

# *Transnational Corporations and Corruption: Towards Some International Solutions*

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## **Introduction**

Spectacular revelations over the past five years of corruption by American transnational corporations have generated great interest among almost everyone except criminologists. The latter have been contented to continue grazing in the green old pastures of delinquency in working class suburbs, prisons, and the courts, rechewing the intellectual cud of their criminological forefathers. Even the monumental scale of transnational corruption has not been sufficient to startle the ruminating criminologists from stampeding after a reality that left them behind a generation ago. It was left to journalists to tell us how in a five and a half year period until 1975 Lockheed Aircraft had paid \$22 million to foreign government officials and political parties to secure sales contracts. Among those on the payroll were the incumbent Prime Minister Tanaka of Japan and Prince Bernhard of The Netherlands.

Further revelations in the following year, 1976, showed that many of Lockheed's competitors might have been involved in the payment of bribes. Boeing disclosed in March 1976 that it had paid nearly \$70 million in commissions to foreign representatives since 1970 to help sell its aircraft, and that "in four or five instances" those commissions went to government employees overseas (Jacoby, Nehemazis & Eells, 1977, p. 117). It was also discovered in 1976 that TWA paid an agent \$20,100,000 in commissions on the sale to Iran of nine used Boeing 747 "jumbo" jets (*The Wall Street Journal*, 1976). In the same year the United States defence department reprimanded some of the 41 Pentagon employees who had been guests of the Rockwell International Corporation.

### **The Seriousness of the Problem**

Bribery and corruption by large corporations are most serious forms of crime because of their inegalitarian consequences. When a government official in a Third World country recommends (under the influence of a bribe) that his country purchase the more expensive but less adequate of two types of aircraft, then the extra millions of dollars will be found from the taxes sweated out of the country's impoverished citizens. For a mass consumer product, the million dollar bribe to the civil servant will be passed on in higher prices to the consuming public. While it is conceivable that bribes can be used to secure the sale of a better and cheaper product, the more general effect is to shift the balance of business away from the most efficient producer and in favour of the most corrupt producer. The whole purpose of business-government bribes is, after all, the inegalitarian purpose of enticing governments to act against the public interest and in the interests of the transnational. Every act of political corruption rewards corruptibility in politics, and exacerbates the social selection into public office of those who are most adeptly corrupt. To the extent that politics and government administration become more corrupt, then to that extent will men and women of high principle find entry into politics repugnant. Transnational corporate corruption is therefore perhaps the most pernicious form of crime in the world today because it involves robbing the poor to feed the rich, and brings into political power rulers and administrators who in general will put self-interest ahead of the public interest, and transnational corporation interest ahead of national interest.

It is naive to conceive of transnational corruption as arising from the inherent malevolence of unscrupulous capitalists. Principled businessmen often find themselves operating in an environment where they have to make the difficult choice between eschewing corruption and commercial survival.

William Fowler, a former chief executive officer of a U.S.-owned French subsidiary . . . wrote that he was shown "on a very confidential basis" by his own sales department a "schedule of bribes and kickbacks" demanded by buyers of a number of the leading French and European retail chains that distributed his company's appliances. His decision *not* to sanction such payoffs was greeted with consternation by his French sales personnel. His explanation that the U.S. parent, Whirlpool Corporation, in more than fifty years since its founding had never engaged in political payments or kickbacks was received by his colleagues, Fowler says, as the ravings of an American out of touch with reality. The moral of the story is that Whirlpool's French subsidiary went out of business because it refused to do business as French custom dictated (Jacoby *et al.*, 1977, pp. 34-35).

Moreover, in many parts of the world businessmen confront bureaucratic machinery which is so clogged with functionless bureaucrats, so silted with paper, that the only possible way to get essential permits is to provide monetary lubrication to the process.

Quite apart from their ethical qualms, businessmen dislike paying bribes because they eat into profits and, to the extent that bribes become known, they tarnish the public image of the corporation and create undesirable legal risks. When *Fortune* magazine produced an "Investability Index" for Asian countries one of the negative factors in the index was a five point scale estimating degree of corruption (Rowan, 1977). For the businessman who is trained to seek the most efficient, least risky way of achieving his goal, bribery is a distasteful last resort. If the corporation executive seeks to change the policy of a government or of another company to favour the interests of his corporation, he will first attempt to do so *via* legitimate influence – public relations, mobilising public opinion, lobbying key decision makers. When legitimate means fail, the corporation, just like Merton's (1957) working class deviants, is under pressure to resort to illegitimate means for achieving its goal. To the extent that the corporation has a strong emphasis on performance, on goal attainment at all costs, then to that extent will the structural strain for illegitimate means be difficult to resist [1].

### The Options

In yielding to this pressure the least risky option will be what we shall call law manipulation, bending the rules rather than breaking them. Transnational corporations employ departments full of tax experts whose job is to manipulate tax laws by finding loopholes and conceiving avoidance strategies which, even if they are not strictly legal, could not be the subject of a *successful* prosecution in court because of either the complexity of the company books or the complexity of the law. Another less risky strategy than law violation, yet clearly a more costly option than law manipulation, is what shall be called law evasion, exemplified by playing one set of national laws off against another such that productive activities are located or relocated in countries with the least restrictive legal codes in the area of concern. If, for example, pollution control laws are less strict in one country than others, then that country is more likely to become the locus for transnationals in dangerously pollutive industries which wish to evade regulation.

When transnationals fail to find the line of least resistance by playing one country's laws off against another's, and instead face uniform regulation from all competing locales for capital investment, then outright law violation becomes the last resort for attaining the corporation's goal. One celebrated case of Third World countries thwarting the international evasion strategy of a transnational by refusing to have their tax laws played off against each other, and thereby precipitating outright law violation, is the case of the confrontation between the United Brands food conglomerate and the Union de Países Exportadores de Banano. UPEB was formed in 1974 by Honduras, Costa Rica, Panama, Guatemala and Colombia after these countries had been emboldened by the success of OPEC. The first move was for Honduras, Costa Rica, and

Table 1 Strategies to circumvent the spirit of the law which are adopted by corporations as a response to blocked goal attainment

Law manipulation		Law evasion		Law violation
		Substitution of legitimate for illegitimate means	Transfer operations to a location where the chosen means is legitimate	
Modus Operandi	Using the complexity of the law to advantage <i>and</i> Using the complexity of events to advantage <i>so as to</i> Make the costs of successful prosecution outweigh the benefits for the state.	When the concern of the state is with preventing a given result, substituting the legally prescribed means to achieving the result with a legitimate means (e.g. substituting price leadership for price fixing).	Playing off one nation's set of laws against another's.	Blatant law breaking
Solution	Replace legal control by administrative control subject to public accountability, but less tied to precedent and to a complex body of rules.	administrative control subject to public accountability, but less tied to precedent and to a complex body of rules (e.g. a prices justification tribunal).	International agreements on minimum legitimate standards.  Harmonising different sets of national laws.	Vigorous prosecution.  Political and social freedom (so that the exposure of blatant acts of corruption is a political possibility) <i>combined with</i> A structured means of providing incentives for the public exposure of corporate crime (e.g. paying international corruption journalists).

Panama in concert to impose a \$1 tax on every forty-pound box of bananas. Among them these three countries supplied United Brands with more than half of their bananas, so that United Brands stood to lose some \$20 million in extra taxes as a result of the cartel.

The sordid story of the United Brands response to the cartel only became known because the founder of the company, Eli Black, jumped forty-four floors from the Pan Am building in New York, and a special committee of the United Brands board of directors filed a report on the incident to the U.S. Securities and Exchange Commission [2]. The report revealed that in May 1974, Black, in a calculated effort to split the banana growers' tax cartel, offered General Oswaldo Lopez Arellano, the Honduran President, several hundred thousand dollars if Honduras would reduce the banana tax. General Lopez reportedly dismissed the idea and "changed the subject". Subsequently, Abraham Bennaton Ramos, the Honduran Economics Minister approached the vice-president of United Brands, Harvey Johnson. Bennaton intimated that the banana tax might be reduced if he were paid \$5 million. This was too much for the company, but Johnson and Bennaton later met and agreed upon \$2.5 million. Black approved the payoff, and \$1,250,000 was transferred to a numbered Swiss bank account opened by the Economics Minister. After Black committed suicide the second payment of \$1,250,000 was never made. Uncharacteristically, the United Brands board was willing to reveal the whole story because, fortunately for them, Black never reported the payment to the board.

The progression from legitimate influence, to law manipulation, to law evasion, to law violation is a progression from less risky to more dangerous ways of resolving blocked goal attainment. This is not to say that the transnational always actually attempts the first three kinds of solutions before law violation is undertaken. Often it would be the case, for example, that a law evasion strategy of relocating in another country to avoid new pollution control laws could not match the cost-effectiveness of paying bribes to officials to ensure that enforcement of the new laws against the company did not take place. The law evasion strategy would hardly be considered.

What solutions can be suggested to deal with these differing strategies that transnational corporations use to overcome blocked goal attainment? Solutions to the problem of legitimate influence by transnationals are hardly an appropriate concern for criminology, but they must be recognised as central concerns for trade unions, governments, and consumers, since many of the behaviours of transnationals which such groups quite reasonably regard as abuses are perfectly legal and widely regarded as ethical.

### **Dealing with Law Manipulation**

When reformist politicians enact laws to crack down on corporate crime, they set in train a process which in the final analysis may well serve the interest of

the corporate criminals they seek to catch. This happens because the whole web of company law becomes more complex. A proliferation of laws means a proliferation of loopholes over which legal argument is possible, and increased costs of litigation. Moreover, Sutton & Wild (1979) have pointed out that "The more formal and complex the body of law becomes, the more it will operate in favour of formal, rational bureaucratic groups such as corporations. In one sense, therefore, 'law' and 'justice' may be fundamentally irreconcilable".

The problem is not only complexity, but also what Max Weber first identified as formality (Weber, 1974). One example of the historically emergent formality of Western law concerns predictability, the doctrine of *stare decisis*, the precept that courts are bound by their own precedents, and lower courts by the precedents of higher courts. Predictability is of more value to corporation lawyers who advise their employers on how to skirt planfully around the law than it is to the consumer who is quite oblivious of legal precedent.

Enacting more and more laws to control the activities of corporations is rather like building a brick wall which is not quite vertical to keep out the wind. Each extra brick helps to keep out the wind, but also moves us closer to the inevitable toppling of the whole wall upon us. There may even be some individual bricks which are laid so as to delay the toppling of the wall (laws which plug loopholes, or simplify) but once we have begun to build the wall on an angle, the aggregate effect of any overall accumulation of bricks must be to hasten the collapse.

The more laws we have, irrespective of their content, the more the premeditated and rational decisions of corporations will turn the web of law to its advantage, and to the disadvantage of "irrational", unplanful consumers and workers. This idea that the rationalization and formalization of law favours the interests of bureaucratic organizations over the interests of individuals is hardly original, being directly derived from Weber. While Sutton & Wild (1979) have elegantly applied the idea to the dealings of large corporations with individual victims of corporate crime, Pepinsky (1976) has similarly built upon Weber in arguing how increasing specification of laws advantages criminal justice bureaucracies in their dealings with individual working class criminals.

The enactment of laws to crack down on the powerful is a good way of salving social democratic consciences. But the reformers soon find that enactment is easier than enforcement. Enthusiasm for the crusade against corporate criminals soon wanes when the first attempt at prosecution under the new laws occupies a hundred days in court. Government lawyers, who must in many ways be all-rounders, cannot compete with the corporation lawyer who spends his whole life finding out all there is to know about a narrowly delimited area of, say, tax loopholes. In time the well intentioned legislation is rarely used, but remains on the statute books to render the body of law more complex.

The distinction between law manipulation and law violation is necessarily

blurred. Competent lawyers can transform what strikes the layman as a clearcut act of rule breaking into a legally equivocal case of rule bending. This is especially true with the legal manipulation of what appear to be blatant instances of transnational corruption. Establishing guilt in a corruption case is extremely difficult even when the corruption occurs within a single country, but in the case of transnational corruption the legal problems for government lawyers in proving the burden of guilt are nigh on insurmountable.

In order to obtain judicially admissible evidence, U.S. investigators would have to obtain proof that (1) a payment was intended for a foreign official, (2) it was made with a corrupt intent, and (3) it was made for a prohibited purpose. Collecting such evidence would necessitate the cooperation of foreign governments. Whether foreign governments would allow U.S. investigators to implicate one of their own nationals *under U.S. law* is doubtful . . . Moreover, a U.S. citizen accused of foreign bribery would be denied due process of law under the U.S. Constitution unless he could produce foreign witnesses and documents in his own defense. These essential components of a fair defense would not be available to a defendant, as they are beyond the compulsory judicial process of U.S. federal courts (Jacoby *et al.*, 1977, p. 218).

Over and above these legal problems, there is the diplomatic problem that it would be an unconscionable interference in the sovereignty of nations for their populations, and expatriates within their territory, to be subject to massive surveillance by company investigators from every other country in the world.

Many bribes are passed by local agents who act for transnational corporations, rather than by the transnationals themselves. Executives of the transnational clearly know what is going on and allow amounts for their agents' fees appropriate to cover the scale of bribery required to effect a particular company goal. However, a requirement that a transnational be accountable for the way its agents spend their fees would involve a departure from the settled doctrine of common law that a principal is not criminally responsible for the acts of his agent. It is in the area of the operations of agents that the impotence of national laws for dealing with transnational corruption is most painfully evident. Agents and corporation executives share either tacit or explicit understandings that bribes are to be passed. The agent himself is likely to be culpable under the laws of the country in which the offence takes place. If the corporate executive who is a party to the understanding is based at corporate headquarters, then his criminality fairly clearly lies within the province of the home government of the transnational. But if the corporate executive is based in the country in which the money changes hands, then the corruption laws of that country might be seen as having greater jurisdiction than the laws of the country of which he is a citizen and in which his company is registered. When all three types of persons are involved in the offence, as will usually be the case,

then there is no legal order which is adequate to untangling the totality of the interlocking webs of guilt.

It needs to be stated quite bluntly that the law in the past has proved to be an ineffective weapon for dealing with transnational corporate crime, and will continue to be so in the future. The more we enact new national laws to attempt to plug up the problem, the more complex the totality of law will become, the more arduous and uneconomic the process of prosecution will become, and the more feasible law manipulation by professional loophole finders and auditing obfuscators will become as a respectable alternative to outright law violation.

Within the more restricted national domain of Australian tax law Professor Geoffrey Sawer has suggested that something needs to be done about loophole manipulation so that the considerations of (social) justice might take precedence over the considerations of law (Sawer, 1978). The courts, in the view of another writer are "simply incapable of developing a logical and equitable approach to the incidence of taxation which would ensure that this corresponded at least approximately to what Parliament intends when it passes tax legislation" (McGuinness, 1978). Sawer's solution is that the problem should be "taken right out of the hands of the courts". His alternative to the courts is a publicly operating administrative tribunal to hear appeals about the way the Taxation Commissioner exercises discretion in dealing with tax manipulators.

Certainly limits must be placed on the discretion of tax assessors. One of the major sources of corruption in Third World countries, and also in some developed countries such as Italy, is the unbridled discretion of tax assessors to make assessments as they see fit. Large payments are extorted in return for favourable assessments, and the only effective appeal might be to a superior who is equally involved in extortion. Most lawyers would suggest that the solution to such graft is a greater legal codification of the principles which must be followed by the tax official in making his assessment. The choice would therefore seem to be between two evils: unbridled discretion which favours the civil service extortionist, or entrenched legal codification of legal complexity which favours the corporate law manipulator. But there is a third choice. That choice is public accountability of discretion instead of legal codification of discretion. Genuine public accountability of discretion avoids both the evils mentioned above. This is why Sawer's suggestion of substituting a *publicly operating* administrative review tribunal for the courts is an appealing one. If an independent and public reproachable tribunal can hear appeals within very broad guidelines such as equal treatment, then both slick corporate tax lawyers and civil servants on the take might be put out of business.

Granted, broad administrative guidelines might eventually become routinized, elaborated, and go the way of laws. Nevertheless, there is a considerable difference between a predictable, formal legal order based on precedent, and an unpredictable (yet accountable) administrative order unfettered by precedent.



**Dealing with Law Evasion**

Laws to control corporations are normally aimed at preventing a given result which is deemed to be undesirable. Examples of such undesirable results might be the pollution of the environment or the undermining of competition. Legislators are typically less concerned with the purity of the intent of corporate executives, with the corruptness or otherwise of means employed to achieve the result, than they are with the result itself. Nevertheless, simply to prohibit any behaviour which leads to the undesirable result would seem unreasonably arbitrary, too amenable to bureaucratic discretion, and at variance with Western legal precepts. Consequently, the only recourse is for the government to define as illegitimate certain predominant ways of achieving the result.

Given this reality, there are available to corporations two major law evasion strategies. The first is to replace an illegitimate means with a legitimate means for achieving the result which the legislature deems undesirable. The second is to move the corporation's operations to a new location where the chosen means is not illegitimate.

To illustrate the first evasion strategy, take the legislative goal of encouraging open competition among corporations producing the same kind of product. Governments enact laws such as the Sherman Antitrust Act in the United States to prevent collusive agreements among companies to fix prices. But firms in the oligopolistic sectors of industry have learned through historical experience that it is not in their long term interests to engage in price competition among themselves. If the law prohibits unity of pricing action by means of collusive meetings as a cartel, then legitimate means for coordinating price decisions must be found. Price leadership, where the largest and/or most powerful firm in the oligopoly assumes responsibility for leading appropriately spaced rounds of price increases, is the most central of these strategies. For price leadership to work, the price leader must have close to the largest share of the market in the industry so that it is in a position to take retaliatory action against any price-cutting delinquents. Market dominance is essential if there is to be a capacity for reminding smaller firms that in any all-out price war it is they themselves who will be pushed to the wall first, and that it is the price leader who has the capacity to do this to them. Price leaders are, however, just as much in the business of building consensus within the oligopoly as they are in the business of holding out the threat of coercion. While formal meetings are not often convened, a series of informal means of communication, such as the announcement by the chief executive of the price leader at an Employers' Federation meeting that "the industry will not for long be able to withstand the pressure for across the board price increases", and subsequent reaction to that in trade magazines and at stockholder meetings of other companies, constitute the tacitly collective nature of pricing decisions. If other firms do not respond approvingly to the flying of a price increase kite by the price leader, then the leader is likely to decide to withhold the increase until evidence of consensus

crystallizes. Price leadership is therefore one of the central law evasion strategies of advanced capitalism. It permits the collective coordination of prices while avoiding direct violation of antitrust laws.

The alternative to the substitution of legitimate for illegitimate means to achieving the disapproved result is to move the corporation's activities to a location where the formerly illegitimate means are legitimate. This evasion strategy is followed by the manufacturer who saves on the cost of installing safety devices to protect his workers from dangerous machinery by setting up his factories in countries which lack adequate industrial safety regulations to protect workers [3].

It often happens that there is an admixture of the two types of evasion strategies which have been discussed here. For example, let us assume that there is a price fixing conspiracy among several transnational companies whereby it is agreed in the United States or Japan that there will be no price-cutting against each other when trading into the Australian market. Each parent company exports to its Australian subsidiary at the agreed price, and the subsidiaries in turn eliminate price competition in Australia by setting prices which are necessarily uniform according to the dictates of the uniform import prices. The price conspiracy which took place in New York or Tokyo was quite legal, being beyond the jurisdiction of the Australian Trade Practices Act.

One solution to the problem of international law evasion is the determination by international agreement of minimum levels of regulation of pollution, industrial safety, and the like. International organizations like the United Nations, the OECD, and the International Labour Organisation could play an important role in formulating such minimum requirements. If governments and the international grade union movement can agree upon minimum standards below which no industrial activity will be allowed to fall, then transnationals will not be in so strong a position to play off one nation's laws against another's. The difficulties in securing international or regional cooperation cannot be underestimated because even in a situation of near universal intergovernmental agreement, it is not difficult for transnationals to buy off regulatory permissiveness from a Third World country which is desperately starved for capital investment. More generally there is a need for a harmonization of national laws affecting transnational corporations.

Many improper political payments have their origin in disparities among, and ambiguities in, national laws dealing with financial accounting, taxation, competition, labor practices, and other aspects of business regulation. The harmonisation of national laws on these subjects would create a more uniform and certain business environment that would be both more efficient and freer from corruption . . . *The formulation of international standards of financial accounting and reporting would be a good starting subject . . .* General adherence by governments to a uniform set of standards would greatly reduce frictions and disagreements between governments

and multinational companies, the scope for corrupt business practices, and opportunities for shakedowns of foreign companies by unscrupulous government officials (Jacoby *et al.*, 1977, pp. 248–249).

### **Dealing with Law Violation**

The simple solution to outright law violation by transnationals is more vigorous prosecution under less complex and formal laws. It has been argued in this paper, however, that the law is a less than adequate tool for controlling corporations. Indeed the very fact that corporations can generally achieve the ends which the law seeks to prevent without being strictly culpable under the law testifies to the inadequacy of legal control.

To reach a conclusion about what form of control might be effective it is best to begin by placing corruption in broad cross-cultural and historical perspective. Most observers would agree that it is in Third World countries with dictatorial régimes that widespread corruption is most evident. It is in the Western capitalist democracies where corporations are most likely to get government permits and approvals, to pay their taxes, and to win contracts without having to pass bribes to lubricate the process. Even a cursory knowledge of history informs the reader that going back two or three centuries into the histories of today's Western capitalist democracies, their commercial and political apparatuses were every bit as corrupt as those of most contemporary Third World countries. In England, for example, up until the nineteenth century seats in Parliament were bought rather than won [4], voters were bribed [5], and most favours from public office holders were obtained by graft (see Scott, 1972). In earlier times, even places at Oxford, God forbid, were routinely secured by bribing academics [6].

Of course one could speculate on various possibilities to explain why things have improved in the broader historical perspective for the West – rising affluence, industrialisation, urbanisation, the emergence of modern capitalism. None of these, however, supplies an immediately appealing explanation for the relative decline in corruption. One explanation of corruption which might hold the key arises from the oft quoted assertion of Justice Brandeis that “sunlight is the best disinfectant”. There has been a rise in political freedom concomitant with the rise of capitalism. Institutions such as a free press, opposition political parties with an unlimited right to speak out, an independent judiciary, the free opposition of pressure groups and trade unions with only limited harassment from political police, and also more recent innovations such as the Ombudsman, and Freedom of Information Acts are all institutionalised mechanisms which with historically emergent tenacity have been exposing the shady activities of governments and business to more and more sunlight. In Mertonian terms, when legitimate means for influencing events are more open, there is less need to resort to illegitimate means such as the bribe. The growing tradition of exposé journalism in the Western capitalist press has played a

constructive role in mobilizing public opinion to effect both informal and formal social control against corruption. Indeed, a realistic analysis must concede, after taking account of the role of the press in Watergate, the Lockheed fiasco, and many other scandals, that the media have done more to uncover and control major acts of corruption than have the courts.

Certainly this is the view of business people themselves. In a survey of 531 top and middle U.S. managers, the Opinion Research Corporation found that 92% of the respondents did not believe that legislation would effectively stop bribery of foreign officials, but there was considerable support for the preventative effectiveness of publicity (Opinion Research Corporation, 1975; Allen, 1976).

A *Harvard Business Review* survey of readers (Brenner & Molender, 1977) found that among respondents who thought that ethical standards in business had improved over the past 15 years, the three factors which were most often listed as causing higher standards were, in order of importance . . .

	Percentage of respondents listing factor
Public disclosure; publicity; media coverage; better communication	31%
Increased public concern; public awareness, consciousness, and scrutiny; better informed public; societal pressures	20%
Government regulation, legislation, and intervention; federal courts	10%

The calculating profit-maximising businessman would be irrational to be overly worried about the constraints imposed by the law, yet he would be well advised to follow the advice of former Ford President, Arjay Miller, to "Do that which you would feel comfortable explaining on television" (quoted by Byron, 1977).

To the officers of a large corporation, immediate public exposure is a far more daunting prospect than the rarely consummated threat of prosecution in the courts. Even in the rare situation where it seems likely that an act of corruption might result in a conviction, this is a distant prospect for the criminal actor, distant in terms of both time and space. Given delays in litigation and the time-consuming complexity of evidence gathering for corporate offences it is likely to be a number of years before the matter is before the courts, and by that time the guilty executives may be in other jobs. In 1975 when the Gulf Oil Corporation was charged in connection with a Bahamian slush fund through which some \$12.3 million in largely illegal foreign political contributions had been channeled, of the 11 executives with direct knowledge

of the fund, only two remained with the company. Three had died and six retired (Sobel, 1977, p. 126).

Most corporations will be so structured that the possibility that the corrupt practices of a manufacturing plant in a Third World country could lead to litigation some years hence might not be part of the reality which it is the job of the manufacturing plant to deal with. It is corporate headquarters back in Detroit or Tokyo who will foot the bill for the fine and they are quite happy to act as an insurance broker, bearing the legal risks of their subsidiaries throughout the world in the (correct) belief that every legal loss resulting from corruption in one part of the world will be matched by many illegal gains in other parts of the world. Even the most momentous legal sanctions can be smoothly integrated in to the transnational's rational calculations of probably costs and benefits.

The \$7 million fine which was levied against the Ford Motor Company for environmental violations was certainly more than a slap on the wrist, but it rather pales beside the estimated \$250 million loss which the company sustained on the Edsel. Both represent environmental contingencies which managers are paid high salaries to handle. We know they handled the latter – the first seven years of the Mustang more than offset the Edsel losses. One can only infer that they worked out ways to handle the fine too (Gross, 1979).

The problem with the costs of bad publicity for the corporation is that they are difficult to calculate. There is no way a transnational can predict just how big an issue a public exposure of corruption might blow up into, and nothing upsets the transnational's rational mode of operation as much as unpredictability. The costs of unsavoury publicity are felt immediately and they hit directly at the source of corruption. When the cameras start rolling at the factory the local managers cannot escape embarrassment by referring the matter to the corporation's legal department back at corporate headquarters. Public humiliation and loss of respectability is a more potent sanction than a fine which hits no-one personally. Moreover, in the final analysis, the company will typically bear a greater indirect diminution of profits through loss of respectability than would ever occur directly from a fine. If we follow up the case study of the Lockheed scandal, for example, we find that in the years subsequent to the revelations Lockheed almost certainly lost some important contracts because governments feared the risk of being (unfairly) accused of corruption by their political opponents simply because they were buying from Lockheed (Kraar, 1977). One of the immediate consequences of the disclosures was the loss of a \$130 million contract in Japan. The company became so concerned about its public image that it conducted a Gallup poll in 1976 which revealed that Lockheed was best known for overseas bribes – and little else. The interim Chairman of Lockheed, Haack, conceded that morale was low among all employees of the transnational to the point where "People around here felt

lower than snakes", (Kraar, 1977). Low morale, of course, has the very tangible consequence of low productivity for any organisation.

Similarly if we follow up the United Fruit case study, the corporation paid dearly to retrieve the good will which it lost in Honduras as a result of the publicity surrounding the banana tax bribe. The scandal, which toppled the Honduran government, brought in a new regime which was after the blood of United Fruit. In charge of negotiations with the company was Benjamin Villanueva, a young Honduran economist who had submitted a postdoctoral thesis at the University of Wisconsin on "Why the Central American Republics Should Buy Our United Fruit". Villanueva extracted what he described as "retribution for a national scandal". United Brands sold Honduras 190 miles of railroad track together with two wharves for the token sum of 2 lempira (\$1 U.S.).

The world could do with more Ralph Naders, more Bernsteins and Woodwards, but the problem is that such people are least likely to flourish where they are most needed. Uganda is yet to have its Ralph Nader. One interesting solution to transnational corruption would be for the United Nations to set up an anti-corruption agency. The sole responsibility of this agency would be to employ anti-corruption journalists in every country in the world. Such journalists would be free agents, snooping out stories and releasing them, free of charge, to the mass media of the country in which they operate. Only the media outlets which are most strongly under the control of either the government or the corporation under suspicion would refuse a good story which is provided without cost and without there being any worries for the media outlet in taking political responsibility for the type of journalism. They could simply blame the United Nations. Indeed the United Nations anti-corruption agency could provide a front for many newspapers to publish stories which they would not dare publish under the by-line of their own journalists. Where anti-corruption journalists could not find any media outlet for their stories in a given country, they could always resort to less formal channels of communication, such as the use of hand-bills, and attempts could be made to put international pressure on governments who prevent the publication of anti-corruption stories by U.N. journalists.

All of this is easier said than done. Idealistic people who were foolish enough to become anti-corruption journalists would have to expect to be the victims of considerable harassment and personal abuse. Those who were not idealistic could be expected to do very well as recipients of graft themselves. Getting informants from inside corporations to feed out information would not be easy. At least the publicised existence of anti-corruption journalists would give the employee who is ready to blow the whistle someone to go to without fear of being required to testify before a court. There would need to be available to governments and companies the possibility of appeal to an independent tribunal against unethical or irresponsible conduct on the part of the anti-corruption journalist. To circumvent the problem of journalists becoming too

well-known, there would have to be periodic rotation of personnel from country to country and perhaps some reliance on more covert freelance employees.

If sunlight is the best disinfectant, then a whole range of alternatives to legal control of corporate corruption spring to mind. Instead of prosecution, governments can reverse the onus of proof by naming corporations suspected of impropriety in an annual report and calling upon them to show cause for their actions. Of course such measures implicitly deny the "innocent until proven guilty" principle of Western justice. But it is inevitable that many of the legal precepts of liberal individualism will have to be turned upon their heads if they are to be applied to the activities of corporations rather than individuals. In the area of corporate crime there is no risk that we are violating the principle that it is better to let ten guilty men go free than find one innocent man guilty. Instead we operate on the principle that it is better to let hundreds of guilty corporations operate with impunity than have one innocent corporation wrongly accused. The complexity and inappropriateness to corporate corruption of the law of bourgeois individualism ensures that this is so.

So far we have considered the operation of sunlight as a disinfectant applied from outside the corporation. We must recognise, however, that the corporation, particularly the transnational corporation, is not a unitary phenomenon. Its head is often unaware of what its hands are doing. Corrupt payments are often made by executives without the knowledge of the board of directors or top management, and often in circumstances where the people at the top would disapprove. Internal scrutiny can be improved by policies to ensure that the board of directors is an independent monitor of management. This could be expedited by ensuring that a majority of directors are "outsiders" rather than salaried managers [7] or by following Nader's suggestion of public interest directors with full-time staffs of internal company investigators. Companies should also have both an audit committee comprised only of outside directors and a vigilant external public auditor who checks that payments are not being made to numbered foreign bank accounts which are not identified by name, that no off-the-books funds or accounts are being kept, and the like.

In the inevitable negotiation processes that go on between transnationals and different national governments over the stringency of regulation of corporations, one of the demands governments might make in return for agreeing to less stringent control is that boards of directors set up effective internal watchdog agencies to control corruption and law violation generally. Such internal agencies would be required to enforce a written policy on law observance which indicated under what circumstances, if any, payments to foreign officials would be permissible.

Formulating such a policy is not an easy task. It is not enough merely to lay down broad principles of good behaviour. These platitudes may sound

impressive, but they will fail to provide practical guidance to foreign managers who confront complex, cross-cutting values in difficult situations in alien societies. Nor is it possible to lay down a detailed code of conduct that will cover every possible set of circumstances that may arise. Written policies should state the general rule *and* illustrate it with examples, avoiding the problem of being too general or too particular (Jacoby *et al.*, 1977).

Conduct codes need to be practical in the sense of allowing corporations to operate in environments where small payments are unavoidable for purposes such as ensuring that the telephone is put in on time and ensuring that permits are not delayed. The Caterpillar Tractor Company's Code of Worldwide Business Conduct provides a good model of such practicality in the way it defines as permissible small payments to facilitate correct performance of duties by public officials, but prohibits payments of any size to induce failure to perform duties correctly.

Payments of any size to induce public officials to fail to perform their duties – or to perform them in an incorrect manner – are prohibited. Company employees are also required to make good faith efforts to avoid payment of gratuities or "tips" to certain public officials, even where such practices are customary. Where these payments are as a practical matter unavoidable, they must be limited to customary amounts; and may be made only to facilitate correct performance of the official's duties (Caterpillar Tractor Co., 1977).

Through mechanisms such as spot-checks, inventories, and audits on a surprise basis much internal sunlight can be brought to bear on activities which might otherwise be carried on in a shady fashion. Much can be done to structure corporations so that it is difficult for any illegitimate dealings to be done in a secretive way. Responsibilities can be structured so that the preparation of payroll and the actual payment of the cash is handled by two different sets of personnel, so that persons who keep inventory records do not participate in the physical counting of inventory, so that employees in sensitive positions do not work on their own and are rotated from one job to another [8].

Quite clearly transnational corruption is not something which can be tackled on only one front. Impassioned pleas for more fire and thunder to be directed at transnational corporations generally overlook the complexity of the problem. Given a recognition that law violation is a strategy which is only likely to be followed if law manipulation and both types of law evasion are not workable policies, Table 1 attempts to suggest the range of solutions to transnational crime which might be effective in meeting the different contingencies. The more general point which should be implicit in Table 1 is that transnational crime can only be dealt with by greater international cooperation, whether that is international cooperation to harmonize national laws, to negotiate uniform accounting standards, to exchange information on corrupt practices, or to set up an international group of anti-corruption reporters. While crime



prevention planning remains fixed at the level of individuals as citizens of nation states, control of the activities of transnational corporations as collective citizens of the international community will remain a pipe dream.

### Acknowledgements

I would like to thank David Biles, William Clifford, Ivan Potas and John Seymour for critical comments on the first draft of this paper.

### Notes

- 1 This point has been made at length by E. Gross (1979).
- 2 For a detailed outline of this case see, How United Brands Survived the Banana War, *Fortune*, July 1976, p.146. *The Wall Street Journal*, 13 December 1976. Jacoby *et al.* (1977, pp. 105–107).
- 3 For an example of this from the asbestos industry see Braithwaite & Condon (1979).
- 4 “*Seat in Parliament.* To be disposed of, a property which commands sufficient influence to return a Member. Apply personally to Mr Witham, Solicitor, No. 8 Gray’s Inn Square, London; if by letter post to be pre-paid.” Advertisement in *The Courier*, 1835. Quoted by Wraith & Simpkins (1964, p.63).
- 5 “A young man on trial for assaulting his father thought it sufficient justification to plead that his father had refused to make him a freeman of the Borough, which would have been worth at least £60 to him as a voter.” (Wraith & Simpkins, 1964, p. 64).
- 6 In 1583, Philip Stubbs described how to enter an Oxford College: “Except one be able to give the Regent or Provost of a House a piece of money, ten pounds, twenty pounds, yea a hundred pounds, a yoke of fat oxen, a couple of fine geldings, or the like, though he be never so toward a youth, nor have never so much need of maintenances, yet he come not there I warrant you.” (Wraith & Simpkins, 1964, p. 56).
- 7 This, and the other suggestions in this paragraph, are substantially the same as those made by Jacoby *et al.* (1977).
- 8 For a more detailed discussion of such principles of preventive management, see Jaspan & Black (1960, p. 248).

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*Date received: September 1978*