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Multinational "Payoffs" Abroad: International Repercussions and Domestic Liabilities

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NOTES

MULTINATIONAL "PAYOFFS" ABROAD: INTERNATIONAL REPERCUSSIONS AND DOMESTIC LIABILITIES

I. Introduction

The vast resources and diverse activities of multinational corporations have made them a controversial phenomenon. Attention has largely been focused upon the conflict between the search of the multinational enterprise [hereinafter referred to as MNE] for capital growth and the interests of the host States in which it operates.[1] Analysis of the problems caused by MNE's has focused upon the manner in which they function, their impact on host States, and the effect of their activities on international relations. Many writers have asserted that MNE's must be subject to regulation.[2] The attitude of MNE's is reflected in a statement by Mr. A. Gerstacker, Chairman of the Dow Chemical Company:

> The anational company may be the major hope in the world today for economic cooperation among people, for prosperity among nations, for peace in our world. I have long dreamed of buying an island owned by no nation, and of establishing the world headquarters of the Dow company on the truly neutral ground of such an island, beholden to no nation or society.[3]

A new facet to the controversy has developed in the past two years because directors and officers of United States MNE's have admitted payment of large sums of money to officials of foreign governments. Disclosures before Senate subcommittees, at annual meetings of shareholders, and in the press reveal the nature, if not the extent, of such MNE disbursements.

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1. *See generally* R. Barnet & R. Muller, Global Reach (1974); The International Corporation (C. Kindleberger ed. 1970); Reich, *Global Responsibilities for the Multinationals*, 8 Texas Int'l L.J. 187 (1973). For an analysis of the deleterious effects of regulation, see Rubin, *Developments in the Law and Institutions of International Economic Relations, The Multinational Enterprise at Bay*, 68 AM.J. Int'l L. 475 (1974).

2. Griffin, *The Power of Host Countries Over the Multinational: Lifting the Veil in the European Economic Community and the United States*, 6 Law & Pol. Int'l Bus. 375 (1974).

3. A. Gerstacker, Chairman of the Dow Chemical Company, remarks at the White House Conference on the Industrial World Ahead, February 8, 1972, cited in Reich, *supra* note 1, at 187.

In the United States, corporate contributions have been prohibited with respect to federal office[4] and most state and local offices.[5] As Justice Reed commented in relation to the predecessor of the Corrupt Practices Act (now the Federal Election Campaign Act):[6]

> This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contributions. Second, the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders.[7]

Although the federal statute is not directed toward contributions to foreign election campaigns, it does indicate a public policy against the use of corporate assets to influence the political sphere.[8] Whether or not corporations have violated any existing laws, Senator Charles Percy has predicted that Congress will enact specific legislation requiring that United States MNE's divorce themselves from foreign politics and report all contributions wherever they are made.[9]

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4. Federal Election Campaign Act, 18 U.S.C. § 606 *et seq.* (1970), *as amended,* (Supp. II, 1972).
5. *See, e.g.,* New York ELEC. L. § 480 (McKinney 1974).
6. Act of Jan. 28, 1907, ch. 420, 34 Stat. 864, *as amended,* Federal Election Campaign Act, 18 U.S.C. § 610 (1970), *as amended,* (Supp. II, 1972).
7. United States v. CIO, 335 U.S. 106, 113 (1948).
8. *See* notes 11 & 12 *infra.*
9. N.Y. Times, June 5, 1975, at 53, col. 5.

Congress has begun to move in the direction predicted by Senator Percy; on November 12, 1975 the Senate passed a resolution by a 93-0 vote. S. Res. 265, 94th Cong., 1st Sess., 121 CONG. REC. S19812 (1975). The resolution "called on U.S. trade diplomats to negotiate an 'international code of conduct' aimed at stopping bribes and kickbacks in business transactions by global corporations." Wall Street Journal, Nov. 13, 1975, at 12, col. 3. This Senate resolution strongly manifests Congressional intent to deter, if not prohibit, payments by MNE's to government officials.

A prior indication of the Congressional mood was a bill introduced by Senator Frank Church, S. 2239, 94th Cong., 1st Sess. (1975), entitled Intervention in Political Affairs of Foreign Countries. The legislation read, in pertinent part:

> SEC. 2. It is unlawful for any citizen or resident of the United States to offer to make, or make, a contribution to any agency of the United States for the purpose of influencing the outcome of an election for public office in a foreign country.
>
> SEC. 3. It is unlawful for any officer, employee, or agent of the United States (1) to solicit any citizen or resident of the United States to contribute to, or make an expenditure in support of, any candidate or political party, directly or indirectly, for the purpose of influencing the outcome of an election for public office in a foreign country, or (2) to accept a contribution from any citizen or resident of the United States for such purpose.

Legislation prohibiting domestic political contributions by corporations has existed since 1907.[10] Such legislation is designed to mitigate the influence a corporation can wield due to the huge accumulations of capital which are available for contributions, and to protect shareholders from directors and officers who make such a gift of corporate assets without their consent (and, in the case of foreign payments, often without their knowledge). The Federal Election Campaign Act defines "election" to include virtually every primary, special, general, or runoff election for federal office.[11] The term "contributions" has been broadened to encompass every conceivable thing of value, including loans, used to influence the election of any person to federal office.[12]

While no United States court has held that payments of corporate assets to foreign governments is a violation of the common law or statutory duties of a director or officer, the courts have condemned domestic political contributions. An analysis of the case law is necessary to delineate public policy regarding corporate political contributions.

This note will analyze the jurisdictional problems that shareholders may encounter when instituting derivative suits against MNE's which have made political payments abroad. The bases upon which United States courts can assert jurisdiction under principles of emergent and customary international law will be examined. In addition, the grounds for such derivative suits under both the Securities Exchange Act of 1934 [hereinafter referred to as the Act] and state law will be discussed.

The bill was considered by the Multinational Subcommittee and passed by the Senate. Although not enacted, S.2239 was merely an initial attempt to regulate political activity of American multinational enterprises abroad as the subsequent Senate resolution clearly indicates.

10. Act of Jan. 28, 1907, ch. 420, 34 Stat. 864.

11. Federal Election Campaign Law, 18 U.S.C. § 610 (1970), *as amended*, (Supp. II, 1972).

12. This section, which prohibits such contributions, specifically excludes "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation . . . provided such contributions to the fund are voluntary and not coerced by the corporation from its employees." The use of such "segregated funds" raises problems not considered in this note. In regard to guidelines for corporations desirous of establishing such funds and an analysis of the law, see Fletcher, *Corporate Political Contributions*, 29 BUS. LAWYER 1071-1100 (1974). It would appear that corporations may use their corporate assets to administer such funds. *Id.* Corporations may solicit employees to contribute to such funds, the only requirement being clear segregation and "voluntariness." *Cf.* Pipefitters Local 562 v. United States, 407 U.S. 385 (1972); United States v. Boyle, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

II. Background

In April of 1973, Harold Geneen, the chairman of the International Telephone and Telegraph Corporation, testified before the Senate Foreign Relations Subcommittee on Multinational Corporations [hereinafter referred to as Multinational Subcommittee]. Mr. Geneen admitted that ITT had, on two occasions, offered $1,000,000 to the Central Intelligence Agency "to prevent the election of the late Chilean President, the Marxist Dr. Salvadore Allende Gossens." Both offers were refused.[13]

On May 16, 1975, an official Honduran investigation commission identified its former Economic Minister, Abraham Bennaton Ramos, as the recipient of a $1,250,000 bribe from United Brands Corporation; the bribe was paid by the huge fruit exporting company to obtain favorable tax treatment on banana shipments.[14] The Honduran government reported that the bribe was given to Bennaton by a United Brands executive in Zurich in September of 1974.[15] The money was traced through the Paris branch of the Chase Manhattan Bank to the Zurich office of the Swiss Credit Union.[16]

On May 24, 1975, Elio Scotto, the chief state prosecutor of Italy, announced that a judicial inquiry was being conducted concerning charges that United Brands had given Italian government officials $750,000 between 1970 and 1974 to obtain favored treatment for banana shipments to Italy.[17] On May 22, 1975, the Securities and Exchange Commission announced that it had filed charges against United Brands for attempting to conceal the "true scope and extent" of the payment of bribes to foreign government officials to obtain reduction of banana export taxes.[18] Several shareholders of United Brands have filed suit against the directors and officers of the corporation to recover the corporate funds paid as bribes to the Honduran government.[19]

The Chairman of the Board of Gulf Oil Corporation, Robert R. Dorsey, testified before the Multinational Subcommittee that in 1966 the corporation had provided the late President of Bolivia,

13. N.Y. Times, August 20, 1975, at 59, col. 6.
14. *Id.* May 16, 1975, at 1, col. 8.
15. *Id.*
16. *Id.* May 21, 1975, at 61, col. 2.
17. *Id.* May 24, 1975, at 33, col. 1.
18. *Id.* May 22, 1975, at 65, col. 2.
19. *Id.* April 11, 1975, at 45, col. 7; *id.* April 12, 1975, at 33, col. 3.

Rene Barrientos Ortuna, with a $110,000 helicopter.[20] Payments of $240,000 and $110,000 were made to Ortuna's political party as well.[21] Mr. Dorsey further testified that Gulf may have made political contributions in Italy.[22] He also admitted that some $5,000,000 in illegal political contributions had been made abroad. Of that amount, Gulf had paid $4,000,000 to the South Korean Democratic Republican Party; $3,000,000 of these payments had occurred in 1971 after the Party's finance chief, S.K. Kim, had demanded $10,000,000.[23] Mr. Dorsey explained to the Subcommittee that all of the payments were made through a Gulf subsidiary, Bahamas Exploration, with the knowledge of only four or five Gulf officers. In urging federal prohibition of such payments so that MNE's might resist pressure to contribute, Mr. Dorsey complained that the State Department did not help United States corporations which had such problems abroad.[24] On May 23, 1974, Gulf shareholders filed suit against Gulf directors and officers to recover funds distributed as political payments in foreign nations.[25]

Richard W. Millar, the Chairman of Northrop Corporation, also testified before the Multinational Subcommittee. Mr. Millar disclosed that bribes totaling $450,000 were paid to two Saudi Arabian generals in 1972 and 1973.[26] Mobil Oil Corporation has admitted making political contributions in Italy[27] and Canada.[28]

At an annual stockholders' meeting in May of 1975, J.K. Jamieson, Chairman of the Exxon Corporation, disclosed that its subsidiary, Exxon Italiano, had contributed to political parties in Italy[29] and that its Imperial Oil subsidiary had made contributions to Canadian campaigns.[30] Orin E. Atkins, the Chairman

20. Testimony of Robert R. Dorsey, Chairman of the Board of Gulf Oil Corporation, May 16, 1975, *Hearings Before the Subcomm. on Multinational Corporations of the Senate Foreign Relations Comm.*, 94th Cong., 1st Sess., pt. 12 (1975) [hereinafter cited as *Hearings Before the Multinational Subcommittee*].

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. N.Y. Times, May 23, 1975, at 40, col. 5.

26. Testimony of Richard W. Millar, Chairman of the Executive Comm. of Northrop Corporation, June 9, 1975, *Hearings Before the Multinational Subcommittee.*

27. Testimony of Mr. Checkett, Vice President of Mobil Oil Corporation, July 17, 1975, *Hearings Before the Multinational Subcommittee.*

28. *Id.*

29. N.Y. Times, May 16, 1975, at 47, col. 2.

30. *Id.* May 17, 1975, at 37, col. 6.

and Chief Executive of Ashland Oil, admitted at Ashland's annual meeting that almost $500,000 in corporate funds had been paid to foreign government officials.[31]

In testimony before the Senate Banking Committee, Daniel G. Haughton, the Chairman of Lockheed Aircraft Corporation, admitted the company's long-standing practice of paying what he termed "kickbacks" to foreign governments in order to obtain contracts. He acknowledged that Lockheed had spent at least $22,000,000 in this manner.[32]

Payments by United States MNE's abroad are customary, if not institutionalized.[33] The activities of the corporations discussed here are merely illustrative.

III. Jurisdiction

MNE's "account to no single national authority, and since international law is feeble or nonexistent, they are free of international authority as well."[34] The lack of a coordinated international approach to MNE's presents jurisdictional problems when suit is brought against a corporation; as a consequence of corporate structure MNE's transcend the jurisdictional sovereignty of

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31. *Id.* Aug. 22, 1975, at 39, col. 2.

32. *Id.* Aug. 26, 1975, at 1, col. 1. The Lockheed Corporation has had its loans secured by the federal government through the Emergency Guarantee Board.

33. *See* Gwertzman, *Is Bribery Defensible*?, N.Y. Times, Oct. 5, 1975, 6 (Magazine), 19.

Corporate contributions to foreign political parties have created controversy in foreign nations. The Honduran government has filed criminal charges against Bennaton, the alleged recipient of $1,250,000 from United Brands, and against a United Brands subsidiary. N.Y. Times, May 18, 1975 at 54, col. 1. The government of Iran has announced that in the future foreign companies securing government contracts will be required to file an affadavit that no unauthorized payments have been made. *Id.*, June 10, 1975 at 61, col. 8.

International concern over corporate payments was also expressed in the preliminary draft of a "multinational code of conduct" promulgated by the Organization for Economic Cooperation and Development. *Id.*, Oct. 27, 1975, at 41, col. 8. The draft of the code provides that "within the framework of laws and regulations of the host. . . the company observe the best standards set by relevant local customs and practices." *Id.*, Oct. 27, 1975, at 41, col. 8. Despite the weak phrasing of this provision, the code represents an initial attempt to control MNE conduct. Other code guidelines call for disclosure of information by MNE's and require MNE's to avoid practices which would "concentrate their economic power." *Id.*, Oct. 27, 1975, at 42, col. 5. Although the code is not compulsary, MNE's that "depart radically from the guidelines would probably find it more difficult to do business." *Id.*, Oct. 27, 1975, at 41, col. 8.

34. Jean-Jacques Servan-Schreiber, *Hearings Before the Subcomm. on Foreign Economic Policy of the Joint Economic Comm.*, 91st Cong., 2d Sess., 935 (1970), cited in Reich, *supra* note 1, at 187.

the individual nations in which they operate. In many instances a subsidiary corporation is economically, but not legally, synonymous with a parent MNE. Because of this relationship, suit against a subsidiary located in one State must necessarily be predicated upon jurisdiction over a parent which is situated in another country.

Principles of International Law

Pursuant to recognized principles of international law, the jurisdiction of national courts must be predicated upon either nationality or territoriality.[35] A State may regulate the conduct of its nationals wherever they reside.[36] According to the *Restatement (Second) of Foreign Relations Law of the United States* [hereinafter referred to as *Restatement*] a corporation has "the nationality of the state which creates it."[37] The applicability of a State's laws to activities conducted within its geographical boundaries[38] is based upon the subjective territorial principle; for acts of a national which occur outside its geographical boundaries jurisdiction is based upon the nationality principle. When political payments are made in the United States or directly through a United States corporation abroad, United States courts clearly have jurisdiction over the transaction.[39]

Problems arise when payments made by a United States parent MNE are channelled through a subsidiary which is incorporated in a foreign State. The subsidiary corporation which makes the payment is an alien and therefore not subject to United States jurisdiction under the traditional theories. By relying upon expanded concepts of international principles, however, a plaintiff shareholder can successfully obtain jurisdiction.

The principle of nationality, as applied to corporations, has been broadly interpreted. The courts have not uniformly adhered

35. *See* 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 11; 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW §§ 7 & 16.

36. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW § 145 (8th ed. Lauterpacht 1955); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1) (h) (1965) [hereinafter cited as RESTATEMENT] offers an even broader basis in protecting the "interests" of a national: "[a]s to the status of a national or as to an interest of a national, wherever the thing or other subject matter to which the interest relates is located."

37. RESTATEMENT § 27.

38. *Id.* § 17: OPPENHEIM, *supra* note 36, § 43; WHITEMAN, *supra* note 35, vol. 1, § 15, at 241 (1963).

39. OPPENHEIM, *supra* note 36. Such jurisdiction must be tempered somewhat by the doctrine of comity. *See* text accompanying notes 67-77 *infra*.

to the theory that incorporation is the exclusive criterion of nationality,[40] and commentators have also questioned its efficacy.[41] Ian Brownlie has pointed out the artificiality of construing corporate nationality by situs of incorporation alone:

> The attribution of legal persons (*personnes morales*) to a particular state for the purpose of applying a rule of domestic or international law is commonly based upon the concept of nationality. The borrowing of a concept developed in relation to individuals is awkward in some respects but is now well established. A major point of distinction is the absence of legislative provisions in municipal law systems which create a national status for corporations: domestic nationality laws do not concern themselves with corporations. The consequences of this are twofold. First, the nationality must be derived either from the fact of incorporation, i.e. creation as a legal person, within the given system of domestic law, or from various links including the centre of administration (*siège social*), and the national basis of ownership and control. Secondly, the content of the nationality tends to depend on the context of the particular rule of law involved: nationality appears more as a functional attribution of tracing and less as a formal and general status of the kind relating to individuals.[42]

The United States, particularly in the enforcement of its antitrust, securities, and tax laws, has often "insisted on treating as domestic corporations . . . businesses incorporated in foreign countries but having substantial financial links with the United States and its citizens."[43]

Expansion of corporate nationality has also been approved in the official comments of the *Restatement*:

> When the nationality of a corporation is different from the nationality of the persons (individual or corporate) who own or control it, the state of the nationality of such persons has jurisdiction to prescribe, and to enforce in its territory, rules of law governing their conduct. It is thus in a position to control the conduct of the corporation even though it does not have

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40. *Cf.* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

41. *See generally* Griffin, *supra* note 2; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2d ed. 1973).

42. Brownlie, *supra* note 41, at 408-09.

43. Note, *Extraterritorial Application of the Securities Exchange Act of 1934*, 69 COLUM. L. REV. 94, 96 (1969) (footnotes omitted); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) [hereinafter cited as United States v. Alcoa].

jurisdiction to prescribe rules directly applicable to the corporation.[44]

A corporation may be concurrently subject to jurisdiction where it is incorporated and where it does business. Furthermore, a particular State may construe the nationality of subsidiaries as identical to that of a parent MNE, even if they have been incorporated elsewhere.[45]

The scope of the territorial principle is not limited to the subjective principle. International law recognizes the rule that when conduct outside a State's borders has a substantial effect within its borders, the State may exercise jurisdiction under the objective territorial principle.[46] This concept, in conjunction with the subjective territorial principle, may also result in the concurrent jurisdiction of both the State in which the event occurred and the State in which the event caused a substantial effect.

The objective territorial principle has long been accepted in United States courts, as exemplified by Judge Learned Hand's statement in *United States v. Aluminum Co. of America* [hereinafter referred to as *United States v. Alcoa*]:[47]

> The only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law . . . . We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States . . . . *On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends;* and these liabilities other states will ordinarily recognize.[48]

The court held that defendant, Aluminum Ltd., had violated Section 1 of the Sherman Antitrust Act. Aluminum Ltd., a Canadian corporation organized to take over Alcoa properties in Canada, was found guilty of conspiring with other foreign corporations to control imports of aluminum products into the United States.

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44. RESTATEMENT § 27 & comment (d). *See also* the Reporter's Note to § 27.
45. RESTATEMENT § 37; OPPENHEIM, *supra* note 36, § 145.
46. RESTATEMENT § 18; *cf.* OPPENHEIM, *supra* note 36, § 147.
47. 148 F.2d 416 (2d Cir. 1945).
48. *Id.* at 443 (citations omitted) (emphasis added).

The doctrine of substantial effects is also recognized by the *Restatement*:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
> (a) the conduct and its effects are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[49]

Where the result in the United States violates federal securities laws, the strong federal policy prohibiting political contributions by corporations, or state law governing corporations, political payments abroad can be viewed as either criminal or tortious in themselves or as creating actionable substantial effects. Foreign political payments cause substantial effects in the United States when the value of an MNE's stock has been affected by the payment or by the disclosure of the transaction. In addition, such payments contravene the strong statutory policy which is exemplified by legislation prohibiting domestic political contributions by corporations.[50]

The United States has been the principal proponent of the objective territorial principle.[51] Most States, including those of the European Economic Community [hereinafter referred to as EEC], currently recognize the validity of this doctrine.[52] This is particularly pertinent in light of the operations of an MNE, which often result in simultaneous effects in several States. The most obvious example of an effect is the impact of MNE operations on shareholders and creditors.

Not all States are satisfied with the objective territorial prin-

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49. RESTATEMENT § 18.

50. *See* note 4 *supra*.

The courts have applied the United States' securities laws to foreign nationals; *see, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Comment, *The Transnational Reach of Rule 10b-5*, 121 U. PA. L. REV. 1363 (1973). In most instances, however, the regulation has been of foreign corporations registered on American exchanges and/or involving American purchasers.

51. RESTATEMENT § 18; United States v. Alcoa.

52. Griffin, *supra* note 2, at 405.

ciple. In 1967, prior to entering the EEC, Britain issued a strong statement decrying the application of the effects doctrine by the EEC in antitrust matters. The British government, at least at the time, felt that jurisdiction should be exercised over foreign corporations only when they were "carrying on business" or "residing" in that State. It was felt that subsidiaries organized under a different jurisdiction should not be supervised as would the parent "unless it can be shown that the subsidiary is the agent for the parent."[53]

An alternative means of obtaining jurisdiction within the confines of the territorial principle has been referred to as "lifting the corporate veil."[54] This concept holds the parent MNE and its subsidiaries to be parts of a single entity. In this manner, a State with territorial jurisdiction over either the parent or the subsidiary can claim valid jurisdiction over the foreign segment of the MNE. Although this method has primarily been employed by the home State of the parent corporation in order to reach the subsidiary, it has been suggested that the process may well be used by host States to obtain jurisdiction over the parent enterprise.[55]

In many instances, in the "balance-of-payments controls, securities regulation, tax policy, and national-security-related export controls,"[56] the home State "treats the local parent and the foreign subsidiary as a single enterprise and thereby attempts to control the activity of the foreign subsidiary."[57] Therefore, where a foreign subsidiary has participated in a transaction at the behest of, or as the financial conduit for, the parent MNE, the activity will be traced back to the parent. Often this will be a United States MNE, in which the prospective plaintiff is a shareholder. Professor Griffin has examined the use of such a theory by host States to give them some control over the parent corporation.[58] He concludes that a carefully delineated legal structure which does not accurately portray the distribution of management and financial control will not shield a corporation from liability since a State's judiciary will endeavor to pierce the corporate veil.

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53. *Excursus, British Aide-Mémoire to the Commission of the European Communities*, dated October 20, 1969, cited in Brownlie, *supra* note 41, at 305.

54. Griffin, *supra* note 2, at 383.

55. *Id.* at 407.

56. *Id.* at 377 (footnotes omitted).

57. *Id.*

58. *Id.*

> Governments and courts are not unaware of these relationships nor of the problems of affixing responsibility for corporate actions on those who in fact control the corporation. Consequently, many nations have resorted to "lifting" the corporate veil in an attempt to affix responsibility more properly. In those instances in which a host country treats the local subsidiary and the foreign parent corporation as a single entity, the legal fiction of separate personality based upon separate incorporation is ignored in order to deal with the "real" as opposed to the "legal" status of the entities.[59]

This reasoning can be applied by United States courts when a United States corporation utilizes a foreign subsidiary to channel corporate assets for political contributions abroad. In such cases, it is necessary to show the intent of the MNE or the direct benefit to it.

The International Court of Justice passed upon the concept of "lifting the corporate veil" in *The Case Concerning Barcelona Traction, Light and Power Company, Ltd.*[60] [hereinafter referred to as *Barcelona Traction*]. In that case, Belgian shareholders had a preponderant interest in Sofina, which controlled another Belgian company called Sidro. Sidro in turn controlled Barcelona Traction, which was a holding company that partly or wholly owned fourteen subsidiaries organized under Spanish and Canadian laws. Barcelona Traction itself was incorporated in Canada, where it had its headquarters.

Belgium requested that the Court "lift the veil" of Canadian incorporation in order to permit the diplomatic protection of Belgium to be invoked on behalf of Belgian shareholders. The Court rejected Belgium's argument, ruling that Belgium had no standing to intervene; it "lacked a legal interest in the subject matter of the claim because the acts complained of affected the interests of the company rather than the rights of the shareholders vis-à-vis the corporation."[61] The Court stated that since the holding company was still in existence, the shareholders could look only to the State of incorporation, Canada, when requesting diplomatic protection.[62]

The Court in *Barcelona Traction* was concerned with determining which State could properly extend diplomatic protection

59. *Id.* at 382-83 (footnotes omitted).
60. [1970] I.C.J. 3.
61. Griffin, *supra* note 2, at 384.
62. [1970] I.C.J. 42.

and not which State could regulate the corporation. The Court indicated a limited acceptance of "lifting the corporate veil" or "disregarding the legal entity":

> the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.[63]

In a separate opinion, Judge Jessup suggested that the criteria for selecting which State had jurisdiction may have been too rigid. He recognized that the effects doctrine was gaining broader acceptance:

> There is a trend in the direction of extending the jurisdictional power of the State to deal with foreign enterprises which have contact with the State's territorial domain; ". . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[64]

Judge Jessup suggested that courts look to the "economic reality" of the transaction in question and to the "overwhelmingly dominant feature." In *Barcelona Traction* this feature was, in Judge Jessup's opinion, the economic interest of Belgian shareholders rather than the incorporation in Canada.[65] Professor Griffin agrees with Judge Jessup, and suggests that

> the majority opinion rejected the more flexible "genuine connection" principle expressed in Judge Jessup's opinion which determines the nationality of a company by reference to real and effective links between the company and the state. . . . Factors to be considered would include location of factories, employment of labor, payment of taxes, location of decision-making, and place of incorporation.[66]

The broad interpretation of this view would permit almost any national court to find sufficient connections or links with its own country to invoke jurisdiction. Thus, the home State of a parent MNE could reach a foreign subsidiary abroad which has caused

63. *Id.* at 40.
64. [1970] I.C.J. at 167 (Jessup, J., separate opinion) (citations omitted).
65. *Id.* at 169-70.
66. Griffin, *supra* note 2, at 386.

an impact domestically or the host country of a subsidiary could reach a parent corporation which has acted through the subsidiary. In the context of political payments, a host country where the payment was made or attempted could reach beyond the local subsidiary which tendered the offer and sanction the parent MNE. Similarly, the State where the parent is incorporated might construe the subsidiary's conduct as that of the parent and invoke its own laws for the protection of the parent corporation's shareholders. In such a case the separate structure of the companies would be disregarded and they would be viewed as a single entity.

Overlapping of the territorial principles and the nationality principle gives rise to problems of comity between States. If a United States court accepts jurisdiction over a shareholder suit, a potential problem is that the foreign State in which the transaction took place may choose to intervene. The host State of the subsidiary could assert jurisdiction under the traditional basis of territoriality. This would in no way diminish the jurisdiction of the United States courts, but where an adjudication had already been made by the foreign court considerations of comity would be relevant. If a foreign decision were contrary to allegations advanced in the United States court, principles of comity might require that the foreign judgment be recognized in the United States court.

In *Kohn v. American Metal Climax, Inc.*,[67] a shareholder derivative suit was brought under rule 10b-5[68] of the rules and regulations promulgated pursuant to section 10(b) of the Act.[69] The complaint alleged that material misrepresentations were included in a proxy solicitation which asked for shareholder approval of the amalgamation and nationalization of the defendant company in Zambia. A Zambian court had approved the transaction. The United States District Court for the Eastern District of Pennsylvania[70] refused to recognize the Zambian decree as a limitation on the Securities and Exchange Commission rules and held that the defendant had violated rule 10b-5 by making misrepresentations in the proxy solicitation.[71] The United States Court of Appeals for the Third Circuit also found a violation of 10b-5, but

67. 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972).
68. 17 C.F.R. § 240.10b-5 (1975).
69. 15 U.S.C. § 78j(b) (1970).
70. 322 F. Supp. 1331 (E.D. Pa., 1970).
71. *Id.* at 1351.

reversed as to the effect of the Zambian decree and held that the foreign decree had to be recognized.[72]

It appears that a derivative suit would be prevented when a foreign jurisdiction has acquitted the parties involved or has found no violation of the criminal or civil laws of that jurisdiction. The legality of an act under the laws of the foreign state, as well as a number of other factors, must be considered by a court when an issue of comity arises. Among the relevant considerations are:

> (1) whether any other court has competence over the offense.
> (2) whether the offense is legal where committed.
> (3) whether the decree would be enforceable.
> (4) whether the judgment might encourage retaliation.
> (5) whether the state has a greater stake in the regulation of given conduct than the other states affected.[73]

It is nevertheless true that where the application of a State's own law would conflict with that of a State having concurrent jurisdiction, the former may properly intervene unless it would violate principles of international law.[74]

Section 40 of the *Restatement* suggests that the following limitations be considered in moderating a State's enforcement of its municipal law:

> a) vital national interests of each of the states,
> b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
> c) the extent to which the required conduct is to take place in the territory of the other states,
> d) the nationality of the person, and
> e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.[75]

The official comments to section 40 add that in the case of the nationality of a corporation "[t]o the extent that the exercise of jurisdiction relates to the conduct of persons controlling a corporation, or who are its officers or agents, the nationality of such

72. *See* Comment, *Scienter, Comity and the U.S. Securities Law*, Kohn v. American Climax, Inc., 5 LAW. & POL. INT'L BUS. 1042, 1054 (1973).

73. 10 COLUM. J. TRANSNAT'L L. 150, 156 (1971).

74. RESTATEMENT § 39. Where the foreign decision-making body is alleged to be the recipient of the bribe an American court may question the competency of that foreign jurisdiction to make a proper adjudication of the matter. In such an instance, there may be a less compelling reason to give the foreign decree final effect in an American court.

75. *Id.* § 40.

persons is also a factor to be considered."[76] In the case of political payments abroad, their legality in the country where they are made should be considered in granting extraterritorial application of a State's domestic law which prohibits such conduct. This should not in and of itself preclude any action, however, once the State has determined that a violation of its own law exists.[77] Where the United States seeks to apply its domestic laws extraterritorially, courts must initially determine whether Congress intended this particular legislation to be so applied.[78]

The Extraterritorial Effect of the Securities Exchange Act of 1934

A foreign issuer may choose to register securities with the Securities and Exchange Commission [hereinafter referred to as SEC] under section 12(b)[79] and comply with the standard registration requirements of the Act. The issuer may, however, be exempt from registration in certain circumstances.

Rule 12g3-2,[80] promulgated by the SEC pursuant to section 12(g)[81] of the Act offers two basic exemptions. First, securities held by no more than 300 persons residing within the United States need not be registered. (Should the number of holders of a class of securities be reduced to less than 300 holders residing within the United States, registration may be terminated.)[82] Second, regardless of the number of United States residents involved, a security may be exempt if certain information is furnished to the SEC on a periodic basis. The information must include what the issuer

> (a) has made public pursuant to the law of the country of its domicile or in which it is incorporated or organized,
> (b) has filed with a stock exchange or which its securities are traded on and which was made public by such exchange, or
> (c) has distributed to its security holders;[83]
> . . . .

76. *Id.* comment (d).
77. *Id.* § 39. A State having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its own jurisdiction solely because this would require a person to engage in conduct subjecting him to liability under the law of another State which has jurisdiction with respect to that conduct.
78. RESTATEMENT § 38; United States v. Alcoa.
79. 15 U.S.C. § 78*l*(b) (1970).
80. 17 C.F.R. § 240.12g3-2 (1975).
81. 15 U.S.C. § 78*l*(g) (1970).
82. 17 C.F.R. § 240.12g3-2(a) (1975).
83. 17 C.F.R. § 240.12g3-2(b)(1)(i) (1975).

> 3. The information required to be furnished . . . is that about which investors ought reasonably to be informed with respect to the issue and its subsidiaries concerning: the financial condition or results of operations; changes in business; acquisitions or dispositions of assets; issuance, redemption or acquisitions of their securities; changes in management or control; the granting of options or the payment of other remuneration to directors or officers; transactions with directors, officers or principal security holders; and other information about which investors ought reasonably to be informed.[84]

Although the SEC is concerned with the protection of United States investors, a foreign issuer need not register if the information he furnishes elsewhere is substantially similar to that intended to be disclosed by the Act.

It must be noted, however, that exemptions are not available where:

> (1) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificate or depository receipts by residents of the United States and
> (2) the business of such issuer is administered principally in the United States or 50 percent or more of the members of its Board of Directors are residents of the United States.[85]

The Act requires the same degree of disclosure by a foreign subsidiary which is substantially owned or controlled by a domestic parent as it requires of the parent itself. In such circumstances an issuer would not be construed as a "foreign issuer" for purposes of exemption under the Act.

The alternative registration requirements for foreign issuers who are not closely linked to the United States relieves them from any conflict between foreign disclosure requirements and those of the Act. According to one commentator, this "is a good example of the kind of flexible, specially adapted rule needed to assure proper extraterritorial application of the Securities Exchange Act of 1934."[86]

With respect to foreign transactions, section 30(b)[87] states that the Act's provisions and any rules or regulations promulgated thereunder

84. 17 C.F.R. § 240.12g3-2(b)(3) (1975).
85. 17 C.F.R. § 240.12g3-2(e) (1975).
86. Note, *supra* note 43, at 111.
87. 15 U.S.C. § 78dd(b) (1970).

> shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.[88]

Any doubt as to whether this section excluded all transactions which occurred outside of the United States, whether or not the purchasers were United States residents, was laid to rest by the United States Court of Appeals for the Second Circuit in *Schoenbaum v. Firstbrook*.[89] The court held that section 30(b) "was not meant to exempt transactions conducted outside of the United States unless they are part of a 'business in securities'."[90] "Business in securities" was construed strictly, the court stating that the section "does not preclude extraterritorial application of the Exchange Act to persons who engage in isolated foreign transactions."[91]

In *Schoenbaum*, the court found subject matter jurisdiction based upon an extraterritorial application of the Act. A derivative suit was brought by a United States shareholder of Banff, a Canadian corporation registered on the American Exchange. The complaint alleged a violation of section 10(b) of the Act and of rule 10b-5 by defendant Aquitaine. Aquitaine, a Canadian corporation, had acquired control of Banff through a tender offer to Banff's Canadian and United States shareholders. Banff and Aquitaine embarked upon a joint venture to develop oil in Canada. Banff issued a substantial amount of its treasury shares to Aquitaine under conditions which the plaintiffs, minority shareholders (Aquitaine now being the marjority holder in Banff), alleged were at a price far less than the real value of the stock.[92] The Second Circuit held that subject matter jurisdiction did exist over Aquitaine but that the plaintiffs had failed to show a 10b-5 violation.[93] On reconsideration en banc, the court upheld subject matter jurisdiction but reversed as to the plaintiffs' failure to state a cause of action and held that a triable issue of fact existed under section 10(b) and rule 10b-5.[94]

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88. *Id.*

89. 405 F.2d 200 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

90. *Id.* at 208.

91. *Id.* at 207.

92. *Id.* at 204-06.

93. *Id.* at 214-15.

94. 405 F.2d 215, 220 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

A transaction will not be exempted from compliance with the Act unless the broker-dealer is one "in the business" outside of the United States. In so construing the Act, the Second Circuit specifically upheld its extraterritorial application. This was done so that United States investors might be protected even though the transaction was a foreign one "among foreign participants involving the sale of foreign securities traded on a domestic exchange . . . where the noxious effects were felt in the United States."[95]

In *Leasco Data Processing Equipment Corp. v. Maxwell*,[96] the Second Circuit again gave extraterritorial effect to the Act and rule 10b-5 in an action brought by two corporate plaintiffs, a United States corporation and its wholly-owned British subsidiary. The complaint alleged that the plaintiffs were induced to purchase stock of a British corporation controlled by Maxwell, a British citizen, at an inflated value due to false representations made to them in Britain and the United States. The transaction was completed in Britain.[97] The court found that "substantial misrepresentations were made in the United States"[98] and held that the Act was applicable to transactions outside of the United States when fraudulent acts had taken place within the United States. Protection is thus not limited to United States securities.[99] Where there are a number of factual connections linking transactions with United States investors, issuers, underwriters, or activities, the Act will be construed to protect the victims of a fraudulent scheme.

Two recent cases before the Second Circuit have further expanded the extraterritorial application of the Act. *Bersch v. Drexel Firestone, Inc.*[100] was a class action brought in the Southern District of New York on behalf of all shareholders in defendant International Overseas Service, Ltd. (IOS), a Canadian corporation, who were either United States residents living abroad or foreigners. The complaint alleged numerous irregularities in a series of three offerings of IOS stock. The offerings were intended to be made only to foreigners outside of the United States and outside of the jurisdictional scope of the Act. Two of the under-

95. Note, *supra* note 43, at 101-02.
96. 468 F.2d 1326 (2d Cir. 1968).
97. *Id.* at 1330-33.
98. *Id.* at 1337.
99. *See also* Comment, *supra* note 50.
100. 519 F.2d 974 (2d Cir. 1975).

writers of the principal offering were United States banking houses, Drexel Firestone and Smith, Barney, which both had offices abroad. In addition, the prospectuses were prepared by Arthur Andersen & Co., a United States accounting firm. The complaint alleged that the "prospectuses failed to reveal illegal activities by IOS and its officers which had seriously damaged the company."[101] In a footnote to its opinion, the court explained these as including "the participation by IOS officers in the smuggling of currency outside of developing countries in violation of their restrictive currency laws. As a result of this activity IOS had been barred from doing business in several of these countries."[102]

The court examined the Congressional intent of the Act and held, *inter alia*, that

> [t]he anti-fraud provisions of the federal securities laws:
>
> (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
>
> (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
>
> (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.[103]

There are thus a number of factual situations which may give rise to an extraterritorial application of the Act under the expansive view taken in *Bersch.*

The Second Circuit specifically passed on the contention that the acts in question precipitated invoking the Act when they merely caused an "adverse general effect" on the United States market for such securities.[104] The court agreed that there may well have been "an unfortunate financial effect in the United States" as a result of the defendants' activities but refused to hold that such "generalized effects . . . were sufficient to confer subject matter jurisdiction over a damage suit by a foreigner under the

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101. *Id.* at 981.
102. *Id.* at 981 n.15.
103. *Id.* at 993.
104. *Id.* at 987.

anti-frauds provisions."[105] This would not preclude such an argument by a United States investor, but is not available as the sole ground for relief requested by a foreign investor.

In a companion case decided the same day as *Bersch*, *IIT v. Vencap Ltd.*,[106] the Second Circuit held that subject matter jurisdiction did exist in a suit by a Luxembourg investment trust against a Bahamian corporation for fraud. The federal securities laws were held to apply to foreign investors where "the United States was used as a base for manufacturing fraudulent security devices for export."[107] Among other activities within the United States, defendant's New York law firm prepared the purchase agreement in New York and transactions were directed, received, and recorded in a New York office.[108] On this basis, an action could be maintained by the SEC "to prevent the concoction of securities frauds in the United States for export" or "for damages or recission by a defrauded foreign individual."[109] The Second Circuit did, however, limit jurisdiction to actual frauds:

> Our ruling on this basis of jurisdiction is limited to the perpetration of fraudulent acts themselves and does not extend to mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries.[110]

Bersch and *IIT* were considered by the District Court for the Southern District of New York in *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Company.*[111] Plaintiff, a Canadian mutual fund and subsidiary of IOS, brought a class action against a United States accounting firm and a United States corporation which alleged misrepresentations in an offering. Plaintiff had purchased debentures of Farrington Overseas Corporation (FOC), a Delaware corporation formed as an overseas investment and loan company. FOC was a wholly owned subsidiary of F.M.C., a Massachusetts corporation with executive offices in New York. None of the debentures were to be sold in the United States or to nationals or residents of the United States and Canada, and they were not registered under the federal securities

105. *Id.* at 988.
106. 519 F.2d 1001 (2d Cir. 1975).
107. *Id.* at 1017.
108. *Id.* at 1018.
109. *Id.*
110. *Id.*
111. CCH FED. SEC. L. REP. ¶ 95,296 (S.D.N.Y. Sept. 24, 1975).

laws. All of the proceeds were to be used to develop overseas properties. Based upon these representations, and the further condition that each underwriter offering the debentures would sign a covenant expressly agreeing that no offers or sales would be made in the United States to nationals or residents thereof, the SEC issued a no-action letter and agreed that the debentures need not be registered. The court found that the plaintiff had purchased the debentures in direct violation of federal securities regulations and contrary to the specific agreement between the SEC and the defendants. The court also declared that the purchase was "predominantly foreign" and that plaintiff was "not within the group of intended or lawful offerees of the FOC Debentures since it purchased them in direct violation of the Federal regulations, the SEC conditions and the express restrictions prominently placed on the Offering Circular."[112]

The court held that under *Bersch* and *IIT* plaintiff was a "foreigner" who could invoke the federal securities laws only where acts within the United States "directly caused such losses." It found that all relevant acts had occurred abroad and "[t]he fact that the issuer, FOC and the other defendants are American is of little independent significance."[113] The fact that the purchase by plaintiff was itself a violation of federal regulations was stressed; this alone may be sufficient to foreclose all relief under the Act. It must be emphasized, however, that the court will not hesitate to give extraterritorial effect to the Act in the proper circumstances. The district court's refusal to intervene in *F.O.F.* is consistent with *Bersch, IIT* and their predecessors. Before giving the Act extraterritorial effect, a court will examine the facts to determine whether the transactions involved had sufficient connections with the United States.

IV. Actions Under United States Law

The Securities Exchange Act of 1934

Regardless of their legality in the United States or abroad, foreign political contributions may embroil a corporation in litigation when that corporation fails to comply with the disclosure requirements of the Act.[114]

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112. *Id.*
113. *Id.*
114. 15 U.S.C. § 78a, *et seq.* (1970) [hereinafter cited as the Act].

Most United States MNE's are public issue corporations registered on national stock exchanges. In addition to an initial registration requirement for each new issue, the issuer must periodically update information required by the SEC.[115] Section 13(a)[116] of the Act requires that every issuer, in conformity with the rules and regulations set forth by the SEC,[117]

> shall file . . .
> (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement . . .
> (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.[118]

Rule 13a-1[119] of the rules and regulations requires annual reports to be filed with the SEC by every issuer. The quality of the information required to be disclosed in the initial registration and in all subsequent reports is dictated by section 12[120] of the Act and the rules promulgated under that section. Rule 12b-20[121] requires that:

> in addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.[122]

"Material" is defined by the rules as "those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered."[123]

The continuous reporting requirements of the Act can be interpreted to require that a corporation which may not have made political payments prior to its registration must disclose

115. 15 U.S.C. § 78m (1970).
116. *Id.*
117. § 23(a) of the Act, 15 U.S.C. § 78w (1970), empowers the SEC to promulgate rules and regulations for the enforcement of the Act.
118. 15 U.S.C. § 78m (1970).
119. 17 C.F.R. § 240.13a-1 (1975).
120. 15 U.S.C. § 78*l* (1970).
121. 17 C.F.R. § 240.12b-20 (1975).
122. *Id.*
123. 17 C.F.R. § 240.12b-2(j) (1975).

subsequent payments in the course of its annual report to the SEC. The payment of millions of corporate dollars, if not construed to be either an unauthorized expenditure or "misleading" when undisclosed, is at least a matter about which the "average investor ought reasonably to be informed."[124] The liability for misleading statements is expressly set out by the Act:

> Any person who shall make or cause to be made in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder . . . which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance.[125]

A stockholder who shows damages caused by reliance on false information has an action against the persons responsible for filing the information with the SEC. Suit must be brought before the federal district courts of the United States.[126]

Furthermore, the Act makes it unlawful "for any director or officer of . . . any issuer required to file any document, report, or information under this chapter or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information."[127] Since a shareholder derivative suit is warranted where the act of a director or officer has been directly prohibited by statute or is void as against public policy,[128] shareholders may successfully maintain an action against a director or officer who knowingly fails to disclose foreign payments. Hindrance, delay, or obstruction by a director or officer is also expressly prohibited by the statute and is *ultra vires* and void.[129] A shareholder may bring an

124. *Id.*

125. 15 U.S.C. § 78r (1970). In addition, where it finds a violation of the Act or any rules or regulations thereunder, the Commission may suspend or withdraw the registration of a security. 15 U.S.C. § 78t(c) (1970).

126. 15 U.S.C. § 78aa (1970).

127. 15 U.S.C. § 78t(c) (1970).

128. Berkey v. Third Avenue Ry. Co., 244 N.Y. 84, 155 N.E. 58 (1926); Schwab v. E.G. Potter Co., 194 N.Y. 409, 87 N.E. 670 (1909).

129. Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd mem.*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944). N.Y. BUS. CORP. L. § 720(a)(1) (McKinney 1963) provides for derivative action by a shareholder against any director or officer to compel an accounting for:

(A) The neglect of, or failure to perform, or other violation of his duties in the

action in the name of the corporation "to procure a judgement in [the corporation's] favor against an incumbent or former officer or director of the corporation for loss or damage due to his unauthorized act."[130]

Failure to disclose foreign political contributions may also be a violation of section 14(e)[131] and the rules and regulations under that section which govern proxy solicitations through the use of mails or interstate commerce.[132] This provision states that:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation.[133]

The rules and regulations require that proxy solicitations be accompanied by various annual reports which include financial statements "as will in the opinion of the management adequately reflect the financial position of the issuer at the end of each such year and the results of its operations for each such year."[134] Such statements must reflect any significant differences from prior statements[135] and be certified by independent public accountants.[136] No proxy statement can contain information

> which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.[137]

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management and disposition of corporate assests committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violations of his duties. *Id.*

130. N.Y. Bus. Corp. L. § 203(a)(2) (McKinney 1963).

131. 15 U.S.C. § 78n(e) (1970).

132. 15 U.S.C. § 78n(a) (1970).

133. 15 U.S.C. § 78n(e) (1970).

134. 17 C.F.R. § 240.14a-3(b)(1) (1975).

135. 17 C.F.R. § 240.14a-3(b)(2) (1975).

136. 17 C.F.R. § 240.14a-3(b)(3) (1975).

137. 17 C.F.R. § 240.14a-9(a) (1975).

A financial statement accompanying a proxy solicitation which fails to reflect a payment of several million dollars in corporate funds may be in violation of the rules promulgated under section 14 of the Act.[138] Enforcement of this section, like section 13, is by an action pursuant to section 18 of the Act.[139]

Finally, with respect to the sale or purchase of any security, section 10(b) of the Act and rule 10b-5 make it unlawful to use the mails, interstate commerce, or any facility on a national exchange:

> (a) To employ any device, scheme, or artifice to defraud
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, not misleading, or
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.[140]

If a corporation which planned to export material to a foreign country offered its securities for sale and attracted buyers on the basis of a series of government contracts of purchase made or about to be made in such foreign markets, failure to disclose the fact that such contracts were made in exchange for substantial bribes to government officials may be a violation of 10b-5. A shareholder who purchased such securities might have a remedy under 10b-5 when such payments are disclosed or when the corporation declares bankruptcy.

Where a corporation is listed on an exchange, it will normally be required to disclose information to the SEC concerning its finances. A shareholder can force disclosure of contributions as either information about which an "average investor ought reasonably to be informed" or "material" information. He may also bring an action against any director or officer who fails to disclose such information, if he has suffered a loss as a result of his reliance on false information. In addition, where a director knowingly distorts or fails to disclose what he knows to be material, an act on behalf of the corporation itself may be brought. Information not required as part of a periodic report may still be necessary

138. *See* Schedule 14A, Rules and Regulations Under the Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a-101 (1975), for the specific information required in a proxy statement.

139. 15 U.S.C. § 78r (1970).

140. 15 U.S.C. § 78j(b) (1970).

where there is a proxy solicitation. A shareholder can also bring an action if there has been a failure to disclose the contribution in the proxy solicitation. In extraordinary circumstances involving a fraudulent misuse of the information, a shareholder who has been injured can seek a remedy under rule 10b-5.

State Law

A number of shareholders have filed derivative suits against corporate directors for political payments abroad under state laws.[141] A derivative suit brought by shareholders has long been recognized as a valid vindication of the rights of the corporation where its directors or officers have injured the corporation by their conduct.[142] Corporate directors and officers are liable to the corporation if they breach their fiduciary duty and fail to act "in good faith with the degree of diligence, care and skill which ordinary prudent men would exercise under similar circumstances in like positions."[143]

The United States Court of Appeals for the Third Circuit held that a violation of section 610 of the Federal Election Campaign Act, as amended,[144] may give rise to a derivative action for director's breach of fiduciary duty under state law in *Miller v. American Telephone and Telegraph Company*.[145] Miller, a stock-

141. *See* text accompanying notes 7 & 13 *supra*; Gall v. Exxon Corp. 75 Civ. 368 (S.D.N.Y., filed July 28, 1975).

142. Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855). Some states have specifically authorized such suits by statute. *See, e.g.*, N.Y. Bus. Corp. L. § 626 (McKinney 1963).

143. N.Y. Bus. Corp. L. § 717 (McKinney 1963); Hun v. Cary, 82 N.Y. 65 (1880). It should be noted that derivative actions must often meet statutory requirements. The foremost of these is the contemporaneous ownership rule, which requires a shareholder to have owned the stock at the time the alleged injury took place as well as at the time of suit. *See, e.g.*, N.Y. Bus. Corp. L. § 626(b) (McKinney 1963). Moreover, before a suit may be instituted, the corporation must have refused to bring suit itself against its directors or officers for breach of duty. Such demand and refusal must be stated in the pleadings with particularity, "or the reasons for not making such effort." N.Y. Bus. Corp. L. § 626 (c) (McKinney 1963). *See also* Jordan v. Hartness, 230 N.C. 718, 55 S.E.2d 484 (1949).

Where such a demand would be futile, as where the corporation is still in the control of the directors accused of misfeasance, demand and refusal is unnecessary. Jacobson v. Brooklyn Lumber Co., 184 N.Y. 152, 176 N.E. 1075 (1906). It would appear that in a derivative action brought against a corporation for foreign payments, a complaint could reasonably state reasons why prior demand would have been useless.

In addition, where the shareholder or shareholders bringing the action hold less than five per cent of the outstanding shares of any class, or the value of such shares is less than $50,000, the corporation may require such shareholders to post security for reasonable expenses, including attorney's fees, incurred by the corporation in defending the suit. N.Y. Bus. Corp. L. § 627 (McKinney 1963).

144. 18 U.S.C. § 610 (1970), *as amended*, (Supp. II, 1972).

145. 507 F.2d 759 (3d Cir. 1974).

holder of AT&T, brought a derivative action in the Eastern District of Pennsylvania alleging that the corporation's failure to recover a debt of $1,500,000 owed by the Democratic National Convention for services rendered during the 1968 Democratic National Convention was a violation of section 610 and therefore a breach of the director's fiduciary duties.[146] Jurisdiction was invoked on the basis of diversity pursuant to § 28 U.S.C. 1332.[147] The district court dismissed the complaint on defendant's motion for failure to state a cause of action upon which relief could be granted.[148] The Third Circuit reversed and held that under New York law the alleged violation of section 610 did give rise to an action against directors for a breach of fiduciary duty to the corporation.[149]

The court examined New York law, since it was the state of incorporation, and found that "even though committed to benefit the corporation, illegal acts may amount to a breach of fiduciary duty in New York."[150] Furthermore, an action which is solely a violation of state public policy may also constitute a breach by directors.[151] In *Miller*, the plaintiffs claimed that the debt owed by the Democratic National Committee was, in effect, an illegal campaign contribution.[152] In addition to citing New York law, the court gave consideration to the Congressional intent underlying section 610. This intent was summarized in *United States v. CIO*[153] as: "(1) to destroy the influence of corporations over elections through financial contributions and (2) to check the practice of using corporate funds to benefit political parties without the consent of the stockholders."[154] These policies, in conjunction with New York law governing corporate behavior, present strong reasons for permitting derivative suits by shareholders:

> The fact that shareholders are within the class for whose protection the statute was enacted gives force to the argument that the alleged breach of that statute should give rise to a course of action in those shareholders to force the return to the corpora-

146. *Id.* at 761.
147. *Id.*
148. 364 F. Supp. 648 (E.D. Pa. 1973), *rev'd*, 507 F.2d 759 (3d Cir. 1974).
149. 507 F.2d 759, 761.
150. *Id.* at 762, *citing* Roth v. Robertson, 64 Misc. 343 (Sup. Ct. 1909).
151. 507 F.2d at 762-63, *citing* Abrams v. Allen, 297 N.Y. 52, 74 N.E. 2d 305 (1974).
152. 507 F.2d at 762-63.
153. 335 U.S. 106 (1948).
154. 507 F.2d at 763.

> tion of illegally contributed funds. Since political contributions by corporations can be checked and shareholder control over the political use of general corporate funds effectuated only if directors are restrained from causing the corporation to violate the statute, such a violation seems a particularly appropriate basis for finding breach of the defendant directors' fiduciary duty to the corporation. Under such circumstances, the directors cannot be insulated from liability on the ground that contribution was made in the exercise of sound business judgment.[155]

It would appear that where a contribution of corporate funds violates a particular statute or contravenes strong public policy directors may be held liable for a breach of fiduciary duty. Although a contribution to a foreign political party does not violate section 610, it may well be in contravention of those policies underlying New York law and section 610 itself, since the section was enacted to protect shareholders and to control the power of corporations. Legislation now being contemplated by Congress which would specifically prohibit foreign political contributions[156] could also be invoked by a shareholder in a state action.

Although *Miller* was decided prior to the 1974 amendments to the Federal Election Campaign Act, shareholder suits under section 610 have been considered by the Supreme Court. In *Cort v. Ash*,[157] the Court held that section 610, as amended, did not give rise to a private federal cause of action in a stockholder. The statute, as amended, provided only for an administrative remedy through the Federal Election Commission.[158] The shareholders' relief was limited to the applicable state law governing corporations.[159]

> [I]t is entirely appropriate to relegate respondent and others in his situation to whatever remedy is created by state law. In addition to the *ultra vires* action pressed here, . . . the use of corporate funds in violation of federal law may, under the law of some states, give rise to a cause of action for breach of fiduciary duty.[160]

The Court refused to make that determination because the plaintiff shareholders had amended their original complaint to

155. *Id.*
156. *See* note 11 *supra*.
157. 496 F.2d 416 (3d Cir. 1974).
158. 95 S. Ct. 2080 (1975).
159. *Id.* at 2087.
160. *Id.* at 2091, *citing* Miller, 507 F.2d 759.

omit an alleged state cause of action, rather than post the security required by state law. The security had been ordered by the district court judge.[161]

In denying relief, the Court reemphasized the right of the shareholders to pursue their state law claims. Such a claim could be pursued before the federal district court pursuant to federal diversity jurisdiction under 28 U.S.C. §1332 or under 28 U.S.C. §1331 in conjunction with a claim arising under federal law.[162]

It would appear from a study of the cases cited above that a suit by shareholders against directors would state a cause of action if it could be established that the foreign contribution violated some statute or contravened some strong public policy. Once that nexus can be established, a court may apply the appropriate state's law governing the internal affairs of a corporation.

V. Conclusion

The disclosure of foreign political contributions by MNE's has created great controversy. A number of questions exist as to whether such conduct is or should be regulated by SEC disclosure requirements, by legislative prohibition, or by shareholder suits. Historically, there is a basis for prohibition analagous to the Federal Election Campaign Law regarding domestic contributions. In addition to the fact that prohibition of foreign contributions is premised on the same rationale as prohibition of domestic contributions, foreign payments involve the problem of foreign relations—the sovereignty of both the States attempted to be

161. 95 S. Ct. at 2085 n.6.

162. While the Court did recognize such a state cause of action, it eroded the significance of the policy which protects shareholders from corporate contributions made without their consent in dicta. The Court relegated that policy, as announced in *United States v. CIO*, 335 U.S. 106 (1948), as "at best a subsidiary purpose of § 610." The *Cort* decision also suggested some strong policy reasons which may militate against recovery in a derivative suit:

> [r]ecovery of derivative damages for violation of § 610 would not cure the influence which the use of corporate funds in the first instance may have had on a federal election. Rather, such a remedy would only permit directors in effect to "borrow" corporate funds for a time; the later compelled repayment might well not deter the initial violation and would certainly not decrease the impact of the use of such funds upon an election already past.

95 S. Ct. at 2091. If a shareholder can analogize foreign political contributions to the facts in *Cort* and *Miller*, he must be prepared to meet and overcome the Court's concern. This may be particularly true where the corporation has profited substantially as a result of the contribution itself since damages in favor of the corporation may be difficult to obtain. In spite of this, injunctive relief against future payments should be available.

influenced by the MNE's and those States which, through the principles of territoriality and nationality, ordinarily regulate the afffairs of the corporation.

Regulation itself must be examined to determine whether it is consonant with, or a violation of, public international law. There is authority for the extraterritorial application of a State's domestic law on three general bases: nationality, subjective territoriality (acts within a state), and objective territoriality. This last principle has long been accepted in United States courts and has recently gained acceptance in the European Economic Community. It appears that in the future, due to the nature of an MNE, more States will recognize that protection of their own sovereignty may depend on the exertion of control through this principle.

In any particular case there are a number of factors to be considered before exercising jurisdiction. These include the number and significance of the effects within the State seeking jurisdiction, the identity of and injury claimed by the plaintiff, the legality of the act where committed, the tax treatment given the payment, and the conduits used for the payment. The recent *Bersch* and *IIT* cases give some indication of what factors will convince a United States court to intervene where a violation of the securities laws is pleaded. It appears that each case will be examined on its facts to determine what acts resulted in a loss to the shareholder and where they occurred. United States courts should intervene when an MNE attempts to wield influence abroad in a manner which is specifically prohibited domestically. The United States government has a strong interest in regulating conduct which can interfere with the territorial sovereignty of foreign governments.

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