

The Emerging Worldwide Jurisprudence of Anti-Corruption Law

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Corruption, including corruption of public officials, dates from early in human history and countries have long had laws to punish their own corrupt officials and those who pay them bribes. But national laws prohibiting a country's own citizens and corporations from bribing public officials of other nations are a new phenomenon, less than a generation old. Over the course of perhaps the last 15 years, anti-corruption law has established itself as an important, transnational legal specialty, one that has produced multiple international conventions and scores of national laws, as well as an emerging jurisprudence that has become a prominent reality in international business and a well-publicised theme in the media.

This volume undertakes to capture the growing anti-corruption jurisprudence that is developing around the globe. It does so, first, by summarising national anti-corruption laws that have implemented and expanded treaty obligations that some 140 countries have now assumed. These conventions oblige their signatories to enact laws that prohibit paying bribes to foreign officials. Dozens of countries have already done so, as this volume confirms. These laws address both the paying and receiving of illicit payments – the supply and the demand sides of the official corruption equation – as well as mechanisms of international cooperation that have never before existed.

Second, because the bribery of a foreign government official also implicates the domestic laws of the country of the corrupt official, this volume summarises the more well-established national laws that prohibit domestic bribery of public officials. Generally not a creation of international obligations, these are the laws that apply to the demand side of the equation and may also be brought to bear on payers of bribes who, although foreign nationals, may be subject to personal jurisdiction, apprehension and prosecution under domestic bribery statutes.

Finally, this volume addresses national financial record-keeping requirements that are increasingly an aspect of anti-corruption law. These requirements are intended to prevent the use of accounting practices to generate funds for bribery or to disguise bribery on a company's books and records. Violations of record-keeping requirements can provide a separate basis of liability for companies involved in foreign and domestic bribery.

The growth of anti-corruption law can be traced through a number of milestone events that have led to the current state of the law, which has most recently been expanded by the entry into force in December 2005 of the sweeping United Nations International Convention against Corruption. Spurred on by a growing number of high-profile enforcement actions, investigative reporting and broad media coverage, ongoing scrutiny by

non-governmental organisations and the appearance of a new cottage industry of anti-corruption compliance programmes in multinational corporations, anti-corruption law and practice is rapidly coming of age.

The US 'questionable payments' disclosures

The roots of today's legal structure prohibiting bribery of foreign government officials can fairly be traced to the serendipitous discovery in the early 1970s of a widespread pattern of corrupt payments to foreign government officials by US companies. First dubbed merely 'questionable' payments by regulators and corporations alike, these practices came to light in the wake of revelations that a large number of major US corporations had used off-book accounts to make large payments to foreign officials to secure business. Investigating these disclosures, the US Securities and Exchange Commission (SEC) established a voluntary disclosure programme that allowed companies that admitted to having made illicit payments to escape prosecution on condition that they implement compliance programmes to prevent the payment of future bribes. Ultimately, more than 400 companies, many among the largest in the United States, admitted to making a total of more than US\$300 million in illicit payments to foreign government officials and political parties. Citing the destabilising repercussions in foreign governments whose officials were implicated in bribery schemes – including Japan, Italy and the Netherlands – the US Congress, in 1977, enacted the Foreign Corrupt Practices Act (FCPA), which prohibited US companies and individuals from bribing non-US government officials to obtain or retain business.

Until the 1990s, enforcement of the FCPA was steady but modest, averaging one or two cases a year. In the past 10 to 12 years, however, enforcement of the FCPA has sharply escalated, with the number of cases and levels of fines increasing on a yearly basis. From 2006 through early 2007, the US Department of Justice and the SEC resolved more than a dozen cases involving both US and non-US individuals and corporations, imposed civil and criminal fines in the tens of millions of dollars, imposed a new variety of sanctions and announced that dozens of additional cases are under active investigation.

Transparency International

In hindsight, a different type of milestone occurred in Germany in 1993 with the founding of Transparency International, a non-governmental organisation created to combat global corruption. With national chapters and chapters-in-information in more than 90 countries, Transparency International promotes transparency in governmental activities and lobbies govern-

ments to enact anti-corruption reforms. Transparency International's annual Corruption Perceptions Index (CPI), which it began publishing in 1995, has been uniquely effective in publicising and heightening public awareness of those countries in which official corruption is perceived to be most rampant. Using assessment and opinion surveys, the CPI ranks more than 150 countries by their perceived levels of corruption and publishes the results annually. In 2006, Finland, New Zealand and Iceland tied as the countries seen to be the least corrupt in the world, while Haiti, followed closely by Iraq, Guinea and Myanmar, topped the index as those perceived to be the most corrupt.

More recently, Transparency International has also developed and published the Bribe Payers Index (BPI), a similar index designed to evaluate the supply side of corruption and rank the 30 leading exporting countries according to the propensity of their companies to bribe foreign officials. In the 2006 BPI, India received the worst ranking, closely followed by China and Russia. Through these and other initiatives, Transparency International has become recognised as a strong and effective voice dedicated solely to combating corruption worldwide.

The World Bank

Three years after the formation of Transparency International, the World Bank joined the battle to stem official corruption. In 1996, James D Wolfensohn, then President of the World Bank, announced at the annual meetings of the World Bank and the International Monetary Fund that the international community had to deal with "the cancer of corruption". Since then, the World Bank has launched 600 programmes designed to curb corruption globally and within its own projects. These programmes, which have proved controversial and have encountered opposition from various World Bank member states, include debarring consultants and contractors that engage in corruption in connection with World Bank-funded projects. Between 1999 and February 2007, the World Bank sanctioned 338 firms and individuals for fraud and corruption.

In 2006, the World Bank established a voluntary disclosure programme (VDP) which allows firms and individuals who have engaged in misconduct – such as fraud, corruption, collusion or coercion – to avoid public debarment by disclosing all past misconduct, adopting a compliance programme, retaining a compliance monitor and ceasing all corrupt practices. The VDP, which has been two years in development under a pilot programme, will be administered by the World Bank's Department of Institutional Integrity. The World Bank's prestige and leverage promise to be significant forces in combating official corruption, although the World Bank continues to face resistance from countries in which corrupt practices are found to have occurred.

International anti-corruption conventions

Watershed developments in the creation of global anti-corruption law came with the adoption of a series of international anti-corruption conventions between 1996 and 2005. Although attention in the early 1990s was focused on the Organization for Economic Cooperation and Development (OECD), the Organisation of American States (OAS) was the first to reach agreement, followed by the OECD, the Council of Europe and the African Union. Most recent, and most ambitious, is the United Nations International Convention against Corruption, adopted in 2003. The events unfolded as follows.

On 29 March 1996, OAS members initialled the Inter-American Convention against Corruption (IACAC) in Caracas. The IACAC entered into force on 6 March 1997. Thirty-three of the 34 signatories have now ratified the IACAC. The IACAC requires each signatory country to enact laws criminalising the bribery of government officials. It also provides for extradition and asset seizure of offending parties. In addition to emphasising heightened government ethics, improved financial disclosures and transparent bookkeeping, the IACAC facilitates international cooperation in evidence gathering.

In 1997, the 28 OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Anti-Bribery Convention), which was ratified by the requisite number of parties and entered into force on 15 February 1999. Thirty-six countries in all, including six countries not members of the OECD, have now signed and ratified the OECD Anti-Bribery Convention.

States that are parties to the OECD Anti-Bribery Convention are bound to provide mutual legal assistance to one another in the investigation and prosecution of offences within the scope of the OECD Anti-Bribery Convention. Similarly, such offences are made extraditable. Penalties for transnational bribery are to be commensurate with those for domestic bribery, and in the case of states that do not recognise corporate criminal liability (eg, Japan), the OECD Anti-Bribery Convention requires such states to enact "proportionate and dissuasive non-criminal sanctions".

In terms of monitoring implementation and enforcement, the OECD has set the pace. An OECD working group monitors state parties' enforcement efforts through a regular reporting and comment process. In phase I of the monitoring process, examiners assess whether a country's legislation adequately implements the OECD Anti-Bribery Convention. In phase II, examiners evaluate whether a country is enforcing and applying this legislation. After each phase, the examiners' report and recommendations are forwarded to the government of each participating country and are posted on the OECD's website.

On 4 November 1998, following a series of measures taken since 1996, the member states of the Council of Europe and eight observer states, including the United States, approved the text of a new multilateral convention – the Criminal Law Convention on Corruption. A year later, the parties adopted the Civil Law Convention on Corruption. Thirty-three countries have ratified the Criminal Convention, which entered into force on 1 July 2002. The Civil Convention entered into force on 1 November 2003. Twenty-five countries have ratified the Civil Convention.

The Criminal Convention covers a broad range of offences including domestic and foreign bribery, trading in influence, money laundering and accounting offences. Notably, the Criminal Convention also addresses private bribery. The Criminal Convention sets forth cooperation measures and provisions regarding the recovery of assets. Similar to the OECD Anti-Bribery Convention, the Criminal Convention establishes a monitoring mechanism through a process of mutual evaluation and peer pressure.

The Civil Convention provides for compensation for damages that result from acts of public and private corruption. Other measures include civil law remedies for injured persons, invalidity of corrupt contracts and whistleblower protection. Compliance with the Civil Convention is also subject to peer evaluation.

The African Union Convention on Preventing and Combating Corruption was adopted on 11 July 2003. Eleven of the 39 signatories have ratified the African Union Convention. This Convention covers a wide range of offences including bribery (domestic or foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The African Union Convention guarantees access to information and the participation of civil society and the media in monitoring it. Other articles seek to ban the use of funds acquired through illicit and corrupt practices to finance political parties and require state parties to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.

Most important of all of the international conventions is the United Nations International Convention against Corruption. One hundred and forty countries have signed this Convention, which was adopted by the United Nations General Assembly on 31 October 2003. Eighty-eight countries have ratified and are now parties to it, which entered into force on 14 December 2005.

The United Nations International Convention against Corruption addresses seven principal topics: mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards for private companies; mandatory and permissive criminalisation obligations, including obligations with respect to public and private sector bribery, trading in influence and illicit enrichment; private rights of action for the victims of corrupt practices; anti-money laundering measures; cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and asset recovery.

Enforcement

Public dispositions of anti-corruption enforcement actions, media reports of official and internal investigations, disclosures in corporate filings with securities regulatory agencies and stock exchanges, private litigation between companies and former employees, monitoring reports by international organisations, voluntary corporate disclosures, occasional confessions or exposes of implicated individuals, statistics compiled by NGOs and international organisations, findings of anti-corruption commissions, World Bank reports and academic studies all provide windows into the fast-changing landscape of enforcement of anti-corruption laws and conventions. Although public knowledge of official investigations and enforcement activity often lags, sometimes by years, the available indicators suggest a crescendo of enforcement activity. Without going beyond the public domain, a few recent examples suggest the breadth and diversity of anti-corruption enforcement, including international cooperation, extra-territorial or parallel enforcement, the use of liberalised bank secrecy laws and a growing array of penalties and sanctions.

- In late 2006, German prosecutors reportedly launched an investigation of a large German multinational company in connection with the company's use of secret bank accounts outside of Germany to pay bribes to foreign officials to obtain business contracts. The company itself is reported to have uncovered US\$544 million in suspicious transactions spanning seven years. The investigation highlights the change in a country that less than a decade ago permitted companies to deduct bribes paid to foreign officials as ordinary business expenses. The investigation of the company and several of its current and former executives also

highlights the effect of the mutual legal assistance provisions of the OECD Anti-Bribery Convention, as German prosecutors are reportedly receiving assistance from Swiss and Italian authorities; the German investigation has also led to a parallel investigation in the United States.

- In France, a multi-year trial of more than two dozen executives of a major French multinational led to further revelations that have triggered investigations of other companies in multiple jurisdictions. Press accounts have asserted that a consortium of companies paid approximately US\$180 million in commissions to a British intermediary who in turn allegedly passed money to officials in West Africa in connection with a major energy project. The country in which the project is located, as well as the United States, France and the United Kingdom, are reportedly investigating various aspects of this case and possible violations of their respective national foreign bribery laws.
- In Norway, a Norwegian company partially owned by the state admitted to improper payments in Iran and agreed to a US\$3 million settlement of an enforcement action. As its shares are listed on the New York Stock Exchange, the company also agreed in 2006 to a disposition with the US government of alleged violations of the FCPA for the same improper payments, agreeing to pay US\$21 million in fines and disgorgement of profits, to establish an anti-corruption compliance programme and to retain for three years an anti-corruption compliance monitor.
- At the World Bank, a Canadian company, already the subject of anti-corruption enforcement action in Lesotho for alleged corrupt payments in connection with a large public works project, was debarred for a period of three years from participating in projects funded by the World Bank following a World Bank investigation and hearing. This sanction is in addition to penalties imposed through criminal prosecution in Africa for the same misconduct.
- In 2007 in the United Kingdom, the Serious Fraud Office announced that the UK government had decided to terminate an ongoing, highly publicised investigation of allegations of widespread bribery by a major UK company in connection with projects in Saudi Arabia. The stated reason for the decision was a determination that continuing the investigation would be contrary to the UK's national security. This decision was widely condemned, prompted a demand from the OECD that the UK offer some explanation for its failure to abide by its OECD Anti-Bribery Convention obligations and worsened the UK's image as a country hesitant to prosecute its own corporations for foreign bribery.
- Yet untested is the provision in article 35 of the United Nations International Convention against Corruption, which creates a private right of action for entities or persons who have suffered damage as a result of bribery of public officials or other acts of corruption covered by the United Nations Convention against Corruption.

This small sample of the diverse array of investigations and prosecutions underway or pending reflects a revolutionary shift in anti-corruption law and a dramatic escalation of enforcement activity compared with only a decade ago.

Anti-corruption compliance programmes

The rapid changes in the legal structure and in enforcement have, in turn, created an additional new corporate

phenomenon and legal discipline – the widespread institution of anti-corruption compliance programmes within multinational corporations. Programmes that would have been innovative and exceptional in the early 1990s are becoming de rigueur. So-called ‘best practices’ have become a standard by which many companies seek to measure their own efforts and that standard continues to rise. Spurred by government pronouncements, regulatory requirements, voluntary corporate codes and the advice of experts as to what mechanisms best achieve their intended purposes, anti-corruption compliance programmes have become common, and often sophisticated, in companies doing business around the world. As a result, anti-corruption codes and guidelines, due diligence

investigations of consultants and business partners or merger targets, contractual penalties, extensive training, internal investigations, compliance audits and discipline for transgressions have become familiar elements of corporate compliance programmes.

Against this backdrop, the expert summaries of countries’ anti-corruption laws and enforcement policies that this volume comprises are an essential resource. It is within this legal framework that the implementation of anti-corruption conventions and the investigations and enforcement actions against those suspected of violations will play out. Our thanks to those firms that have contributed to this volume for their timely summaries and for the valuable insights they provide.