

# **CONTROLLING CORRUPTION IN INTERNATIONAL BUSINESS: THE INTERNATIONAL LEGAL FRAMEWORK**

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## **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.

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### **Biographical Sketch**

**Padideh Ala'i** is an Associate Professor of Law at American University Washington College of Law where she specializes in international trade law with particular emphasis on WTO/GATT law. A graduate of Harvard Law School, Professor Ala'i has practiced international trade and business law at Jones, Day, Reavis, & Pogue and Reichler, Milton, & Medel in Washington D.C. Prior to joining the faculty of American University, she represented developing country governments, including, Guyana, Nicaragua, Uganda, China and the Philippines, in negotiations with multinational corporations, foreign investors, and lending institutions, such as the World Bank, the Inter-American Development Bank, OPIC and U.S. Export/Import Bank, as well as in international arbitrations and before a WTO dispute settlement body. Similarly, Professor Ala'i has represented multinational corporations in international business transactions. Professor Ala'i has co-authored a book published by Research Center of the State Council of the People's Republic of China entitled: *Role of Law in a Market Economy: The US Legal System as a Case Study* (1993). Professor Ala'i's recent publications have concentrated on issues relating to the WTO and include “*Free Trade or Sustainable Development: An Analysis of the WTO Appellate Body's Shift to a more Balanced approach to Trade Liberalization*”, 14 *American University International Law Review* 4 (1999); “*Judicial Lobbying at the WTO: The Debate over the use of amicus curiae briefs and the U.S. Experience*”, 24 *Fordham Journal of International Law* (Nov-Dec. 2000); “*A Human Rights Critique of the WTO: Some Preliminary Observations*”, 33 *George Washington University International Law Review* 3 & 4 (2001).