

2002

International Investment, Development, and Privatization

Bonnie H. Weinstein

Recommended Citation

Bonnie H. Weinstein, *International Investment, Development, and Privatization*, 36 INT'L L. 355 (2002)
<https://scholar.smu.edu/til/vol36/iss2/8>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Investment, Development, and Privatization

BONNIE H. WEINSTEIN*

When we look back on 2001, the overarching event was the terrorist activity of September 11, 2001. The results of the attacks had monumental effects, including on most aspects of international legal and business transactions. The year encompassed major downturns in the world economy, preceded and further fueled by the terrorist activities, and the precipitous decline of world stock markets. Looming large was the economic collapse of Argentina. Advances were made, however, reflecting the longstanding commitment of the international community, regional and local, to further the development and implementation of anti-bribery and corrupt practice schemes.

I. General

In recent years, bribery and corrupt practices, in its various forms, have been increasingly viewed as a scourge and impediment to international business, economic and political development and stability. Corruption is increasingly recognized as having wholly negative effects. In 2001, reducing bribery and corrupt practices was a major focus. It is evident from the status of numerous international initiatives that it will remain so in the years ahead.

A. THE UNITED NATIONS

One of the recent precursor institutional initiatives addressing bribery occurred in 1996, when the United Nations formally directed its attention to this issue, through the adoption by the General Assembly of the Declaration Against Corruption and Bribery in International Commercial Transactions,¹ and the Declaration of the International Code of Conduct for Public Officials.² The first declaration sought the criminalization of foreign bribery, and

*Bonnie H. Weinstein is a co-chair of the International Investment, Development, and Privatization Committee of the ABA Section of International Law and Practice. Ms. Weinstein engages in private international law practice in Washington, D.C., and is managing director of Strategic Development Group, LLC.

1. G.A. Res. 51/191, U.N. GAOR, 86th plen. mtg., U.N. Doc. A/RES/51/191 (1996), available at <http://www.un.org/documents/ga/res/51/a51r191.htm> (last visited July 25, 2002).

2. G.A. Res. 51/59, U.N. GAOR, 82nd plen. mtg., U.N. Doc. A/RES/51/59 (1996), available at <http://www.un.org/documents/ga/res/51/a51r059.htm> (last visited July 25, 2002).

the abolishment of the then routine practice, including in many western European Member States, of permitting tax deductions as legitimate business expenses for the bribing of foreign public officials in connection with international business transactions. In 1998, a second declaration was adopted that urged the criminalization of the bribery of foreign officials, and encouraged the development of systematic programs to combat bribery and corruption.³ In addition, the United Nations, through the U.N. Centre for International Crime Prevention⁴ and the U.N. Development Programme (UNDP)⁵ and its Accountability and Transparency program has instituted anti-corruption initiatives. In 2001, the United Nations began negotiations on a global anti-corruption convention.⁶

B. THE WORLD BANK

Addressing corruption has been a major theme in recent years at the World Bank. This trend continued in 2001. In April, the Bank's Oversight Committee on Fraud and Corruption, which was established in 1998 to investigate allegations of corruption involving Bank staff, was reconfigured and enlarged into the Corporate Committee on Fraud and Corruption Policy.⁷ Its mandate includes that the Bank develops poverty reducing, encompassing, and coordinated anti-corruption policy and strategies;⁸ Senior Bank staff serve as committee members. Also created was the Department of Institutional Integrity responsible for investigating fraud and corruption involving Bank staff and projects.⁹ In recent years, a telephone hotline and post office box dedicated to provide the Bank anonymous indications of possible corrupt activities was created.¹⁰ Guidelines for the procurement of goods and services in Bank projects have been issued and are in effect.¹¹ Commencing in 1998 companies and individuals found to have engaged in corrupt practices have been temporarily suspended or permanently disbarred from engaging in Bank-financed projects.¹² In 2001, additional companies were added to the list upon findings of engagement in improper practices.¹³

3. G.A. Res. 53/176, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/176 (1999), available at <http://www.un.org/documents/ga/res/53/a53r176.pdf> (last visited July 25, 2002).

4. United Nations Office for Drug Control and Crime Prevention, at <http://www.undcp.org/corruption.html> (last visited July 25, 2002).

5. United Nations Development Programme, at <http://www.undp.org> (last visited July 25, 2002).

6. Documents from the Informal Preparatory Meeting of the Ad Hoc Committee on the Negotiation of a Convention Against Corruption (Buenos Aires Dec. 4-7, 2001) and the First Session of the Ad Hoc Committee of the Negotiation Against Corruption (Vienna Jan. 2002) are available at http://www.undcp.org/crime_cicp_documentation.html (last visited July 25, 2002).

7. See World Bank Group, Anticorruption, at <http://www.worldbank.org/publicsector/anticorrupt> (last visited July 25, 2002).

8. *Id.*

9. *Id.*

10. The Bank hotline address is: PMB 137, 4736 Sharon Road, Suite W, Charlotte, N.C. 28210, USA; the telephone in the United States and Canada is 1.800.831.0463, and outside these locales the number can be reached through the AT&T operator.

11. See *The World Bank, Procurement Guidelines*, para. 1.15, available at <http://www.mesct.gov.mz/highered/prowsc.htm> (last visited July 25, 2002); *The World Bank, Guidelines for Consultants*, para. 1.25, available at <http://www.worldbank.org/html/opr/consult/contents.html> (last visited July 25, 2002).

12. See *World Bank Listing of Ineligible Firms: Fraud and Corruption*, available at <http://www.worldbank.org/html/opr/procure/debarr.html> (last visited July 25, 2002).

13. *Id.*

Ethical Guidelines for Bank staff have been instituted.¹⁴ There have been increased efforts of oversight of borrower governments' procurement processes.¹⁵

C. OTHER INSTITUTIONS

Transparency International,¹⁶ the European Union,¹⁷ the Council of Europe,¹⁸ the European Bank for Reconstruction and Development,¹⁹ the International Monetary Fund,²⁰ the Inter-American Development Bank,²¹ and the Asian Development Bank,²² among others,²³ have instituted anti-corruption guidelines, programs, and indices. Transparency International (TI) releases an annual index of perceived worldwide corruption levels. The World Bank, the Soros Foundation,²⁴ and others release their own surveys. For 2001, the Corruption Perception Index (CPI) produced by TI ranked ninety-one countries based on perceptions of the degree of corruption as indicated by business people, academics, and risk analysts.²⁵ The ratings of countries from least to most perceived engagement of corruption include: Finland (rank 1); Denmark (rank 2); the United Kingdom (rank 13); United States (rank 16); Germany (rank 20); Japan (rank 21); France (rank 23); Poland (rank 44); Bulgaria, Croatia, and the Czech Republic (rank 47); Argentina and China (rank 57); Thailand (rank 61); India, Kazakhstan and Uzbekistan (rank 71); Ecuador, Pakistan and the Russian Federation (rank 79); Ukraine (rank 82); Indonesia and Uganda (rank 88); Nigeria (rank 90); and Bangladesh (rank 91). The CPI focuses on corruption involving public officials. To date, as acknowledged by TI, the CPI does not reflect secret payments to finance political campaigns, the complicity of banks in money laundering, and other forms of bribery. In 2002, TI is scheduled to publish a new Bribe Payers Index, which will highlight the propensity of Western companies to engage in bribery in emerging market countries. TI reports that the perception of bribery in the developing world is most common in the areas of arms trade, public works, and large infrastructure projects.²⁶

Significantly, anti-corruption initiatives are beginning to be advanced in Asia. Historically, much of Asia has lagged on these issues. Recently a framework for instituting anti-corruption

14. *The World Bank, Ethical Guide for Bank Staff Handling Procurement Matters in Bank-Financed Projects*, available at <http://www1.worldbank.org/publicsector/anticorrupt/ethicalguide.htm> (last visited July 25, 2002).

15. *Id.*

16. See Transparency International, at <http://www.transparency.international.org> (last visited July 25, 2002). Founded in 1993, Transparency International is the sole global non-governmental and non-profit organization devoted to abolishing and tracking corrupt practices.

17. See European Union, at <http://www.europa.eu.int> (last visited July 25, 2002).

18. See Council of Europe (COE), at <http://www.coe.org> (last visited July 25, 2002).

19. See European Bank for Reconstruction and Development, at <http://www.ebrd.com> (last visited July 25, 2002).

20. See International Monetary Fund, at <http://www.imf.org> (last visited July 25, 2002).

21. See Inter-American Development Bank, at <http://www.iadb.org> (last visited July 25, 2002).

22. See Asian Development Bank, at <http://www.adb.org> (last visited July 25, 2002).

23. Another anti-corruption focus is the Stability Pact Anti-Corruption Initiative in South East Europe. The OECD, the Council of Europe, the World Bank, the European Commission, and the United States coordinated the initiative, which was formally endorsed by Stability Pact authorities in February 2000. The OECD and the Council of Europe act as the Secretariat to the Initiative. See Stability Pact, at <http://www.stabilitypact.org> (last visited July 25, 2002).

24. See Soros Foundations Network, at <http://www.soros.org> (last visited July 25, 2002).

25. See Transparency International, at <http://www.transparency.international.org> (last visited July 25, 2002).

26. *Id.*

policies has begun to take shape. In May 2001, representatives from nine countries,²⁷ the Asian Development Bank, the Organization for Economic Co-operation and Development (OECD), TI, the UK Department for International Development, the UNDP, and the World Bank met and prepared a working draft of an Anti-Corruption Plan for the Asia-Pacific region. The plan contains legally non-binding principles for the promotion of regional governmental efforts to combat corruption.²⁸ In November 2001, seventeen Asian and Pacific governments at the conclusion of the Third Annual Conference of the Asian Development Bank and the OECD endorsed the plan.²⁹

What is widely seen to date as the most comprehensive and successful convention addressing corrupt practices, because of its rigorous review process for compliance, is that instituted by the OECD.

II. OECD Anti-Bribery Convention

In 2001 continued progress was made on the implementation of the OECD's Anti-Bribery Convention on Combating Bribery of Foreign Officials in International Business Transactions.³⁰ In December 1997 twenty-nine of the OECD member countries, joined by five non-OECD members, executed the OECD Convention on Combating Bribery.³¹ By year-end 2001 all of the initial signatory nations had deposited instruments of ratification with the OECD Secretary-General and had legislation putting the Convention in effect.³² By February 2002, when the implementing legislation of the UK went into force, all of the

27. Indonesia, Japan, Korea, Malaysia, Pakistan, People's Republic of China, the Philippines, Singapore, and Thailand.

28. See, e.g., *Anti-Corruption Action Plan for Asia-Pacific*, Asian Development Bank, News Release No. 052/01, May 25, 2001, available at <http://www.adb.org/documents/news/2001/nr2001052.asp> (last visited July 25, 2002).

29. See Organisation for Economic Co-operation and Development (OECD), at <http://www.oecd.org> (last visited July 25, 2002).

30. See *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, available at <http://www.oecd.org> (last visited July 25, 2002).

31. Ratification Status of the Convention at January 21, 2002: Deposit of instrument of ratification with the OECD Secretary-General; Entry into force of the Convention; Entry into force of implementing legislation of the Convention, respectively: Argentina (Feb. 8, 2001, Apr. 9, 2001, Nov. 10, 1999); Australia (Oct. 18, 1999; Dec. 17, 1999; Dec. 17, 1999); Austria (May 20, 1999, July 19, 1999, Dec. 17, 1999); Belgium (July 27, 1999, Sept. 25, 1999, Apr. 2, 1999); Brazil (Aug. 24, 2000, Oct. 23, 2000, not enacted); Bulgaria (Dec. 22, 1998, Feb. 20, 1999, Jan. 29, 1999); Canada (Dec. 17, 1998, Feb. 15, 1999, Feb. 14, 1999); Chile (Apr. 18, 2001, June 17, 2001, not enacted); Czech Republic (Jan. 21, 2000, Mar. 21, 2000, June 9, 1999); Denmark (Sept. 5, 2000, Nov. 4, 2000, May 1, 2000); Finland (Dec. 10, 1998, Feb. 15, 1999, Jan. 1, 1999); France (July 31, 2000; Sept. 29, 2000, Sept. 29, 2000); Germany (Nov. 10, 1998, Feb. 15, 1999, Feb. 15, 1999); Greece (Feb. 5, 1999, Apr. 6, 1999, Dec. 1, 1998); Hungary (Dec. 4, 1998, Feb. 15, 1999, Mar. 1, 1999); Iceland (Aug. 17, 1998, Feb. 15, 1999, Dec. 30, 1998); Ireland (not yet engaged, not yet into force, Nov. 26, 2001); Italy (Dec. 15, 2000, Feb. 13, 2001, Oct. 26, 2000); Japan (Oct. 13, 1998, Feb. 15, 1999, Feb. 15, 1999); Korea (Jan. 4, 1999, Mar. 5, 1999, Feb. 15, 1999); Luxembourg (Mar. 21, 2001, May 20, 2001, Feb. 11, 2001); Mexico (May 27, 1999, July 26, 1999, May 18, 1999); Netherlands (Jan. 12, 2001, Mar. 13, 2001, Feb. 1, 2001); New Zealand (June 25, 2001, Aug. 24, 2001, May 5, 2001); Norway (Dec. 18, 1998, Feb. 16, 1999, Jan. 1, 1999); Poland (Sept. 8, 2000, Nov. 7, 2000, Feb. 4, 2001); Portugal (Nov. 23, 2000, Jan. 22, 2001, June 9, 2001); Slovak Republic (Sept. 24, 2001 (accession instrument), Nov. 5, 2001, not yet enacted); Spain (Jan. 4, 2000, Mar. 4, 2000, Feb. 2, 2000); Sweden (June 8, 1999, Aug. 7, 1999, July 1, 1999); Switzerland (May 31, 2000, July 30, 2000, May 1, 2000); Turkey (July 26, 2000, Sept. 24, 2000, not yet enacted); United Kingdom (Dec. 14, 1998, Feb. 15, 1999, Feb. 14, 2002); United States (Dec. 8, 1998, Feb. 15, 1999, Nov. 10, 1998). See <http://www.oecd.org/pdf/m00017000/m00017037.pdf> (last visited July 25, 2002).

32. *Id.*

initial signatory countries had implementing legislation in place.³³ In September 2001 Slovenia became the first country not part of the original signatories to ratify the Convention.³⁴ There were also certain important outreach events in 2001, including informal meetings with Russian officials to assess current anti-corruption efforts in the Russian Federation.³⁵

What is so significant about the Convention is that a national, corporate, or other juridical entity incorporated under the law of a signatory nation can be prosecuted in that country for the bribery of a foreign official even if the entire alleged offence took place wholly outside the signatory country.

There is an intensive two-tier evaluation process with respect to signatory nation compliance with the Convention under the auspices of the OECD Working Group.³⁶ The Council of Europe, the European Union, TI, and others coordinate with the Working Group and the OECD generally to provide analysis, avoid duplicity of effort, and encourage the broadening of activities covered by the Convention. The principal objective of the first tier, commonly known as Phase One, which commenced in 1998 and concluded in November 2001, was to evaluate whether the individual signatory nations were in compliance with Convention requirements. Extensive review of individual signatory country's domestic legislation and activities, strict self- and peer review were undertaken to evaluate, encourage and pressure for compliance.³⁷ The Working Group issues reports on a regular basis with detailed analyses and suggestions for remedial action to close loopholes and encourage signatories to become fully compliant with the Convention.³⁸ The Convention does not specify punishments for non-compliance. This is left to be determined under each country's penal code.

Phase II is currently under way. A major undertaking of Phase II is the analysis of gaps in the current Convention, and the analysis of possible future action.³⁹ Among consideration are that the Convention does not cover instances of the bribery of foreign political party officials, or where advantages are promised or provided to any person in anticipation of that person becoming a foreign public official.⁴⁰ Other shortcomings include when foreign subsidiaries are engaged in bribery transactions, and that the bribery of foreign public

33. *Id.*

34. The Convention went into effect in Slovenia in November 2001.

35. OECD, Council at Ministerial Level, May 16–17, 2001, *Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendations*, available at <http://www.oilis.oecd.org> (last visited July 25, 2002).

36. *See, e.g., id.* OECD, Council at Ministerial Level, June 21, 2000, *Report by the CIME: Implementation of the Convention on Bribery in International Business Transactions and the 1997 Revised Recommendations*, available at [http://www.oilis.oecd.org/oilis/2000doc.nsf/linkto/c-min\(2000\)8](http://www.oilis.oecd.org/oilis/2000doc.nsf/linkto/c-min(2000)8) (last visited July 25, 2002) [hereinafter *Revised Recommendations*] The report provides analysis of legislation of twenty-one of the ratifying countries. The report includes results of the monitoring process, and individual country assessments. Assessment of seven additional countries reviewed since June 2000 is available at [http://www.oilis.oecd.org/oilis/2001doc.nsf/linkto/c-min\(2001\)5](http://www.oilis.oecd.org/oilis/2001doc.nsf/linkto/c-min(2001)5) (last visited July 25, 2002). This information is declassified and available. *See, e.g., Commentaries on the OECD Convention, Convention on Combating Bribery, Revised Recommendation of the Council on Combating Bribery, Bribery Convention: Procedure of Self-and Mutual Evaluation*, available at <http://www.oecd.org> (last visited July 25, 2002).

37. *See* OECD, 2001 Country Reports, at <http://www.oecd.org> (last visited July 25, 2002).

38. *See, e.g.,* OECD, at <http://www.oecd.org>; *see also supra* note 31.

39. *Id.*

40. *Id.*

officials do not constitute a predicate offence in current money laundering legislation.⁴¹ The role of offshore centers in bribery transactions is also under consideration.⁴² Improvements are sought with respect to accounting, auditing, and financing controls.⁴³

A major issue continues to be the review and evaluation of the progress in the implementation of the 1996 Recommendation on the Tax Deductibility of Bribes of Foreign Officials.⁴⁴ By the late 1990s most of the ratifying nations had enacted domestic legislation that prohibited the tax deduction as a corporate business expense for foreign bribery payments to facilitate international business transactions. This was not always the case. Until recently, in many European countries and elsewhere worldwide, certain or all aspects of bribes in this context were viewed as legitimate business expenses. In the United Kingdom, it was the Finance Act of 1993 that disallowed tax deductions for all such payments, and made it clear that such payments were a criminal offense.⁴⁵ In France, legislation enacted as part of the Corrective Finance Bill of 1997 prohibited the deductibility of bribes paid to foreign officials.⁴⁶ International and peer pressure is a significant factor in these changes. TI's Germany chapter reportedly took issue with the German government's plan to limit the prohibition of tax deductibility of bribes to instances only where there had been criminal convictions, which would have allowed for the continued deduction of most bribes.⁴⁷ New legislation enacted in March 1999 abrogated this distinction and eliminated the tax deductibility of all bribes.⁴⁸

41. *Id.*

42. *Id.*

43. *Id.*

44. See, e.g., Annex 2: Tax Treatment of Bribes to Foreign Public Officials (updated Apr. 4, 2001), OECD, *Report by the CIME*, *supra* note 35, contains a country-by-country assessment.

45. *Id.*; see also TradePartner, at http://www.tradepartner.gov.uk/corruption_overseas/corruption (last visited July 25, 2002).

46. *Id.*

47. Transparency International, <http://www.transparency.international.org> (last visited July 25, 2002), at global issues.

48. *Revised Recommendations*, *supra* note 36.