whereas the U.S. tends to apply the broader nationality principle.⁶⁸ The difference is most clearly demonstrated in taxation - Canada taxes its citizens only if they are resident in Canada; the U.S. taxes its citizens wherever they may reside.⁶⁹ As a result of the application of the more restrictive territorial principle, there is much less jurisprudence on the limits of criminal extra-territorial jurisdiction in Canada than in the U.S.

In *Libman*, the defendant used a "boiler-room" telemarketing operation in Canada to convince U.S. residents into investing in a worthless Central American mining company. He was charged with both fraud and conspiracy to commit fraud. The Court set a test for finding territorial jurisdiction under Canadian criminal law - there must be a "real and substantial link" between the offence and Canada before criminal liability will be imposed in this country.⁷⁰

In delivering the judgment, La Forest, J. acknowledged that while the primary basis for jurisdiction was territorial, there are other valid and internationally recognized bases upon which countries assert jurisdiction.⁷¹ Particularly with transnational crimes, countries exercise jurisdiction over behaviour in other states that has harmful consequences within their own

⁶⁷ Harvard Research on International Law, Draft Convention on Jurisdiction With Respect to Crime (Supp. 1935), 24 Am. J. Int'l Law 435 at 445.

⁶⁸ R. A. Klotz, *Extra-Territorial Jurisdiction in Securities Enforcement* (1993) [unpublished] at 3. For a brief consideration of this topic from the U.S. perspective, see S. J. Marcuss, "Extraterritoriality: U.S. Antiboycott Law and the Foreign Corrupt Practices Act" (1983) 15 Law & Policy in Int'l Bus. 1137.

⁶⁹ *Ibid.*

⁷⁰ G. Hainey, "Secret Commissions - Companies Must Maintain Guard Against Exposure to Criminal Liability from Improper Employee Actions" (1983) 1 Corp. Liability 18.

⁷¹ *Supra* footnote 68 at 5.

territory. More than one state may take jurisdiction. He proposed a two-stage test to determine if the crime was committed in Canada:⁷²

... we must, in my view, take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. One must then consider whether there is anything in those facts that offends international comity.

He then defined a fairly limited standard:⁷³

As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a “real and substantial link” between an offence and this country, a test well known in public and private international law.

The “real and substantial link” formulation serves two purposes. The first satisfies Canada’s requirement for rational and sufficient grounds for expending the resources necessary to prosecute. The second serves as justification to the international community that Canada is entitled to claim jurisdiction under the norms of international law i.e. that its exercise of jurisdiction is objectively justifiable.⁷⁴

In *Libman*, the Court found that there was a real and substantial link, but declined to provide further detail into the specific factors required to identify the link. Instead, the Court provided a cloudy guide to further courts — requiring an examination of the facts which take place in Canada in each case. Where the scheme is “hatched in” and largely put into effect in Canada, it is likely the Court will conclude that Canadian criminal law applies.⁷⁵

Does the *Libman* test cover a Canadian businessperson in China delivering cash to a Chinese official in order to obtain a lucrative contract in China? According to the Supreme Court of Canada, the answer is not yet transparent. If however, it is the intention of the Canadian government that such activities should be prohibited, then the *Criminal Code* could easily be amended to specifically capture conspiracies made “outside Canada” to bribe foreign officials.

4. *International Anti-Corruption Actions*

Should Canada adopt anti-foreign corrupt practices legislation, or should it wait for the international community to respond first? Currently, there is an international initiative proceeding slowly forward towards a unified approach to the problem of seeking to curb international corrupt practices. This initiative is the second attempt. The first attempt, at the United Nations, was wholly unsuccessful.

⁷² *Supra* footnote 66 at 198-199.

⁷³ *Ibid.* at 200.

⁷⁴ *Supra* footnote 68 at 6.

⁷⁵ *Supra* footnote 70.

The United Nations initially addressed the subject of corrupt practices in international business transactions for the first time in 1975,⁷⁶ in response to the foreign corruption disclosures in the United States in the early 1970's. The U.S. actively lobbied for this cooperative effort because of its concerns that its unilateral action to outlaw bribery would put American firms doing business abroad at a disadvantage in the international business field.⁷⁷ One commentator has suggested that the failure by the U.S. in its efforts to negotiate an agreement with other countries is not surprising, citing the disincentive of losing their competitive edge for their firms.⁷⁸ The U.N. Assembly condemned all corrupt practices and called on Governments to take all necessary measures, including legislative measures, to prevent such practices. The following year, in 1976, the Economic and Social Council ("ECOSOC") created an Ad Hoc Intergovernmental Working Group to consider the problem of corrupt practices

⁷⁶ *Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries and Others Involved*, UNGADR No. 3514 (1975):

condemned all corrupt practices, including bribery, by transactional and other corporations, their intermediaries and others involved, in violation of the laws and regulations of the host countries, and reaffirmed the right of any State to adopt legislation and to investigate and take appropriate legal action, in accordance with its national laws and regulations, against incidents of such corrupt practices. It also called upon both home and host Governments to take, within their respective national jurisdictions, all the necessary measures that they deem appropriate, including legislative measures, to prevent such corrupt practices, and to exchange information bilaterally and, as appropriate, multilaterally, particularly through the United Nations Centre on Transnational Corporations.

See *United Nations Economic and Social Council, Commission on Transnational Corporations, Intergovernmental Working Group of the Whole on the Code of Conduct, Transnational Corporations: Material Relevant to the Formulation of a Code of Conduct, Report of the Secretariat*, E/C.10/18 10 UN Doc. E/1976/C.10/1810.

⁷⁷ It has not been clearly demonstrated that in fact the FCPA has caused U.S. interests to suffer. During the debate on the FCPA amendments in 1988, a report was cited indicating that in the two years following the enactment of the FCPA, the period during which the FCPA would purportedly have had its most inhibiting effect, U.S. exports actually increased more than 10 percent each year. See C. Gillen et al., *supra* footnote 16. However, in a separate report, U.S. corporations were reported to be experiencing difficulty in conducting their operations as a result of questions concerning the applicability of the FCPA. "Impact of the Anti-Bribery Prohibitions in Section 30A of the SEC Act of 1934, SEC Release No. 16,593 (Slip Op. Feb 21, 1980). The U.S. State Department and the CIA have recently cited a virtual epidemic of bribery by foreign corporations. In response, the CIA is trying to find out who in foreign countries is bribing who else in order to get contracts that American companies are losing. The CIA is apparently also attempting to save contracts for U.S. companies by obtaining information that allows the State or Commerce departments "to go to a foreign government and say, "You'd better be careful. On this contract, we understand X country or X company is trying to bribe its way into getting that contract. You'd better play straight". From comments attributed to CIA Director R. James Woolsey, see T.W. Lippman, "U.S. Seeks to Halt Illegal Payoffs by Foreign Corporations" *The Washington Post*, 3 December 1993. See Also: U.S. Department of State, Office of the Spokesman, News Release (2 December 1993).

⁷⁸ F. A. Gevurtz, "Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade" (1987) 27 *Virginia J. of Int'l L.* 211. Prof. Gevurtz recommends that if the United States wants to even the odds in this one aspect of international trade, it must do so by applying its own law.

and to determine a method of dealing with it. A variety of approaches were considered for dealing with the problem of corrupt practices in international commercial transactions at the international level. These included (a) international agreements, (b) codes of conduct, (c) model laws, (d) unilateral national action, (e) procurement codes, (f) certification, and (g) voluntary business codes.

While none of these methods are mutually exclusive, ECOSOC chose to flesh out an international agreement which could be used to prevent and eliminate illicit payments. By 1979, a draft agreement was completed, known as the "International Agreement on Illicit Payments" (the "draft U.N. Agreement").⁷⁹ The draft U.N. Agreement outlawed all bribes to public officials, including the "grease" payments currently exempted under the FCPA.

Although the text of the draft U.N. Agreement was forwarded to the Council to the General Assembly, no action was ever taken to convene a conference to conclude and formalize it, despite strong efforts to do so by the U.S.⁸⁰ This was largely due to the insistence of the developing countries on

⁷⁹ UN Doc. E/104/1979 (25 May 1979), reprinted in 18 I.L.M. 1025 (1979). The key provisions of the draft U.N. Agreement are below:

"Article 1:

Each contracting State undertakes to make the following acts punishable by appropriate criminal penalties under its national law:

- (a) 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 connexion with an international commercial transaction.
- (b) The 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.

Each Contracting State likewise undertakes to make the acts referred to in paragraph 1(a) of this article punishable by appropriate criminal penalties under its national law when committed by a juridical person, or, in the case of a State which does not recognize criminal responsibility of juridical persons, to take appropriate measures, according to its national law, with the objective of comparable deterrent effects.

Article 4:

Each Contracting State shall take such measures as may be necessary to establish its jurisdiction:

- (c) Over the offence referred to in article 1, paragraph 1(a), relating to any payment, gift or other advantage in connexion with (the negotiation, conclusion, retention, revision or termination of) an international commercial transaction when the offence is committed by a national of that State, provided that any element of that offence, or any act aiding or abetting that offence, is connected with the territory of that State.

⁸⁰ *Supra* footnote 3. Since the FCPA had already been passed, the U.S. was quite disappointed in the failure of the U.N. initiative. However, at the Venice Economic Summit in July, 1980, the U.S. obtained in the summit communique the following commitment to further action on the U.N. initiative:

linking conclusion of an illicit payments agreement with the Code of Conduct for Transnational Corporations which was being prepared concurrently under UN auspices. The U.S. and a number of other Western countries took the view that such linkage was inappropriate. Other issues left unresolved in the draft U.N. Agreement included resolution of conflicts between national law and the agreement itself, extraterritorial jurisdiction under the proposed international agreement, and disclosure of payments made by enterprises to public officials.⁸¹ The draft U.N. Agreement also seemed to exceed its mandate by including provisions dealing with South Africa.⁸² In a separate vein, in 1976, the 24-nation Organization for Economic Cooperation and Development (OECD) member countries included specific policy statements relating to the elimination of illicit payments in the non-binding "OECD Guidelines on Multinational Enterprises".⁸³ These guidelines are for private conduct only.⁸⁴

After the failure of the first U.N. initiative, the U.S. pressed the OECD Executive Committee in Special Session (ECSS) in 1981 to consider instead an illicit payments agreement among OECD members. However, a number of members expressed the view that differences among their legal systems would make such an agreement problematic.⁸⁵ No action was taken.

After a hiatus of seven years, the U.S. again began lobbying for an international agreement that would require each OECD member state to incorporate in its domestic law prohibitions on illicit payments made by its

"As a further step in strengthening the international trading system, we commit our governments to work in the United Nations towards an agreement to prohibit illicit payments to foreign government officials in international business transactions. If that effort falters, we will seek to conclude an agreement among our countries, but open to all, with the same objective".

See *Report to Congress: Implementation of Section 5003(d) of the Trade Act of 1988* (Presidential Report) (25 August 1989) courtesy of United States Department of State, Washington D.C.

⁸¹ *Ibid.* (Report to Congress).

⁸² *Supra* footnote 79. Article 7 includes a prohibition of a contracting state's nationals or enterprises from paying royalties or taxes to illegal minority regimes in Southern Africa.

⁸³ i) Enterprises should not render - and they should not be solicited or expected to render - any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office.
ii) Unless legally permissible, enterprises should not make contributions to candidates for public office or to political parties or other political organization.

From *Annex to the Declaration of 21st June 1976 by Governments of OECD Member Countries on International Investment and Multinational Enterprises, as Amended in 1979 and 1984*. See also R. Blanpain, *The OECD Guidelines for Multinational Enterprises and Labour Relations 1976-1979* (Antwerp: Kluwer, 1979).

⁸⁴ Following the release of these guidelines, several variants appeared, such as the International Chamber of Commerce (ICC) *Rules of Conduct on Extortion and Bribery in International Transactions*, prepared in 1978, which the ICC recommended for adoption by its members. Many multi-national corporations have created their own rules of conduct using this guide as the model.

⁸⁵ *Supra* footnote 81.

nationals in international commercial transactions. This effort resulted directly from the passing of the 1988 Amendments to the FCPA, a provision of which specifically required the U.S. President to actively pursue an international anti-bribery agreement amongst the OECD members.⁸⁶

The OECD Legal Advisor subsequently invited the United States, as well as France, Germany, Italy, Japan, Spain, Sweden, Switzerland and the United Kingdom (but not Canada), to participate in the legal experts' group, known as the "Ad Hoc Group on Illicit Payments". The group agreed on the terms of a comprehensive questionnaire asking OECD Member states to describe existing national laws governing illicit payments and the circumstances, if any, under which these laws could be applied to actions carried out wholly or partly abroad.⁸⁷

This recently resulted in the tabling of a series of recommendations agreed to by a majority of the OECD countries, entitled "OECD Recommendation on Bribery in International Business Transactions" (the "OECD Recommendations"). In itself, this represents the first multilateral agreement among governments to combat the bribery of foreign officials. However, it is far from the binding international code or model national code as was hoped for. Rather, each Member country is recommended to "take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions."⁸⁸ No specific measures are recommended. Instead, a broad list of "meaningful steps" is provided, including criminal and civil sanctions, taxation, record keeping requirements and

⁸⁶ *Foreign Corrupt Practices Act Amendments of 1988*, 102 Stat. 1415, Section.104(d) International Agreement

- (1) Negotiations. - It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.
- (2) Report to Congress. - (A) Within 1 year after the date of the enactment of this Act, the President shall submit to the Congress a report on -
 - (i) the progress of the negotiations referred to in paragraph (1),
 - (ii) those steps which the executive branch and the Congress should consider taking in the event that these negotiations do not successfully eliminate any competitive disadvantage of United States businesses that results when persons from other countries commit the acts described in paragraph (1); and
 - (iii) possible actions that could be taken to promote cooperation by other countries in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.

Note that the requisite report from the U.S. President was properly tabled in *Report to Congress supra* footnote 81.

⁸⁷ *Supra* footnote 81.

⁸⁸ "Recommendation of the Council of the OECD", from OECD Publications and Information Centre, Washington, DC (27 May 1994).

prohibition from government procurement.⁸⁹ Member countries are encouraged to consult and cooperate in investigations concerning specific cases of bribery, including provision of evidence and extradition. The Committee on International Investment and Multinational Enterprises is to strike a Working Group to monitor implementation and follow-up of the proposals. A review of the recommendations is to take place three years after their adoption.

Even before the OECD Recommendations were public, the U.S. stated its disappointment with the weakness of the proposals, and will be offering its own, stronger plan, which will call on Member countries to "criminalize illegal payments and end their tax deductibility."⁹⁰ Indeed, considering the effort that went into preparing the OECD Recommendations, the gist is simply that the OECD has agreed that bribery of foreign officials is a bad thing.

Why is it so difficult to get strong international agreement on this issue? Though there is little doubt that there is consensus that such conduct should be condemned, the United States has stood alone. Not only has no other nation

⁸⁹ *Ibid.*, Article III provides as follows:

"RECOMMENDS that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. These steps may include:

- i) criminal laws, or their application, in respect of the bribery of foreign public officials;
- ii) civil, commercial, administrative laws and regulations so that bribery would be illegal;
- iii) tax legislation, regulations and practices, insofar as they may indirectly favour bribery;
- iv) company and business accounting requirements and practices in order to secure adequate recording of relevant payments;
- v) banking, financial and other relevant provisions so that adequate records would be kept and made available for inspection or investigation; and
- vi) laws and regulations relating to public subsidies, licences, government procurement contracts, or other public advantages so that advantages could be denied as a sanction for bribery in appropriate cases."

⁹⁰ T.W. Lippman, *supra* footnote 77. The U.S. plan has the following features:

- i) OECD members should adopt a Recommendation that strengthens national laws to combat illicit payments and lists the specific legal elements that should underlie such domestic action. In particular, members need to prohibit illicit payments by their nationals and firms, and enact appropriate criminal, civil and administrative sanctions.
- ii) A Recommendation also should contain a commitment to eliminate any laws, regulations or administrative practices that provide tax benefits or other incentives for illicit payments.
- iii) Agreement on mechanisms to review how each member is implementing the Recommendation is another key element. Members must be willing to have the OECD examine the effectiveness of their own and other Members' actions to carry out the Recommendation.

See Assistant Secretary Daniel K. Tarullo, Remarks, OECD Executive Committee in special session (26 October 1993).

followed the U.S. lead, but many European diplomats and corporate executives have ridiculed the U.S. as being naive on the subject.⁹¹

The reasons appear to be twofold. The first is that the exact formulation of provisions on the issue are problematic. For example, there are really two kinds of corrupt practices and bribes that can be distinguished: one made to hasten a decision, the other to actually alter a decision. While the latter appears more serious than the former (as the FCPA has seen fit to treat), they may merge with each other. For example, when only one favourable decision is possible within a given country (such as when the market is too small to permit anything else), hastening the decision may preclude the consideration of other proposals.⁹²

The second problem is that business practices are treated differently under different national legislation. The two parties to a corrupt practice may be covered by different national jurisdictions governing one illicit payment made wholly or partly outside national territory. Most governments are rightfully hesitant about the extraterritorial interpretation of their laws.

3. *Towards an International Agreement*

(a) *Definitions Needed*

An international agreement against corruption has a number of hurdles which the drafters must negotiate. Firstly, it must identify the length and breadth of its scope. For this, the definitions of prohibited conduct are the most difficult to agree upon. To start with, the specific elements covered in the definitions and the scope of the concepts used in legal provisions on bribery vary from country to country. The term "illicit payments" generally includes bribery, but is not as such a technical legal term. It is normally used in a non-technical sense to refer to any payments that are contrary to or prohibited by some law. There are three other notable examples of illicit payment. These are: illegal political contributions; payments of royalties and taxes to illegal regimes in contravention of United Nations resolutions, and payments in violation of currency exchange regulations. The drafters of an international agreement on illicit payments will have to choose whether or not to cover all or only some of these types of payments.⁹³ In the draft U.N. Agreement, the drafters chose to prohibit only illicit payments to, or for the benefit of, public officials, rather than the broader net of the FCPA which includes foreign political parties and candidates.⁹⁴ In the OECD Recommendations the drafters chose not to clearly address this issue — simply stating that "the notion of bribery in *some* (emphasis added) countries

⁹¹ *Ibid.* In his remarks to the OECD Executive Committee, the U.S. Assistant Secretary went as far as suggesting that some Members (of the OECD) prefer to minimize the problem and to dilute efforts to address it.

⁹² United Nations Economic and Social Council, *Transnational Corporations: Issues involved in the Formulation of a Code of Conduct*, Report of the Secretariat, UN Doc. E/C.10/17 (1976).

⁹³ *Supra* footnote 3.

⁹⁴ 15 U.S.C.A. §§78dd-1, 78dd-2.

also includes advantages to or for members of a law-making body, candidates for a law making body or public office and officials of political parties.”⁹⁵

Likewise, there is no generally accepted definition of “corrupt practices”, though examples of international business activities that could be included in that concept are restrictive business practices, unfair competition, double accounting, fraudulent transfer pricing and tax evasion.⁹⁶ Unfortunately, apart from bribery, other kinds of illicit payments or corrupt practices have not traditionally been regulated in penal codes. These kinds of payments are so variant in nature that it is difficult, if not undesirable to evolve general criteria for penalizing them.⁹⁷

As it stands, the FCPA, the OECD Recommendations and the various draft agreements and guidelines have prohibited payments made to public or government officials. The definition of an “official”, however, appears to vary from one country to another. In some countries, it covers only civil servants; in other countries it includes elected officials, the military, police and judicial personnel; in yet others it includes ecclesiastic and party officials. A broad definition of “government or public official” would encompass all persons in decision-making or implementing roles, as well as persons who are in a position to influence decision-making.⁹⁸

(b) *Enforcement Mechanisms*

There are a number of methods which can be utilized to clamp down on the use of illicit payments in international business transactions. The U.S. chose perhaps the most vigorous route - to criminalize international corrupt practices on its own, and then seek support from the international community. At the international level, there are two methods of achieving criminalization - either by prescribing it in an international instrument which could state the standards for criminalization, or by urging their adoption into the various national penal

⁹⁵ *Ibid.* footnote 88. This statement is a footnote to Article II of the OECD Recommendations, which states the following:

“CONSIDERS that, for the purposes of this Recommendation, bribery can involve the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public official, in violation of the official’s legal duties, in order to obtain or retain business.”

⁹⁶ *Supra* footnote 3.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* In contrast, the definition of “public official” in the draft international agreement on illicit payments expressly covers persons holding legislative offices, but, does not include officials of intergovernmental organizations, nor does it specify whether the term would cover employees of State-owned or controlled enterprises. Though not adopted, the French delegation proposed the following definition:

“Article 3: “Public Official”: administrator, judicial, military (or equivalent), civil servant, whether principal or agent of a public agency subject to jurisdiction of the public authorities and to any citizen performing public functions.”

Supra footnote 79, Annex, French Proposal for elimination of Illicit Payments in International Commercial Transactions.

statutes. The second method was followed in the draft U.N. Agreement.⁹⁹ In addition to criminalizing illicit payments, both the FCPA and the draft U.N. Agreement provide standards of disclosure of information in relation to the payments made in connection with international commercial transactions.

A second approach, not mutually exclusive to criminalization, is to provide in an international agreement for standards of disclosure of information in relation to payments made in connection with international commercial transactions. Disclosure is one of the main preventive measures prescribed in the draft U.N. Agreement.¹⁰⁰ The difficulty for the drafters is determining what kind of payments should be disclosed, who should be required to make the disclosure, and to whom such information should be disclosed. The FCPA's accounting provisions only apply to issuers subject to the *Securities Exchange Act*,¹⁰¹ but require records to be kept of all transactions, regardless of whether or not they are involved in international transactions. In contrast, the draft U.N. Agreement's accounting provisions are broader in that they extend to all enterprises and persons within the contracting state,¹⁰² but narrower in that they are limited to records of payments made to intermediaries in connection with international commercial dealings.¹⁰³

The draft U.N. Agreement provides for the free-flow of information and cooperation in investigations and proceedings by contracting states,¹⁰⁴ subject to the law of the state requested to provide assistance.¹⁰⁵ This issue is problematic for countries like Canada where there is no legislative requirement for public disclosure of payments made by business corporations to foreign agents.¹⁰⁶ Both the *Income Tax Act*¹⁰⁷ and the *Statistics Act*¹⁰⁸ contain

⁹⁹ Article 1 of the *Draft International Agreement on Illicit Payments* contains an undertaking by the State parties to make the acts covered in the agreement punishable by appropriate penalties under their national laws.

¹⁰⁰ *Supra* footnote 79, Annex 1, art. 8, *U.N. Draft International Agreement on Illicit Payments*.

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

¹⁰² The draft Agreement requires records to be kept pertaining to payments in connection with international transactions. An "international transaction is defined (Article 2(b)) as:

".. 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]."

Note that the bracketed words remain in disagreement in the draft agreement.

¹⁰³ *Supra* footnote 79, art. 6 at 5.

¹⁰⁴ *Ibid.* Art. 10 at 6. Young, *op cit.* footnote 15 at 821.

¹⁰⁵ *Ibid.* Art. 10(3).

¹⁰⁶ See Castel, deMestral and Graham, *International Business Transactions and Economic Relations* (Toronto: Emond-Montgomery, 1986) at 438.

¹⁰⁷ S.C. 1970-71-72, c.63, as am.

¹⁰⁸ S.C. 1970-71-72, c.15, as am., ss. 16-17.

confidentiality provisions which prohibit the public disclosure of information gleaned thereunder. Similarly, there is no requirement under either the *Canada Business Corporations Act*¹⁰⁹ or its provincial counterparts for corporations to disclose information concerning payments made by them to foreign agents.¹¹⁰ Additionally, a further drafting obstacle relates to the coincident exchange of information with a foreign government. Care will be required to ensure that the governments, Canada included, will have the power to transfer information relating to illicit payments to a foreign government.

Several other approaches have been recommended as deterrents to international corrupt practices. These include:

- (a) The possibility of rendering the relevant transaction null and void is also contemplated in the draft U.N. Agreement.¹¹¹
- (b) Imposition of high tax surcharges in the home country on the profits made from transactions tainted with corrupt practices.
- (c) Exclusion of the errant foreign corporation from doing business in the host country for several years.
- (d) Enacting legislation in the host country to requiring public officials to declare their net worth or net assets upon the assumption of, and at the end of office. This could be coupled with a requirement to account for any undue increases or anomalies that might appear.

Notably, none of the last three measures were included in either the FCPA nor the draft U.N. Agreement.¹¹²

6. Recommendations for Canada

In 1981, at least one Canadian commentator noted that Canada was moving relatively slowly on this subject.¹¹³ Over a decade later, there has been no further movement. Fifteen years ago, the Canadian Institute of Chartered Accountants issued a report in part on the matter of illicit payments in international trade, suggesting "that the government should not attempt to legislate ethical standards for Canadian enterprises where there are legitimate differences of opinion as to appropriate conduct".¹¹⁴ It is clear that this attitude is one of the past. In the international community, there has been a general recognition that an international agreement addressing the problem of corrupt practices in international commercial transactions could make an important contribution to the reliability,

¹⁰⁹ S.C. 1974-75-76, c.33, as am.

¹¹⁰ *Supra* footnote 107.

¹¹¹ *Supra* footnote 79. See Annex I, art. 8.

¹¹² *Supra* footnote 3.

¹¹³ *Supra* footnote 53 at 270-272.

¹¹⁴ *Report of the Special Committee to Examine the Role of the Auditor*, (1978) 3:4 CA Magazine, as quoted in Williams and Castel, *op cit.* footnote 53 at 270-272.

fairness and transparency of international private business relations with foreign governments, for the benefit of economic development in the world.¹¹⁵

There is precedent in Canada for making bribery of all governmental officials, Canadian or otherwise, illegal. In at least one respect, the Canadian government has clearly treated both domestic and international bribery in the same manner. Following an embarrassing question in the House of Commons in 1990 concerning the permissive deductibility of bribes,¹¹⁶ the *Income Tax Act (Canada)*¹¹⁷ was amended to prohibit the deductibility of illegal payments.¹¹⁸ Similarly, the U.S. also first attempted to deal with corporate bribery with an amendment of the Internal Revenue Code, whereby bribes could no longer be computed as taxable income if they were unlawful when made in the United States.¹¹⁹

In the face of concurrence, what course of action should Canada take towards bribes paid by Canadian businesspersons and firms to foreign officials? While there are obviously a number of serious drafting difficulties, a clear policy statement is required. Thereafter, the legislative drafters can decide to either wait for a cohesive response from the OECD or U.N., or proceed to amend the *Criminal Code*, the *Income Tax Act*, and any other legislation necessary to make such payments both determinable and illegal. If Canada waits, it could be

¹¹⁵ *Supra* footnote 3.

¹¹⁶ As provided for in Information Circular 76-4R2, dated January 31, 1986. Article 5, under the heading "Kickbacks, Bribes, Etc., provides as follows:

"An unvouchered expenditure that may be described as an "under-the-table" payment is not deductible unless the following conditions are met:

- (a) the recipient thereof is identified, and
- (b) the expenditure was made or incurred to earn income and the amount was reasonable in the circumstances."

Article 6 went further:

"In the case of a corporation, where the recipient of a payment remains unidentified, consideration will be given to including the amount of such payment in the income of the person who authorized it pursuant to subsection 15(1), 56(2) or paragraph 6(1)(a) depending on the circumstances."

¹¹⁷ S.C. 1970-71-72, c.63 as am.

¹¹⁸ S.C. 1970-71-72, c.63 as am., s. 67.5(1):

"In computing income, no deduction shall be made in respect of an outlay made or expense incurred for the purpose of doing anything that is an offence under any of sections 119 to 121, 123 to 125, 393 and 426 of the *Criminal Code* or an offence under section 465 of that Act as it relates to an offence described in any of those sections.

¹¹⁹ Internal Revenue Code in 1958, 26 U.S.C. §§162(c) (1976). This section was part of the *Technical Amendments Act of 1958*, Pub. L. No. 85-866, 72 Stat. 1606 (1958), to prohibit a deduction for any direct or indirect payment that "would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee." However, in tax changes enacted in 1982 (*The Tax Equity and Fiscal Responsibility Act of 1982*, Pub. L. No. 97-248, 96 Stat.324.), the U.S. now permits a business deduction for facilitating or "grease" payments that do not violate the antibribery provisions of the FCPA. See R. R. Dunn, "Congress Amends Internal Revenue Code to Comport with the Foreign Corrupt Practices Act" (1983) 18 *Texas Int'l L. J.* 407 at 408.

a long wait, as the international process is now over fifteen years in the making, with still no clear sign of concrete progress amongst the parties. Given the resigned approach by some western countries to systemic corruptive problems, unanimous support for such condemnation may require further support by countries other than the U.S. There is no need to wait. In the drafting process, the FCPA provides a good example of a very tough approach to the problem; the draft U.N. Agreement provides a less onerous framework. As a minimum, the *Criminal Code* should be amended to include corrupt practices involved to obtain a contract with a foreign government. This will send the appropriate message to the business community. However, to ensure that any changes to the *Criminal Code* are effective, a disclosure requirement, similar to that of the FCPA should be required for payments to foreign agents.¹²⁰ Without this mechanism, the law will have no teeth.

¹²⁰ It has been suggested that since there is no federal security legislation, it would be up to the provincial securities commissions to determine whether, in the exercise of their statutory powers, they should require the disclosure of payments to foreign agents, in the same way as under the FCPA. There may be a constitutional issue hidden here as well. See Williams and Castel, *supra* footnote 53 at 270-272.