

SECTION RECOMMENDATIONS AND REPORTS

American Bar Association Section of International Law and Practice Reports to the House of Delegates*

I. Corrupt Practices in the Conduct of International Business

RECOMMENDATION

RESOLVED, that the American Bar Association supports efforts by the international community, by national governments, and by non-governmental organizations to encourage the adoption and implementation of effective legal measures and mechanisms to deter corrupt practices in the conduct of international business.

FURTHER RESOLVED, that the American Bar Association urges the United States government to take steps to support the adoption and implementation by national governments and the international community of effective legal measures and mechanisms that are actively monitored and enforced to deter corrupt practices in the conduct of international business.

*The House of Delegates adopted these Recommendations and Reports in February 1995.

REPORT

I. Explanation of Recommendation¹

The purpose of this recommendation is to put the American Bar Association ("ABA") on record in support of efforts by the international community, including international organizations and international lending institutions, by national governments, including the United States government, and by non-governmental organizations ("NGOs") in the United States and elsewhere to address the problem of corrupt practices and, in particular, the payment of bribes to foreign government officials, in the conduct of international business.

II. Background

In the early 1970s, the international community began to examine the incidence and effects of corrupt practices in the conduct of international business. Much of the impetus for this examination came out of disclosures concerning the foreign activities of U.S. companies. Though limited in practical effect, the United States was able to obtain a resolution from the General Assembly of the United Nations condemning corrupt practices in international commerce and calling for unilateral and multilateral action against them.^{2,3} The United Nations also called on the Economic and Social Council ("ECOSOC") to establish a specific policy challenging corruption.

In 1976, ECOSOC created an Ad Hoc Intergovernmental Working Group to consider the problem of corrupt practices.⁴ International agreements, codes of conduct, model laws, unilateral national action, procurement codes, certification, and voluntary business codes were among the alternatives considered. ECOSOC chose to flesh out an international agreement which could be used to prevent illicit payments. By 1979, a draft agreement, known as the "International Agreement on Illicit Payments" (the "draft U.N. Agreement"), was nearly completed.⁵ It would have obligated states to prohibit all bribes to foreign public officials, including "grease" payments exempted under the Foreign Corrupt Practices Act ("FCPA") in the United States, which had been adopted in the United States

1. The Task Force on Foreign Corrupt Practices of the Section of International Law and Practice's Committee on International Criminal Law took the lead in preparing this recommendation and report. The Task Force was chaired by Stuart H. Deming and John A. Detzner. Its members included Anthony J. Carroll, Curtis E. Hall, William M. Hannay, Steven J. Lepper, Elliot R. Lewis, Jill D. Rhodes, Douglas Stringer, Pamela B. Stuart, Peter F. Vaira, Bruce Zagaris, and Nancy B. Zucker.

2. G.A. Res. 3514 (XXX), UN Doc. A/10034 (1976).

3. Indeed, at this same point in time, there was support for U.S. submission of an anti-bribery proposal at a meeting of the General Agreement on Tariffs and Trade ("GATT"). Rubin, *International Aspects of the Control of Illicit Payments*, 9 SYRACUSE J. INT'L L. & COM. 315, 319 (1982).

4. E/C.10/38, 20 March 1978 at 123-24.

5. U.N. Doc. E/104/1979 (May 25, 1979), reprinted in 18 INT'L L. MAT'LS 1025 (1979).

in 1977. However, no action was ever taken to convene a conference to conclude and formalize the draft U.N. Agreement.⁶

Part of the reason for this inaction was the insistence of the developing countries to link the draft U.N. Agreement with the Code of Conduct for Transnational Corporations ("Code"), which was also being prepared under U.N. auspices.^{7,8} Though not a legally binding document, the Code urged corporations to refrain from using subversive activities to interfere in the internal affairs of host countries, including offering bribes to influence a public official's duties, and to maintain accurate records of payments. The Code also prohibits states from using transnational corporations as instruments to intervene in the affairs of another state and encourages states to take appropriate action to prevent companies from engaging in such intervention.

In 1976, the Organization for Economic Co-operation and Development ("OECD") issued the *OECD Declaration and Decisions on International Investment and Multinational Enterprises*.⁹ Though the Declaration did not include an enforcement mechanism for signatories, it stated that enterprises should not be expected to render improper benefits to holders of public office. Unless involvement [in] local political activities is legal, enterprises are to avoid such activities, including making contributions to political candidates or organizations. The Declaration also contained disclosure standards similar to the internal control and accounting records provisions in the FCPA.

Finally, during this same period, the International Chamber of Commerce ("ICC") initiated action to challenge corruption. In 1977, the ICC adopted rules of conduct to confront extortion and bribery.¹⁰ The rules of conduct prohibited transnational corporations from paying bribes directly or indirectly to secure business. A panel was established to interpret the rules. However, the panel's effectiveness was limited because its by-laws state that its deliberations are confidential and the panel cannot proceed without permission of the accused party.

6. At the Venice Economic Summit in July, 1980, the United States obtained in the communiqué the following commitment to further action on the U.N. initiative:

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

See Interim Report to Congress: Implementation of Section 5003(d) of the Trade Act of 1988 (Aug. 25, 1989).

7. J. Klotz, *Bribery of Foreign Officials—A Call for Change in the Law in Canada*, 13 CAN. B. REV. (Dec. 1994).

8. In 1978, the ECOSOC Commission on Transnational Corporations issued an examination of transnational corporations in world development. E/C.10/38, 20 March 1978. ECOSOC also established an intergovernmental working group to draft an international agreement to prevent and eliminate the occurrence of illicit payments. *Id.* at 123-24. In 1984, ECOSOC issued the Code.

9. OECD/GD(92)16.

10. See *Extortion and Bribery in Business Transactions*, Report adopted by the 131st Session of the Council of the ICC, Doc. No. 192/44 (Dec. 2, 1977).

III. The U.S. Experience

Investigations relating to the Watergate scandal in the U.S. disclosed widespread and illegal use of domestic political contributions and the establishment and maintenance of off-book slush funds by corporations as vehicles to fund the payment of these contributions as well as bribes to foreign officials.¹¹ As a consequence, the U.S. Securities and Exchange Commission ("SEC") instituted a voluntary disclosure program that ultimately induced more than 400 American public companies to conduct voluntary internal investigations, which revealed illicit payments to foreign officials. The results of these voluntary disclosures led to the passage of the FCPA in December of 1977.

The FCPA makes it unlawful for a firm or person subject to the statute to offer, pay, or promise to pay, money or anything of value to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.¹² A similar prohibition applies with respect to payments to a foreign political party or official, or to a candidate for foreign political office. The FCPA also requires issuers of publicly-traded securities to maintain books and records that accurately and fairly reflect the transactions of the corporation and to design an adequate system of internal accounting controls.

In addition to direct payments by "domestic concerns" (a broad term encompassing all forms of U.S. business enterprise, U.S. citizens and residents, and the officers, directors and agents of U.S. enterprises) and issuers of publicly-traded securities in the United States, the FCPA prohibits certain indirect payments. As originally enacted, the FCPA made it unlawful to make a payment to a third party with "reason to know" that the third party would use all or a portion of the payment to bribe a foreign official. Since 1988, liability for intermediary payments has been subject to a "knowledge" standard.

Regardless of whether enforcement action is taken by the U.S. Department of Justice or the SEC, the FCPA has deterred corrupt practices in the conduct of international business by U.S. firms.¹³ Indeed, the legal and accounting professions have exerted leadership to assure compliance by U.S. firms.¹⁴ Some companies have even found it prudent to adopt stricter standards than what the FCPA requires.

IV. Recent Developments

On May 27, 1994, the 26 OECD governments agreed to take collective action to tackle the problem of bribery in international business transactions. The OECD

11. Gareis & Linklater, *The Foreign Corrupt Practices Act: A Pragmatic Analysis*, in INTERNATIONAL TRADE: AVOIDING CRIMINAL RISKS at 13-5 (W. Hannay ed. 1991).

12. 15 U.S.C. §§78 dd-1—78dd-2.

13. See, e.g., Hill, *Foreign Representatives: Saudi Law and the FCPA*, in BUSINESS LAWS, INC. (FCPA) at 200.0128 (Apr. 1989).

14. See, e.g., Low & Wellington, THE FOREIGN CORRUPT PRACTICES ACT: AVOIDING THE PITFALLS, 13 PREVENTIVE L. REP. at 13 (Spring 1994).

Recommendation on Bribery in International Business Transactions was the first multilateral agreement among governments to combat the bribery of foreign officials. The recommendation called on Member countries to take effective measures to deter, prevent, and combat bribery of foreign public officials. Such measures include reviewing their criminal, civil, and administrative laws and regulations and taking "concrete and meaningful steps" to meet this goal as well as strengthening international cooperation. The recommendation also makes an appeal to non-Member countries to join with OECD Members in their efforts to eliminate bribery in international business transactions and it also provides for a follow-up mechanism to monitor implementation.

The General Assembly of the Organization of American States ("OAS") likewise adopted a resolution presented by a number of delegations that found that in international trade "corrupt practices are capable of frustrating the process of overall development, generating the diversion of resources necessary to the improvement of the economic and social condition of the peoples. . . ." The resolution, adopted on June 1, 1994, called for a Working Group to study the subject of honesty and civic ethics. The Working Group has now been established. It has also been reported that the Organization of African Unity ("OAU") is awaiting what action the OAS may take before initiating its own action.

More recently, on June 15, 1994, Justice Ministers from the Council of Europe adopted a program to combat corruption at the close of its XIXth Conference.¹⁵ This program calls for the establishment of a multi-disciplinary group, under the auspices of the Council of Europe, to promote research projects, training programs, and exchanges in practical experiences on corruption. It is suggested that the group will also address issues such as public and private codes of conduct, fines for illegal payments, ways to discourage corruption by foreign officials, and the ability to extradite and facilitate mutual legal assistance when corruption is involved.

There are also recent developments with the United Nations in its efforts to work with nations to restrict corruption through its Commission on International Trade Law ("UNCITRAL"). On July 23, 1993, UNCITRAL adopted a Model Law on Procurement of Goods and Construction. A similar model law was adopted for the procurement of services in July, 1994. These model laws, which contain a section that challenges bribery within a host country, are offered as advisory legislation to countries establishing procurement regulations.

Finally, the leadership in many developing countries is at the forefront of efforts to seek concerted action against corruption. In particular, Ecuador has implemented an antibribery commitment requirement for corporations bidding on specific public procurement projects. Transparency International is working with government officials throughout the hemisphere on a declaration and action

15. *Europe: Justice Ministers of Council of Europe Engage in Fight Against Corruption*, Agence Europe (AE), June 16, 1994.