

Foreign Corrupt Practices

STUART H. DEMING

I. Introduction

There has been increasing interest in recent years by the international community, including international organizations and multilateral lending institutions, by national governments, and by nongovernmental organizations (NGOs) to address the problem of corrupt practices and, in particular, the payment of bribes to foreign government officials in the conduct of international business.¹ This interest has now begun to spawn the development of new international norms.

II. Recent Developments

The end of the Cold War and the eruption of public corruption scandals in the West have, much like the Watergate period in the United States, prompted a renewed interest in corruption in the conduct of international business. This renewed interest has led to a number of developments.

A. OECD

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 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 included reviewing their criminal, civil, and administrative laws and

Stuart H. Deming is a partner with Inman Deming, L.L.P., in Washington, D.C., and Kalamazoo, Michigan. He currently co-chairs the ABA International Law and Practice Section's Task Force on International Standards on Corrupt Practices. He previously served in various capacities as a federal prosecutor with the U.S. Department of Justice and the Securities and Exchange Commission.

1. Defined in the report prepared by the Council of Europe as, in its most simple form, "the payment, either directly or indirectly, of sums of money for the purpose of obtaining from the official or the authority to which he belongs a decision in breach of his official duties, for the benefit of a private individual or corporation and to the detriment of other private individuals and of the interests of the State." P. Bernasconi, *New Criminal Law Provisions Against the Corruption of Public Officials: Analysis of the Gaps in Substantive Law, Procedural and International Mutual Assistance, Proposals for Remedying Them*, COUNCIL OF EUROPE, MULTIDISCIPLINARY GROUP ON CORRUPTION at 4 (Dec. 31, 1994) (Report of Council of Europe).

regulations and taking "concrete and meaningful steps" to meet this goal as well as strengthening international cooperation. The recommendation appealed to non-Member countries to join with OECD Members in their efforts to eliminate bribery in international business transactions. It also provided for a follow-up mechanism to monitor implementation.

In the fall of 1995, the fiscal and bribery committees of the OECD approved a report calling on member countries to discontinue the practice of providing tax deductions for bribes made by their companies overseas.² Their action led to the adoption of the Recommendation on Tax Deductibility of Bribes to Foreign Public Officials at the May 1996 Ministerial Conference.³ The recommendation called on OECD member countries which do not disallow the deductibility of bribes to foreign public officials to "reexamine such treatment with the intention of denying this deductibility."⁴ More than half of the OECD member countries consider bribery in the conduct of international business to be deductible as a business expense for tax purposes.⁵

At the May Conference, OECD Ministers also made a political commitment to criminalize bribery "in an effective and coordinated manner," and to examine the "modalities and appropriate international instruments to facilitate criminalization and consider proposals in 1997."⁶ Member countries are to report to working groups in November and February the action each has taken in implementing these recommendations.⁷ At the 1996 Summit of Industrialized Nations in Lyon, France, the "G-7" reinforced the efforts of the OECD in resolving "to combat corruption in international business transactions through supporting ongoing efforts in other multinational organizations."⁸

Finally, in May, the OECD Development Assistance Committee adopted a statement of principle to include anti-corruption provisions in bilaterally funded procurement contracts.⁹ This is representative of an effort to reduce opportunities for transnational bribery in projects funded by bilateral assistance. Members of the Assistance Committee include the United States, Germany, Austria, Belgium, Canada, Denmark, Spain, France, Finland, Italy, Japan, Norway, New Zealand, Portugal, the United Kingdom, Sweden, and Switzerland.

B. COUNCIL OF EUROPE

On June 15, 1994, Justice Ministers from the Council of Europe adopted a program to combat corruption at the close of its Nineteenth Conference.¹⁰ This program called for the establishment of a multidisciplinary group on corruption (GMC) under the auspices of the Council of Europe to promote research projects, training programs, and exchanges in practical experiences on corruption. 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.

2. *U.S. Expects Other Countries to Agree to Scrap Tax Breaks for Bribes*, AIDE SAIS, 12 ITR 2091 (Dec. 20, 1995).

3. Fourth Annual Report of Trade Promotion Coordinating Committee at 115.

4. Recommendation of the Council of the OECD on the Tax Deductibility of Bribes to Foreign Government Officials, March 28, 1996.

5. Fourth Annual Report of Trade Promotion Coordinating Committee at 115.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 121.

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

In the initial report of the GMC, a broad series of recommendations were made to address various aspects of foreign corrupt practices in the conduct of international business.¹¹ These included a series of proposed legal reforms that would alter existing administrative, tax, civil, commercial, and criminal laws in most countries.¹² Central to the report was the recommendation that the "time is therefore ripe to consider revising national criminal legislation along the lines of the Foreign Corruption Practices Act which has been in force in the United States since December 19, 1977. . . . In other words, corruption would in (sic) future be a punishable offense irrespective of the place where it was committed and of the country to which the official to whom the illegal payment was made belonged."¹³

C. EUROPEAN PARLIAMENT

In December 1995, at the plenary session of the European Parliament, a Report of the Committee on Civil Liberties and Internal Affairs on combating corruption in Europe was adopted. The Report included a recommendation that "Member States abolish any tax legislation and other legal provisions or rules which indirectly encourage corruption and make it a punishable offense for national or foreign officials and decision-makers to be granted or to accept advantages."¹⁴ The Report went on to explain that "[i]t is not only at national level[s] that bribes change hands, however. The activities of transnational companies, the increasing internationalization of trade and the lack of criminal and legal provisions against corruption at [the] international level . . . frequently lead to corrupt practices at [the] international level."¹⁵

D. TRANSATLANTIC BUSINESS DIALOGUE

At about the same time, in the joint report of the Transatlantic Business Dialogue Conference in Seville, Spain, European and U.S. business leaders concluded that the "highest priority" should be given "to collective efforts to combat corruption and bribery, and fully support the prompt implementation of the 1994 OECD Recommendation on Bribery in International Transactions, including appropriate legislation aimed at eliminating illicit payments, extortion and bribery, and including sanctions against such practices."¹⁶ This joint report was followed by the communiqué of the Madrid Summit, on December 3, 1995, where the European Union and the United States agreed to combat corruption and bribery by implementing the 1994 OECD Recommendation on Bribery in International Transactions.¹⁷

E. UNITED NATIONS

There are also developments with the United Nations in its efforts to work with nations to restrict corruption through its Commission on International Trade Law (UNCITRAL). On December 9, 1994, UNCITRAL adopted a Model Law on Procurement of Goods, Construction, and Services. This model law, which contains a section that challenges bribery within a

11. The report of the Multidisciplinary Group on Corruption of the Council of Europe was largely prepared by Paolo Bernasconi of Switzerland.

12. Report of Council of Europe at 3-4.

13. *Id.* at 10.

14. Report of the Committee on Civil Liberties and Internal Affairs on Combating Corruption in Europe, at 5, European Parliament, DOC_EN/RR/287/287701 (Dec. 1, 1995).

15. *Id.* at 11.

16. The Joint Report of the European and American Business Executives Participating in the Transatlantic Business Dialogue Conference, Seville, Spain, November 10-11, 1995, at part IV.5.

17. Joint EU-U.S. Action Plan, Madrid Summit, December 3, 1995, Part III at 1(i).

host country, is offered as advisory legislation to countries establishing procurement regulations. It is "designed to promote transparency and objectivity in public procurement proceedings; it specifically requires the rejection of a tender, proposal, offer or quotation if it is accompanied by a bribe from a supplier or contractor."¹⁸ Poland and Albania have recently adopted the model law.¹⁹ A number of other countries are considering its implementation.²⁰

During 1996, the United States introduced a proposal for a "United Nations Declaration on Corruption and Bribery in Transnational Commercial Activities."²¹ The proposal called on member states to criminalize both domestic and international bribery and to prohibit the tax deductibility of bribes. It was adopted by the Economic and Social Council of the United Nations, ECOSOC, on July 23, 1996, and later adopted by the General Assembly of the United Nations on December 16, 1996.²²

F. NONGOVERNMENTAL ORGANIZATIONS

In May 1993, an international, nonprofit NGO known as Transparency International (TI) was established to curb corruption in international business transactions. TI is headquartered in Germany and has chapters in almost fifty countries. TI has taken a prominent role in pressing governments and international organizations to adopt measures designed to deter corruption in the conduct of international business. Other organizations like the American Bar Association (ABA) and more recently the International Bar Association (IBA) have taken official positions to support and endorse efforts by the international community, by national governments, and by nongovernmental organizations to encourage the adoption of effective legal measures, which are actively implemented and enforced, to deter corrupt practices in the conduct of international business.²³

III. Substantive Developments in the Near Term

To a large degree, the international action to date represents the evolution of "soft" rather than "hard" law. Only recently have the first incremental steps in the transition from "soft" law to substantive law and business practices begun to emerge.

A. THE WORLD BANK

In 1995, the World Bank revised its procurement rules for goods and works to strengthen transparency, mandate the use of Standard Bidding Documents, incorporate written guidance to bidders, and tighten and clarify bidding procedures.²⁴ These revisions were viewed as "safeguards" against bribery and corruption. This year the World Bank took even more pronounced action against bribery by explicitly establishing policy for not tolerating fraud or corruption on Bank-financed contracts by bidders or borrowers.²⁵

18. Fourth Annual Report of Trade Promotion Coordinating Committee at 117-18.

19. *Id.* at 118.

20. *Id.*

21. *Id.* at 117.

22. E/C.1996/8, 23 July 1996.

23. In February 1995, the ABA House of Delegates adopted a recommendation supporting national and international efforts promoting legal measures and mechanisms to deter corrupt practices in international business. On June 1, 1996, the Council of the IBA adopted a resolution on Detering Corrupt Practices in the Conduct of International Business.

24. Fourth Annual Report of Trade Promotion Coordinating Committee at 118.

25. *Id.*

Antibribery amendments to the World Bank's loan conditions, procurement rules, and standard bidding documents were approved in July. They require disclosure of commissions and gratuities paid or to be paid to agents relating to their bids or to contract execution on World Bank-financed contracts. The Bank will reject proposals for contract awards or cancel the portion of a loan if the bidder or the borrower has engaged in fraud or corruption in the procurement or execution of the contract. "Companies determined by the Bank to have engaged in corrupt or fraudulent practice will be blacklisted from participation in Bank-financed contracts, either indefinitely or for a stated period of time."²⁶

Consistent with this new policy, in the recently revised World Bank Guidelines for Procurement under IBRD Loans and IDA Credits, specific language was inserted to address issues of corruption:

1.15 It is the Bank's policy to require that Borrowers (including beneficiaries of Bank Loans), as well as bidders/Suppliers/Contractors under Bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts.

In pursuance of this policy, the Bank:

- (a) defines, for the purposes of this provision, the terms set forth below as follows:
 - (i) "corrupt practice" means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution; and
 - (ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, noncompetitive levels and to deprive the Borrower of the benefits of free and open competition;
- (b) will reject a proposal for award if it determines that the bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question;
- (c) will cancel the portion of the loan allocated to a contract for goods or works if it at any time determines that corrupt or fraudulent practices were engaged in by representatives of the Borrower or of a beneficiary of the loan during the procurement or the execution of that contract, without the Borrower having taken timely and appropriate action satisfactory to the Bank to remedy the situation;
- (d) will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a Bank-financed contract if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for, or in executing, a Bank-financed contract; and
- (e) will have the right to require that, in contracts financed by a Bank loan, a provision be included requiring Suppliers and Contractors to permit the Bank to inspect their accounts and records relating to the performance of the contract and to have them audited by auditors appointed by the Bank.²⁷

The procedures outlined in the Guidelines are limited to contracts for goods and works financed in whole or *in part* from Bank loans.²⁸ For the procurement of those contracts for goods and works not financed from a Bank loan, the Borrower may adopt other procedures which essentially assure that the project be carried out diligently and efficiently.²⁹

26. *Id.*

27. Guidelines: Procurement under IBRD Loans and IDA Credits, § 1.15.

28. *Id.* at § 1.15. (Emphasis added).

29. *Id.*

B. INTER-AMERICAN CONVENTION AGAINST CORRUPTION

The General Assembly of the Organization of American States (OAS) has also 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. These initiatives led to the negotiation of the "Inter-American Convention Against Corruption," which was adopted and opened for signature on March 29, 1996, in Caracas, Venezuela. Of the 35 OAS countries, 23 have signed the Convention.³⁰ The United States signed the Convention on June 2, 1996, at the OAS general assembly in Panama City. No country has yet ratified the Convention.³¹

The Convention identifies acts of corruption to which the Convention will apply and contains articles that create binding obligations under international law as well as hortatory principles to fight corruption. The Convention provides for institutional development and enforcement of anticorruption measures, including mutual legal assistance and technical cooperation. Procedures are provided for cooperation in extradition, seizure of assets, mutual legal assistance, and technical assistance where acts of corruption occur or have effect. The Convention also contains a series of "preventive measures" that the Parties agreed to consider establishing measures to prevent corruption, including systems of government procurement that assure the openness, equity, and efficiency of such systems.

The Convention equates "public official," "government official," and "public servant" under one broad definition which applies to, "among others, civil servants at all levels, high level political appointees and temporary government officials, including possibly some consultants."³² These acts of corruption are:

[t]he direct or indirect solicitation or acceptance by a government official of any benefit for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; the offering or granting of such benefits; acts or omissions in the course of public functions to obtain such benefits; and the fraudulent use or concealment of property derived from, or any participation in, an act of corruption. The Convention applies to these acts of corruption even if they do not harm State property.³³

Article VIII of the Convention addresses transnational bribery. It requires parties to the Convention to prohibit and punish foreign corrupt practices in the conduct of international business:³⁴

[E]ach State Party shall prohibit and punish the offering or granting, directly or indirectly, by its nationals, persons having their habitual residence in its territory, and businesses domiciled there, to a government official of another State, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.³⁵

30. Fourth Annual Report of Trade Promotion Committee at 115.

31. *Id.*

32. Summary of the Organization of American States Inter-American Convention Against Corruption, U.S. Department of Commerce, Chief Counsel for International Commerce (April 30, 1996) at 4.

33. *Id.*

34. *Id.* at 5.

35. Inter-American Convention Against Corruption, OEA/Ser.K/XXXIV.1, CICOR/doc.14/96 rev.2 (March 29, 1996), Art. VIII.

Under the terms of the Convention, transnational bribery shall be considered an act of corruption once it has been established as an offense under the domestic laws of a party to the Convention.³⁶ In a similar manner, "illicit enrichment" can be made an act of corruption under the terms of the Convention.³⁷ Illicit enrichment is "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."³⁸ For the parties to the Convention that do not establish transnational bribery or illicit enrichment, or both, as offenses under their domestic laws, they "must, to the extent permitted by their laws, provide the assistance and cooperation provided for in the Convention to other Parties with regard to transnational bribery and illicit enrichment."³⁹

This is the "world's first anticorruption treaty which requires signatories to criminalize bribery of foreign officials."⁴⁰ "While the Convention does not set specific deadlines for implementation of these commitments, discussion is already underway on ways to help member countries rewrite laws and regulations to comply and to provide technical and other assistance to facilitate the process."⁴¹

C. INTERNATIONAL CHAMBER OF COMMERCE

The ICC's Executive Board and Council agreed in June of 1994 to set up an Ad Hoc Committee on Extortion and Bribery in International Transactions to revise the 1977 ICC Report and to coordinate the ICC's participation in various fora on extortion and bribery issues. This led to the issuance of its Report on Extortion and Bribery in business transactions on March 27, 1996. The 1996 Report included recommendations to governments and the private sector, including recommended Rules of Conduct for voluntary application by enterprises. The Rules prohibit extortion and bribery for any purpose, and not just to obtain or retain business, and cover extortion and bribery in judicial proceedings, in tax matters, in environmental and other regulatory cases, or in legislative proceedings.

Some of the key provisions of the rules include:

- No enterprise may, directly or indirectly, offer or give a bribe and any demands for such a bribe must be rejected;
- Enterprises should not kick back any portion of a contract payment to employees of the other contracting party;
- Enterprises should ensure that payments to agents represent no more than appropriate remuneration for legitimate services;
- All financial transactions must be properly recorded, with no "off the books" or secret accounts;
- Enterprises should draw up their own codes, consistent with the ICC rules, to meet particular circumstances of their business;
- Corporate governing bodies should establish control systems aimed at preventing payments that infringe ICC rules and take appropriate action against directors or employees who contravene the rules.

36. Summary of the Organization of American States Inter-American Convention Against Corruption at 5.

37. *Id.*

38. Inter-American Convention Against Corruption, Art. IX.

39. Summary of the Organization of American States Inter-American Convention Against Corruption at 5.

40. Fourth Annual Report of Trade Promotion Committee at 115.

41. *Id.* at 116.

D. ACTIONS BY OTHER COUNTRIES

No country has yet to implement the recommendations of the OECD or the recommendations of any multilateral organization or NGO. However, there are indications that legislative bodies in Norway, Switzerland, Denmark, and Australia are considering legislation to bar deductibility, and "[a] few countries have stated publicly that their existing criminal statutes can cover bribery abroad."^{42,43} In this regard, Singapore recently convicted a top government official at its Public Utilities Board and debarred a number of foreign firms from new government contracts for five years for their role in the bribery scandal.⁴⁴ None of these companies were U.S. companies.

E. ACTIONS BY THE UNITED STATES

Currently, foreign-owned U.S. companies may be able to take advantage of U.S. advocacy assistance, while their foreign parent, or subsidiaries of the foreign parent, may nonetheless engage in the bribery of foreign government officials.⁴⁵ The United States is now taking steps to amend its advocacy guidelines "to condition the provision of advocacy support on the U.S. entity and its foreign parent and affiliates not paying bribes in connection with the transaction for which advocacy support is sought and their maintaining a policy prohibiting the bribery of foreign officials."⁴⁶

The Export-Import Bank (Ex-Im Bank) requires a number of submissions before approving a disbursement or insuring a transaction. In addition to existing requirements, the Ex-Im Bank recently revised its supplier certificate to require disclosure of offers or other arrangements by the supplier or by third parties for any payments not already disclosed. "This additional requirement seeks to uncover unusual payments that take place with the knowledge of the supplier, but that are not made directly by the supplier."⁴⁷

In its insurance contracts, the Overseas Private Investment Corporation (OPIC) will not permit the payment of compensation if corrupt practices by the insured are the preponderant cause of any otherwise-covered loss. OPIC is now in the process of amending its insurance application form to obtain representations and covenants like those in its finance documentation.⁴⁸ This would include representations that a project complies with the FCPA and all other applicable laws, including applicable foreign laws, pertaining to corrupt practices.

IV. Conclusion

There is a growing consensus in the international community of a need to implement measures that would serve to deter corrupt practices in the conduct of international business. This consensus has led to the first concrete steps being taken in international fora like the OECD, OAS, and the World Bank. The impact of these developments on U.S. firms already in compliance with the FCPA will be limited. However, for firms thought to be out of reach of the FCPA, their actions will increasingly be subject to similar restrictions.

42. *Review & Outlook: Commercial Corruption*, WALL ST. J. (Jan. 2, 1997) at 5.

43. Fourth Annual Report of Trade Promotion Coordinating Committee at 114.

44. Annual Report on Discrimination in Foreign Government Procurement, Office of the U.S. Trade Representative (April 30, 1996). See also Andrew Taylor, *Singapore Exposes Tip of Corruption Iceberg—Efforts to Curb Bribery in the Award of International Contracts Are in Their Infancy*, FINANCIAL TIMES at 4 (Feb. 15, 1996).

45. Fourth Annual Report of Trade Promotion Coordinating Committee at 119.

46. *Id.*

47. *Id.* at 120.

48. *Id.* at 121.