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Controlling Corruption in International Business: The International Legal Framework

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Glossary

Active Bribery: The offence of bribery committed by the person who promises or gives the bribe.

Arms-length transaction: Said of a transaction negotiated by unrelated parties, each acting in his or her own self-interest; the basis of a fair market value determination.

Bribery: An offer or payment or promise or authorization of an offer or payment of money or anything of value with a view to corrupting the behavior of a person, as a public official.

Corrupt Practices: The offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract evaluation. It includes bribing, as well as extortion or coercion, which involve threats of attack on person, goods or reputation.

Corruption: Behavior on the part of officials in the public and private sectors in which they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing their official position.

Enterprises: Any person or entity engaged in business, whether for profit, non-profit, private, public or quasi-public, parent or subsidiary.

Extortion: The obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Facilitation Payment: Small payments to public officials in order to expedite routine business needs, such as clearing customs and obtaining licenses or permits.

Fraudulent Practices: A misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the borrower. It covers collusive practices among bidders (before or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the Borrower of the benefits of free and open competition.

Guanxi: A Chinese word referring to interpersonal connections that imply continued exchange of favors and reciprocal obligations.

Hard Law: Refers to laws that have come about as a result of a domestic legislative process or are recognized as agreements between sovereign states and are therefore binding and enforceable.

Illicit Payment: A bribe that may or may not have been paid with a corrupt intent.

Kickback: Any technique where payments are channeled to government officials, relatives or business associates of a contracting party.

Passive Bribery: The offence of bribery committed by the person who receives the bribe.

Rule of Geographical Morality: the norm by which a citizen of a country in the North may engage in acts of corruption in any country in the South, including bribery and extortion, without the attachment of any moral condemnation to those acts.

Soft Law: Non-binding and non-mandatory initiatives adopted by governments, enterprises, business groups, non-governmental organizations, or inter-governmental organizations through recommendations, resolutions, internal rules, guidelines, policies, or voluntary codes.

COE: The Council of Europe is an organization formed in 1949 that is now composed of forty three member states, whose primary goal is to achieve a greater unity between members in safeguarding individual freedom, political liberty and the rule of law.

FCPA: The Foreign Corrupt Practices Act is a U.S. law that prohibits bribery of foreign public officials or political party candidates and officials.

GRECO: The Group of States against Corruption was set up by the Committee of Ministers of the Council of Europe on 1 May 1999. The GRECO was conceived as a flexible and efficient follow-up mechanism, called to monitor, through a process of mutual evaluation and peer pressure, the observance of the Guiding Principles in the Fight against Corruption and the implementation of international legal instruments adopted in pursuance of the Programme of Action against Corruption. The GRECO is financed through annual compulsory contribution of its member states.

IAIP: The International Agreement on Illicit Payments sought to criminalize the "offering, promising, or giving" of illicit payments to public officials in connection with international commercial transactions. Although the IAIP was adopted in the U.N. ECOSOC and forwarded to the General Assembly for consideration in 1980, the General Assembly ultimately failed to adopt it.

I.C.C.: The International Chamber of Commerce is a non-profit, private association composed of individuals from member states that works to harmonize international trade practices and legislation, and to develop internationally recognized commercial instruments and mechanisms.

IFIs: International Financial Institutions including the International Monetary Fund, World Bank, and multilateral development banks.

MDB Working Group: Multinational Development Bank Coordinating Committee on Governance, Corruption and Capacity Building.

OECD: The Organization for Economic Co-operation and Development is currently comprised of thirty member countries which, through the governing body of the OECD, produce

internationally agreed instruments, decisions, and recommendations to promote ground rules in areas where multilateral agreement is necessary for individual countries to progress in the global economy.

OAS: The Organization of American States brings together thirty-five member states from North, Central and South America, and the Caribbean, to serve as a political forum for multilateral dialogue and action.

TI : The Transparency International was founded in 1993 to bring civil society, business, and governments together in a powerful global coalition devoted to combating corruption. The TI is the most established anti-corruption non-governmental organization with national chapters in more than eighty countries.

Summary

Since 1995, the anti-corruption movement has had success in developing a global legal framework to combat transnational bribery and corruption. A distinguishing feature of the current anti-corruption movement is its emphasis on the economic cost of corruption and the involvement of the international financial institutions such as the World Bank, the International Monetary Fund and regional development banks, in the efforts to combat corruption. As part of their efforts to combat corruption, international financial institutions have made effective anti-corruption reforms a prerequisite for future allocation of funds. The current anti-corruption movement has also been successful in enlisting the participation of sectors of international and domestic civil society, as well as the business community, through integrity pacts and codes of conduct.

Notwithstanding its relative success, the current anti-corruption movement faces serious hurdles as incidences of transnational corruption keep rising. On a philosophical level, the economic repackaging of the problem of corruption has made the anti-corruption effort more acceptable by excluding any explicit moral judgments that may lead to charges of moral or legal imperialism; however, the re-packaging is proving to be inadequate given the irrefutable moral and ethical dimension of corruption. Increasingly, scholars of international business ethics, as well as anti-corruption advocates, are emphasizing a "virtues'' approach to combating corruption. The failure of the anti-corruption movement may also contribute to the de-legitimization of the "science" of economics. On a more practical level is the difficulty of distinguishing among different categories of illicit payments, such as a facilitation payment that can be legal; a bribe, which is illegal, and maintaining a favorable climate payment, which may be legal or illegal.

Finally, the current anti-corruption movement must address the legacy of colonialism and its impact on how developing countries view anti-corruption efforts. For centuries, corruption has been associated with the East and anti-corruption with the West. Making free markets, rule of law, and democratic reforms a part of the anti-corruption campaign may lead to the perpetuation of the rule of geographical morality and the imposition of Western values. To some, this approach opens the anti-corruption movement to charges of neo-colonialism.

1. Introduction

Corruption has existed from the beginning of time. Globalization, however, seems to have increased the magnitude and impact of such corruption. The end of the Cold War in the early 1990s removed certain incentives for unqualified support of corrupt regimes by the West. It also resulted in universal application of free market reforms by donor governments and International Financial Institutions (IFIs). These reforms have, in turn, increased opportunities for corruption. Since 1995, recognition of the detrimental effects of corruption on economic development has increased. As a result, IFIs have recognized the relevance of corruption to their economic mandate, have agreed to control corruption if associated with development projects they fund; and are linking anti-corruption reforms to the future allocation of funds.

The success of anti-corruption efforts is largely attributable to the repackaging of the problem of corruption as an *economic* rather than a *political* or *moral* problem. Anti-corruption advocates have convincingly argued that corruption impedes economic development by distorting public sector choices towards "wrong" public projects that benefit corrupt government officials while producing inefficient and inequitable spending. This argument has allowed anti-corruption advocates to overcome the East-West and North-South divisions that dominated the U.N. initiatives against corruption and bribery in the late 1970s, i.e., the First International Anti-Corruption Movement.

2. The First International Anti-Corruption Movement (1975-1980)

On December 15, 1975, the U.N. General Assembly passed Resolution 3514, entitled "Measures against Corrupt Practices of Transnational and Other Corporations, their Intermediaries and Others Involved." The Resolution condemned "all corrupt practices, including bribery, by transnational and other corporations, their intermediaries and others involved, in violation of the laws and regulations of host countries." The Resolution directed the U.N. Economic and Social Council (ECOSOC) to make further recommendations for eliminating corrupt practices, including bribery. The ECOSOC responded by forming, an Ad Hoc Intergovernmental Working Group on Corrupt Practices (U.N. Working Group) which met regularly between 1976 and 1980 and submitted reports of its discussions. The U.N. Working Group concluded that in order to successfully combat corruption and bribery, "international action" was necessary and, as a result, drafted the *International Agreement on Illicit Payments* (IAIP). IAIP sought to criminalize the "offering, promising, or giving" of illicit payments to public officials in connection with international commercial transactions. In addition, it criminalized the "soliciting, demanding, accepting or receiving, directly or indirectly, of any illicit payments" in connection with an international commercial transaction. IAIP recognized that not all countries attribute criminal culpability to legal persons, such as corporations, and therefore imposed the requirement of "comparable deterrent effects." IAIP also addressed mutual legal assistance, record keeping, and accounting and extradition.

The IAIP was adopted by the ECOSOC and forwarded to the U.N. General Assembly for consideration in 1980. That year, however, the G-77 also introduced a decision requiring that

the U.N. Conference on IAIP be convened *only after* completion of the U.N. Conference on the *Code of Conduct for Transnational Corporations* (TNC Code of Conduct). This Code, however, was strongly opposed by many developed nations. Therefore, neither the IAIP nor the TNC Code of Conduct was adopted by the General Assembly. The U.N. initiatives to combat corruption failed as a result of political disagreements between the developed and developing states and succeeded in turning the problem of illicit payments into a divisive political issue. The developed states blamed the problem on political corruption in the developing world, and the former colonies placed the responsibility on transnational corporations (TNCs) that provide the illicit payments.

Until the mid 1990s, the IFIs avoided addressing the corruption problem by arguing that corruption is a political issue and therefore outside their economic mandate. The IFIs are limited by their charters from interfering in the political affairs of their member states. Throughout the 1980s and early 1990s, the problem of corruption was marginalized in international forums. The only notable exception was the United States, which continued to advocate criminalizing transnational bribery.

In 1977, the United States enacted the Foreign Corrupt Practices Act (FCPA) that prohibited U.S. domestic concerns and issuers from bribing foreign public officials or political party candidates and officials. From 1977 to 1996, the FCPA was the *only* domestic legislation that prohibited bribery of foreign public officials by domestic firms. Throughout this time, the FCPA was criticized for its extra-territorial reach and its attempt at "moral imperialism." In practice, the anti-bribery provisions of the FCPA were rarely enforced. From 1977 to 2000, only 30 FCPA criminal cases were brought against U.S. corporations for violations of the anti-bribery provisions. Notwithstanding the lack of enforcement, the U.S. business sector remained highly critical of the FCPA, arguing that the law had created an uneven playing field for U.S. companies that had to compete with non-U.S. multinationals that were not prohibited from paying bribes to foreign officials and, in some instances, were even able to deduct the cost of such bribes under the tax laws of their country of origin.

3. The Second International Anti-Corruption Movement (1995-Present)

3.1. Overview

In view of the political nature of the failure of the IAIP, the new anti-corruption movement addressed the corruption problem as an *economic* rather than a *moral* or *political* problem. By 1995, economists, lawyers, and political scientists, among others, were focused on the detrimental effects of corruption on economic development. This detrimental economic effect was particularly evident in the selection and construction of large infrastructure projects in the developing world, where corruption resulted in selection of the "wrong" kind of public projects and inefficient and inequitable spending. The packaging of corruption as an economic problem allowed the IFIs to address bribery and corruption of government officials. The IFIs created anti-corruption task forces and amended their procurement and consultant guidelines to include anti-corruption or anti-bribery provisions.

This Second International Anti-Corruption Movement (the current movement) has been successful in concluding two multilateral conventions against bribery and corruption: The *Inter-American Convention Against Corruption* (OAS Convention) in 1996 and the *Organization for Economic Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Convention) in 1997. In 1996, the U.N. General Assembly adopted its *Declaration Against Corruption and Bribery in International Commercial Transactions* (Anti-Corruption Declaration). At the same time, multinational corporations began to voluntarily adopt codes of conduct and internal controls to combat bribery. Finally, the current movement enlisted the support of civil society groups in mobilizing grass root support for its anti-corruption initiatives.

3.2. International Legal Framework Against Corruption and Bribery

Every country has its own domestic legislation that prohibits corruption or bribery of public officials and acceptance of bribes by such officials. In some instances, countries have created special units within the government to coordinate anti-corruption activities. The discussion of specific domestic anti-corruption law and efforts is outside the scope of this short article. The focus is solely on the international legal framework and those who affect that framework, including IFIs, multinational corporations, and international civil society.

3.2.1. The Inter-American Convention Against Corruption (OAS Convention)

In 1996, the 34 members of the Organization of American States approved the OAS Convention, which is aimed at eliminating bribery and corruption of government officials. The OAS Convention was the first international legal framework that criminalized bribery of *foreign* government officials. Generally, the signatories to the OAS Convention are required to develop and strengthen legal mechanisms to "prevent, detect, punish and eradicate" official corruption. The OAS Convention requires a signatory state to prohibit not only "Transnational Bribery" but also "Illicit Enrichment," "subject to its Constitution and the fundamental principles of its legal system." Should a signatory state decide to criminalize both Transnational Bribery and Illicit Enrichment as offenses under domestic laws, offenses shall be deemed to be "Acts of Corruption" under the Convention. The OAS Convention specifically identifies the following "Acts of Corruption": (1) the solicitation and acceptance of any article of monetary value or other benefit, such as a gift, by a government official; (2) the offering or granting of any such article or benefit; (3) any act or omission by a government official in the discharge of his or her official duties for the purpose of illicitly obtaining benefits for him or herself or for a third party; (4) the fraudulent use or concealment of property derived from any of the Acts of Corruption; and (5) participating or conspiring to commit any of the Acts of Corruption. Should a signatory state decide not to criminalize either transnational bribery or illicit enrichment, the Convention requires that such a state provide assistance and cooperation to other states in their prosecution of the offense "insofar as the laws permit."

On June 5, 2001, the OAS adopted AG/Resolution 1785 (xxxi-o/01), *Enhancement of Probity in the Hemisphere and Follow Up on the Inter-American Program for Cooperation in the Fight Against Corruption* (Resolution 1785) which sought to encourage the ratification of the OAS Convention. The United States finally ratified the Convention on September 15, 2000. Resolution 1785 adopted Resolution 1723, which led to the creation of the *Working Group on Probity and Public Ethics* (the OAS Working Group). The OAS Working Group is responsible for integrating the various international models against corruption with the aim of recommending the most appropriate model for state adoption. The OAS Working Group has also proposed the creation of an institutional follow-up mechanism to ensure effective implementation of the OAS Convention.

The OAS has also created the *Inter-American Program for Cooperation in the Fight Against Corruption* (OAS Program). The Program calls for, among other things, reforms in laws, such as codes of conduct for public officials, as well as institutional reform, including establishment of a support system for government institutions charged with fighting corruption and helping states develop education programs in the area of ethics and other matters dealing with corruption. From April 20 to 22, 2001, the OAS held the Third Summit of the Americas in Quebec City, Canada, where the States produced the "Fight Against Corruption" Declaration, which reiterates many of the common anti-corruption themes.

3.2.2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)

In 1994, the OECD adopted a *Recommendation on Bribery in International Business Transactions* (Recommendation), which called upon member countries to take "effective measures to deter, prevent and combat bribery of foreign public officials in connection with international business transactions" and instructed the OECD Committee on International and Multilateral Enterprises (CIME) and its Working Group on Bribery in International Business Transactions to monitor the implementation of the Recommendation. On May 23, 1997, the CIME proposed, and the OECD adopted, a Revised Recommendation. The Revised Recommendation preserved the general undertaking of the 1994 text to combat bribery of foreign public officials and elaborated on specific commitments to the criminalization of the bribery of foreign public officials, accounting, and public procurement. Eventually, on December 17, 1997, the 29 members of the OECD, along with 5 non-members, signed the OECD Convention. The Convention came into effect on February 15, 1999. The OECD Convention is not self-executing, and it does not include a model law. Rather, it provides only rough guidelines for its implementing legislation. The aim is that the signatories, by national implementation, will provide clear and detailed rules that are *functionally equivalent* to one another in punishing and deterring bribery in international business. Notwithstanding the functional equivalency rule, the OECD Convention contains *five* mandatory provisions: First, legislation must criminalize "active bribery." Second, legislation must make not only the amount of the bribe but also proceeds or property derived from the bribe subject to seizure or sanctions of comparable effect. Third, legislation must establish jurisdiction over an offense of bribery of foreign public officials when the offense is committed in whole or in part in that nation's

territory. If possible under the domestic legal system, legislation must recognize national jurisdiction with regard to bribery of foreign public officials. Fourth, the OECD Convention also serves as an extradition treaty allowing for extradition for violations of the anti-bribery provisions. Finally, penalties must be comparable to those applicable to bribery of domestic officials and such penalties must be "effective, proportionate and dissuasive."

The OECD has enacted a number of mechanisms to ensure that signatories of the Convention are taking appropriate steps to implement its provisions. The OECD Anti-Corruption Division (ACD) serves as the focal point within the OECD Secretariat to respond to the fight against corruption in international business. In early June 1999, the ACD launched the OECD Anti-Corruption Ring Online (ANCORR WEB), a comprehensive online information and resource center on corruption, bribery, money laundering, and related issues that provide governments, businesses, civil society, international organizations, and individuals with information they need to implement better policies and actions to fight corruption. In addition to the ACD, OECD Public Management Service (PUMA) helps member countries develop and maintain a framework for promoting integrity and high standards in public officials. PUMA primarily functions by creating country reviews, comparative analyses, evaluative bench marking, and producing guidelines that can be used to evaluate and design policies, e.g., the *OECD Principles for Managing Ethics in the Public Service*. PUMA has also launched *the OECD Journal on Budgeting,* which is intended to make modernizing budgetary practices available to a wide community. Finally, on June 27, 2000, the 20 member countries and 4 non-member countries also adopted the OECD *Guidelines for Multinational Enterprises.*

The OECD Convention is significant in that it is an acknowledgement that investors from the OECD countries bear responsibility for spreading corruption in the developing countries. The extent to which a multinational is dissuaded from engaging in active bribery, however, depends upon the implementation and enforcement of the Convention by each signatory state. Enforcement of the OECD Convention has proved to be difficult, because of the inefficiency of national criminal and evidentiary rules in the context of transnational bribery and the fact that the same companies who engage in acts of bribery and corruption in the developing world often are the most respected and law-abiding companies in their home jurisdiction.

3.2.3. Initiatives by the United Nations

In December 1996, the U.N. General Assembly adopted its Anti-Corruption Declaration (See Section 3.1 above) and Resolution 51/59 (Action against Corruption) that had annexed thereto the *International Code of Conduct for Public Officials* (U.N. Code of Conduct for Public Officials) that targeting passive bribery. The Declaration is non-binding and calls on states to "take effective and concrete action to combat all forms of corruption, bribery and related illicit practices in international commercial transactions." In particular, it calls for "effective enforcement of existing laws prohibiting bribery," encourages Member States to criminalize bribery of foreign public officials "in an effective and coordinated manner," and recommends many of the provisions found in the OAS and OECD Conventions. The U.N. Code of Conduct for Public Officials sets forth guidelines and recommendations to be used as tools by states in

their efforts against corruption. The Code of Conduct also adopts the principle that a public office is a position of trust, which implies a duty to act in the public interest: the "ultimate loyalty of public officials should be to the public interests of their country as expressed through democratic institutions of government." Under the Code, furthermore, public officials may not use their official capacities for improper advancement of their family's personal or financial interests, nor may they improperly use public monies, services, or property.

From July 30 to August 3, 2001, the *Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption* (the Inter-Governmental Expert Group), comprising 95 Member States met in Vienna and agreed to the Terms of Reference for a *United Nations Convention Against Corruption* (the UN Convention). The Inter-Governmental Expert Group set up a committee to draft a convention by the end of 2003. The Report indicates that the participants hope that the U.N. Convention addresses the issue of prevention, including the necessity of dealing with the "economic and social" factors associated with corruption.

3.2.4. Initiatives by the Council of Europe

In 1994, European Ministers of Justice called upon the Council to address the threat of corruption. The Council immediately set up a Multi-disciplinary Group on Corruption (GMC) and instructed it to examine potential measures for an international program against corruption. The GMC submitted a draft Program of Action against Corruption to the Council of Europe (COE) Committee of Ministers, which approved the program and instructed the GMC to implement it before December 31, 2000.

On November 6, 1997, the COE adopted Resolution (97)21 on 20 guiding principles for the fight against corruption (Guiding Principles). On May 5, 1998, the COE adopted Resolution (98)7, which established the Group of States against Corruption (GRECO). GRECO was initially established set up by 17 states; since 1998 its membership has grown to 34 member states. GRECO functions as a monitoring mechanism that aims to improve the capacity of its members to fight corruption by following up on their activities through a dynamic process of mutual evaluation and peer pressure. GRECO is responsible for monitoring observance of the Guiding Principles and implementation of international legal instruments. To date, three instruments have been adopted: (1) the *Criminal Law Convention on Corruption* (Criminal Law Convention), opened for signature on January 27 1999; (2) the *Civil Law Convention on Corruption* (Civil Law Convention), adopted in September 1999 and opened for signature on November 4, 1999; and (3) the *Recommendation on Codes of Conduct for Public Officials* (Recommendation), adopted on May 11, 2000. The Criminal Law Convention is an "instrument aimed at the coordinated criminalization of a large number of corrupt practices." It deals with both active and passive bribery of foreign and domestic officials, in both the private and public sector. Under the Criminal Law Convention signatory states are required to provide sanctions for violations of the anti-bribery provisions and allow for extradition. The Civil Law Convention requires that States provide "for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of

obtaining compensation for damage." It also provides protection for whistle blowers. The Recommendation sets out a Model Code of Conduct for Public Officials in the Appendix. The Model Code of Conduct recommends how to deal with real situations frequently faced by public officials, such as, the receipt of gifts.

3.2.5. Initiatives by the Business Sector: International Chamber of Commerce and Corporate Codes of Conduct

The International Chamber of Commerce (ICC), as a world business organization with national associations in more than 130 countries, has also been active in developing "soft law" on the subject of corruption and bribery. The ICC's focus has been on "extortion" of bribes by "foreign public officials." In 1977 the ICC issued the *Report on Extortion and Bribery* in business transactions that included Model Rules of Conduct for business enterprises. In the 1990s, the ICC position was that extortion and bribery "could undermine the most promising development in the post Cold-War era, i.e., the spread of democratic governments and of market economies worldwide." The ICC has also strongly advocated including corruption on the list of non-tariff barriers that are prohibited under the international trading rules enforced by the World Trade Organization (WTO). According to the ICC, offering or giving a bribe, in addition to being a crime, constitutes an act of unfair competition that could give rise to actions for damages.

On March 26, 1996, the ICC executive board adopted a revised version of the ICC "Rules of Conduct to Combat Extortion and Bribery" (ICC Rules). The ICC Rules are intended to help enterprises develop corporate compliance programs that are tailored to their own circumstances. Generally, the ICC Rules condemn private-public bribery as well as private-private bribery by prohibiting extortion (which is defined by the ICC as direct or indirect demand or acceptance of a bribe), bribery, and kickbacks. They also require enterprises to take reasonable measures to make sure that their agents do not pay bribes by maintaining records and ensure that the amounts of commission are commensurate with the work done by each agent. The ICC Rules also recommend that enterprises avoid "off the books" transactions and that all accounts should be audited by independent auditors. In 1996, the ICC set up a Standing Committee on Extortion and Bribery whose primary tasks include urging ICC National Committees to strongly support the ICC Rules and encourage enterprises to adopt them while coordinating with domestic efforts to combat corruption.

Notwithstanding the foregoing, far too few companies have adopted an official "no-bribery" policy. In many cases, the companies deny paying "bribes," but admit to paying "facilitation payments." According to recent business ethics scholarship, even if corporate codes of conduct are adopted by enterprises, they will not be successful if they are not based on values that "come from within the enterprise", i.e., if they are not based on a "firm culture of integrity." This view has led to the development of the "Combating Corruption Principles", which are based on the belief that a "virtue" approach inside an enterprise or a melding of virtue ethics in a corporate culture will be far more successful in stopping the payment of bribes and kickbacks than the imposition of highly detailed, inflexible corporate codes. According to the proponents of the "virtues approach," bribery and corruption are "hard to define and delineate across subtle

cultural lines" and can only be accommodated within the virtue ethics framework which, in contrast to rigid rules and regulations, can account for cultural differences.

3.2.6. Initiatives by Civil Society: Transparency International and Integrity Pacts

Over the years, TI's primary focus has been to help overcome the resistance of entities with a stake in the status quo; mobilize people and expertise behind anti-corruption initiatives; and improve the interface between governments, businesses, and civil society for effective governance. TI's most influential publication is its *Annual Corruption Perception Index (CPI).* CPI is becoming increasingly important as countries struggle to move up from a low rank; which may lead to increased scrutiny by IFIs and aid agencies. In addition, TI has also published a *Bribe Payers Survey* and *a Corporate Best Practices Survey*.

TI has been an effective proponent of the view that corruption, defined as "misuse of public office for private profit," is always bad. In coming to this conclusion, TI concentrates on the economic costs of corruption to the general welfare of the population. TI has rejected the argument that poverty or lack of development leads to corruption. It maintains that abundance of wealth, as well as poverty, can cause corruption, but poverty is almost always the result of corruption. TI categorically rejects the argument that corruption is part of *some* cultures by stating that although differences in practices exist among various cultures in how business is conducted, e.g., the extent of gift-giving, no culture accepts blatant attempts to "buy" favorable decisions. TI's rejects cultural relativism, but it does admit that for anti-corruption efforts to be successful, they must be "tailor-made" to address local institutional and cultural concerns.

The solutions proposed by TI to combat corruption include the development of "integrity" systems at the national level, through TI National Chapters, and at the international level, by creating "Islands of Integrity" and encouraging the use of "Integrity Pacts" (IPs). The aims of the IPs are: (1) to enable companies to abstain from bribing by providing assurances that their competitors will also refrain from bribing and (2) to force government procurement agencies to prevent any form of corruption, including extortion, and to follow transparent procedures. A government may choose to have an IP for all of its projects, for some in a particular sector, or for only one contract. The requirement of entering into an integrity agreement is mentioned in the government's *Invitation to Tender* as well as the *Procedures for Bidding for Public Sector Contracts*. Under these procedures, TI recommends that bidders who fail to comply with the terms of the IP will be subject to significant sanctions, such as loss of contract, liability for damages, and forfeiture of the bid security. Bidding companies are required to provide the government with a no-bribery policy and compliance program that can be specific to the contract at issue or general policy of the corporation. The IP as envisioned by TI also requires companies to disclose all past and intended future payments to third parties at the bidding stage and then be formally recorded and reported during the execution stage by the successful bidder. To date, the IP's has been used in a variety of projects, including a refinery rehabilitation project in Ecuador and the privatization of telecommunications in Panama.

3.3. International Financial Institution' Efforts against Corruption and Bribery

The International Financial Institutions (IFIs) have recently instituted official anti-corruption policies. In 1997, the International Monetary Fund (IMF) and the World Bank suspended all aid to Kenya, totaling $210 million, and conditioned the resumption of the aid on the passage of anti-corruption legislation, among other things, which subsequently led to the creation of the Kenya Anti-Corruption Authority (KACA). The IMF involvement in Kenya has been sharply criticized by Third World scholars, who have claimed that the IMF and the World Bank are forcing the passage of "bank-sponsored laws" that will in the end not solve the corruption problem. According to this view, to fight the problem of corruption, there is a need to look at the local conditions that make corruption desirable, e.g., low salaries and underdevelopment. The IFIs, however, insist that reducing corruption is a *precondition* for development.

In February 1998, the World Bank met with representatives of regional development banks, the European Commission, and the United Nations Development Program at the Asian Development Bank headquarters in Manila to discuss harmonization of procurement rules. As a result, the *Multilateral Development Bank Coordinating Committee on Governance, Corruption and Capacity Building* (the MDB Working Group) was formed. The MDB Working Group has adopted a MDB *Master Bidding Document for Procurement of Goods* and is working on other project-related issues, such as pre-qualification of civil work contractors and recruitment of consultants.

3.3.1. World Bank

The World Bank's anti-corruption policy is outlined in a 1997 report entitled: *Helping Countries Combat Corruption: The Role of the World Bank.* The Bank's anti-corruption strategy has four main themes: (1) preventing corruption in Bank projects, (2) helping countries reduce corruption (3) mainstreaming anti-corruption in Bank projects, and (4) supporting international anti-corruption efforts. Central to the World Bank's goal of prevention of fraud and corruption in Bank -financed projects is the World Bank's *Procurement Guidelines* and the World Bank's loan disbursement procedures. Specifically, the World Bank has in place two guidelines: *Procurement Under IBRD Loans and IDA Credits* (Procurement Guidelines) and *Selection and Employment of Consultants by World Bank Borrowers* (Consultant Guidelines), both of which were amended to include a section specifically addressing fraud and corruption. Both Guidelines provide that bidders, suppliers, and contractors observe the highest standard of ethics during procurement. The World Bank will cancel any portion of a loan that it determines to have been allocated to a contract that involved corrupt or fraudulent practices. Under the new guidelines, procurement contracts must now include provisions allowing the Bank to inspect accounts and records or have them audited by Bank-appointed auditors. The Bank also allows a "no bribery pledge" in bid forms, but only at the borrowing country's request. Such a pledge would obligate parties to abide by national fraud and corruption laws in bidding and executing contracts. Finally, the most recent Procurement Guidelines require the use of Standard Bidding Documents which, in turn, require disclosure of any commissions or gratuities paid in association with a bid or contract. In May 1998, the Bank established an Oversight Committee on Fraud and Corruption, which is responsible for supervising all investigations into allegations of fraud or corruption—including those involving World Bank Group staff—and for ensuring that

investigations are thorough and prompt. As of July 6, 2001, sixty-one firms had been declared ineligible for World Bank-financed contracts as a result of anti-corruption investigations.

The Bank's position is that it can help countries combat corruption by helping them deregulate and expand their markets. This approach is based on the belief that markets discipline participants more effectively than the public sector dues. The work of the Bank that is intended to help reduce corruption includes: macroeconomic and sector policy reform, including eliminating price controls and reducing regulations, licensing requirements and other barriers to entry for new firms, and cutting subsidies to enterprises. Countries are encouraged to build strong institutions, including well-functioning public management systems, accountable organizations, a strong legal framework and independent judiciary, and a vigilant civil society. The Bank is attempting to mainstream anti-corruption by incorporating it into country strategy formulation and its support of international efforts to combat corruption.

3.3.2. International Monetary Fund

The International Monetary Fund's limited anti-corruption policy is set out in its publication entitled *Good Governance: the IMF's Role.* The IMF has focused on three areas in order to help countries improve governance and thus reduce the likelihood of corruption: (1) assisting member countries in creating systems that limit the scope for *ad hoc* decision making; (2) enhancing a country's capacity to design and implement economic policies, build effective policy making institutions, and improve public sector accountability; and (3) promoting transparency in financial transactions. The IMF will take authoritative action against corruption *only* if such corruption will have *significant macroeconomic implications*, even if such instances are not precisely calculable. Should an instance of corruption rise to the level of significant macroeconomic implications, financial assistance from the IMF could be suspended or delayed on account of poor governance; resumption of IMF support is only permitted after corrected efforts have addresses the issues of poor governance that led to suspension of IMF programs.

3.3.3. Asian Development Bank

In 1995, the Asian Development Bank (ADB) adopted a formal *Good Governance Policy*, which represented an institutional commitment to making governance a focus of the ADB operations. The Good Governance Policy has four principles of good governance: accountability, transparency, predictability, and participation. In 1998, the ADB adopted an official *Anti-Corruption Policy* that address: (1) the design or selection of uneconomical projects because of opportunities for financial kickbacks and political patronage; (2) illicit payments of "speed money" to government officials to facilitate the timely delivery of goods and services to which the public is rightfully entitled, such as permits and licenses; and (3) extortion and abuse of public office, such as using the threat of a tax audit or legal sanctions to extract personal favors. The ADB rules require borrowers to observe the highest standards of ethics in contract procurement and execution. The amended *Procurement Guidelines* require the ADB to cancel the remaining portion of any loan if it determines that the borrower engaged in corrupt practices in contract procurement and to disqualify a firm from participating in ADB-financed projects,

either indefinitely or for a stated amount of time. The Procurement Guidelines authorize the ADB to inspect the accounts and records of suppliers and contractors relating to performance of the contracts and to have such accounts audited. The 1998-1999 amendment to the ADB procurement rules require that contract documents include a commitment by the contractor and that no fees, gratuities, rebates, gifts, commissions, or other payments, other than those shown in the bid, have been given or received in connection with the procurement process or in the contract execution.

ADB staff are required to report any allegations or evidence of corruption that they receive regarding lending or technical assistance to the Office of General Auditor (OGA). The Anti-Corruption Unit of the OGA screens this information, if a decision is made to proceed with the investigation, the OGA convenes an Oversight Committee in order to outline further procedures for a detailed investigation. Any sanctions or remedial action imposed by the Oversight Committee may be appealed to the Review Committee.

The ADB participates with the World Bank and other regional development banks in the MDB Working Group. As of September 7, 2000, allocation of resources by the ADB must be made on a performance based allocation system, which includes a 30 percent weighting for "governance."

3.3.4. North American Development Bank

The North American Development Bank (NADB) *requires* anti-bribery certifications from all applicants on projects in which it lends. NADB will decline or cancel financing if a project sponsor has engaged in corrupt activity in the bidding process.

3.3.5. European Bank for Reconstruction and Development

Unlike the other IFIs, the European Bank for Reconstruction and Development's (EBRD) Charter does not prohibit the bank from interfering in internal political affairs of the borrowing states. Like the other IFIs, the EBRD has amended its procurement guidelines to include fraud and anti-corruption language, and the EBRD actively participates in the MDB Working Group, which has produced the Master Bidding Document for the Procurement of Goods. In addition, the EBRD has also explicitly addressed the problem of corruption by developing draft *Guidelines for Sound Business Standards and Corporate Practices* for use by companies in the EBRD's region. According to EBRD sources, the EBRD performs routine due diligence on prospective private and public sector clients. The due diligence process verifies, amongst other things, that the procurement and contracting is carried out at arms length and with no conflict of interest.

3.3.6. African Development Bank

In 1999, the African Development Bank (AFDB) approved a formal policy on "good governance." The new policy focuses on accountability, transparency, and participation, as well

as legal and judicial reform, and gives increased attention to the roles of the productive private sector and of NGOs, particularly TI and the Global Coalition for Africa. The AFDB also participates with the World Bank and the other regional development banks in the MDB Working Group and now requires the use of Standard Bidding Documentation for international competitive bidding. In 1999, the AFDB board of directors approved explicit anti-fraud and anti-corruption amendments to the AFDB procurement rules. Borrowers are required to include provisions against corrupt practices in the bidding documents. Under the new procurement rules, the AFDB can reject award proposals if it is determined that the bidder engaged in corrupt practices, and the bank can cancel the portion of the loan allocated to a contract that was involved in corrupt or fraudulent practices. An explicit no-bribery undertaking can also be included on certain AFDB-financed contracts, but only at the request of the borrowing country and in conjunction with that country's anti-corruption program.

AFDB shareholders have also recently agreed to take governance and corruption issues into account as a basis for lending through the country performance assessment process. The new policy emphasis on governance is expected to link lending programs directly to borrowing countries' commitments to reform their governance system. The focus of the AFDB has been on support of civil service, specifically legal and judicial reform, to raise the level of human resources and technical know-how of procurement and law enforcement officials with the aim of improving detection and punishment of corrupt practices. Much of this work is still in the planning stages, and it remains to be seen how effectively the AFDB can link improvements in governance, i.e., success in fighting corruption, with its lending programs.

3.3.7. Inter-American Development Bank

The Inter-American Development Bank (IDB) program is identical to those adopted by the World Bank and other regional development banks. In January 1998, the IDB amended its procurement policies and procedures by adding specific anti-corruption language. The changes allow IDB to reject proposals and declare a firm ineligible for future contracts under IDB-financed projects and cancel a portion or all of a loan or grant in cases in which fraud and corruption are demonstrated. Similarly, the IDB can require that bid documents include provisions that allow the IDB to audit suppliers' and contractors' accounting records and financial statements pertaining to the execution of the contract. In 2001, the IDB's executive directors adopted an explicit strategy entitled *Strengthening a Systemic Framework Against Corruption for the IDB.*

3.4. Challenges faced by the Second International Anti-Corruption Movement

3.4.1. The Limitations of the Economic Approach

Anti-corruption activists and supporters acknowledge that one of the distinguishing features of the international anti-corruption movement has been its emphasis on the economic costs of corruption. In fact, some analysts have argued that economics should continue to be the focus of

the anti-corruption movement because the objectivity of the market can overcome the charges of moral or cultural imperialism that plague non-economic and rights-based initiatives. The emphasis on economic costs of corruption has been strategically useful, given the failure of the First International Anti-Corruption Movement, the prohibition against political interference contained in the IFI Charters, and the hostility of many in the developing world to the imposition of non-economic agendas on the IFIs and the WTO. However, there are limitations to this economic approach. Although early British economists, such as Adam Smith, emphasized the historical and humanistic component of economics, the movement of economics has been toward the sciences. The science that has been specifically emulated by the economists has been physics and not evolutionary biology. As a result, an economic approach is less flexible or accommodating of the diversity of human relationships. This limitation of economics has led to the re-emergence of the moral or ethical dimension of corruption. The proponents of the current anti-corruption movement have recently acknowledged the need for anti-corruption initiatives that accommodate cultural and societal diversity and emphasize ethical training through ethics workshops and the virtues approach to controlling corporate corruption. Indeed, as the critics of the anti-corruption movement have noted, the moral and ethical dimension of corruption give the movement its strength by making a corrupt act by definition a *morally* indefensible act. Notwithstanding its economic packaging, therefore, the current anti-corruption movement is also a *moral* crusade.

In addition, the emphasis on the economic dimension of corruption may result in a backlash against the anti-corruption movement should the market reforms advocated by the IFIs fail to bridge the North–South economic divide. At the same time, the failure of the anti-corruption movement to reduce incidences of corruption may contribute to the de-legitimization of the science of economics and its market principles.

3.4.2. The Problem of Gifts, Facilitating Payments, and Bribes

A fundamental problem faced by the current anti-corruption movement has been the difficulty in distinguishing between bribes, which are illegal, gifts, which may or may not be illegal; and facilitation payments, which are legal under the emerging international legal framework. As a result, corporations readily admit to making "facilitation payments" while insisting that they do not bribe.

The distinction between bribes, gifts, and facilitation payments was explored by the U.N. Working Group on Illicit Payments in its work from 1977 to 1980. The U.N. Working Group used the words "illicit payment" instead of "bribe" because the latter requires a "corrupt intent." The U.N. Working Group identified three types of payment: (1) expediting payment, (2) maintaining a favorable business climate payment, and (3) altering a decision payment. The third type of illicit payment is *clearly* prohibited and subject to criminal sanctions under the OECD Convention. The U.N. Working Group also concluded that the altering a decision payment "was a more serious problem than the expediting payment." However, the U.N. Working Group admitted that "expediting payments" are "far from harmless" if made by multinational corporations with deep pockets that are willing to pay far above what local

competitors can handle. Finally, the problem of "maintaining a favorable business climate payment" was not adequately addressed by the U.N. Working Group and continues to raise serious issues in gift-giving cultures. For example, the Chinese word "guanxi" translates as "interpersonal linkages with the implication of continued exchange of favors" and expresses a concept that is an integral part of all relationships (including business relationships) in Chinese society.

The allowance for facilitating or expediting payments under the OECD Convention, as well as the difficulty of distinguishing between the different types of illicit payments in concrete cases, poses serious practical problems for the anti-bribery legal framework and has led many analysts to conclude that the current international legal framework against bribery in international business will not end payments of bribes. Rather, the framework will only force companies to change the *manner* in which the bribes are paid.

3.4.3. Corruption, Anti-Corruption, the Rule of Geographical Morality, and Colonialism

The Second International Anti-Corruption Movement cannot escape the historical context within which it is placed. In the developed world, the challenge is to overcome the rule of geographical morality that has long been adhered to: the norm by which respectable citizens and corporations from the West have engaged in acts of corruption, including bribery and extortion, without attachment of any moral condemnation to those acts. In the developing world, the challenge is to overcome the legacy of the rule of geographical morality, the distrust it has engendered, and the linkage of anti-corruption with Westernization.

During the colonial period, it was common to equate corruption with the east or the orient and anti-corruption with the west or the occident. This view provided a moral justification for colonial rule and the rule of geographical morality. In the de-colonization period, reacting to the imposition of western values in the name of anti-corruption, a cultural relativist approach to corruption was adopted. This cultural approach ironically perpetuated the rule of geographical morality and allowed the TNCs to engage in acts of corruption, including bribery and kickbacks, by stating that they were merely respecting local business culture. The OECD Convention attempts to reject the legacy of the rule of geographical morality by requiring transnational corporations to adhere to the same codes of conduct in foreign countries as they do in their home countries. However, it is unclear to what extent OECD countries are willing to prosecute their highly respected local companies.

From a developing country perspective, the anti-corruption movement remains fundamentally suspect, even though few may dare to openly criticize it. Once again, the current anti-corruption movement is in danger of equating anti-corruption with Westernization. As part of their anti-corruption mandates, the IFIs are requiring political, legal, and economic reforms, all based on the western model of governance. Given the developing states' historical distrust of anti-corruption efforts, the IFI's efforts to force such reforms under the banner of anti-corruption may ultimately lead to the failure of the current movement.

4. Conclusion

An international legal framework to combat transnational corruption is emerging. It is still in its infancy, and much of it is still soft law. The emphasis of the current anti-corruption movement on the economic costs of corruption has been instrumental to its success. Important limitations to this approach exist, however, given the limitations of the science of economics and the fact that, at its core, any anti-corruption movement is a moral crusade. Finally, IFIs that have made corruption an economic problem are in danger of perpetuating a new rule of geographical morality under the banner of anti-corruption.

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