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Anti-corruption - a signpost for transactional lawyers

Professor Michael Levi and Monty Raphael

Introduction

It is timely for the members of the International Bar Association and others, particularly those concerned with facilitating international business and contracting with governments, to focus on the anti-corruption measures that now hold centre stage in the policies of the international community. Let us begin by recalling the IBA Council's Madrid Resolution of 1996:

"Recalling:

1. the importance of promoting the rule of law,
2. the importance of promoting democracy and democratic institutions,
3. the importance of promoting free and open markets,
4. the importance of promoting the efficient and effective allocation of limited resources, and
5. the importance of promoting good international relations; and

Considering that the proliferation of corrupt practices in the conduct of international business;

1. poses a danger to the rule of law,
2. undermines democratic institutions,
3. compromises free and open markets,
4. causes the misallocation of resources, and
5. fosters strains in international relations.

Supports and endorses

1. efforts by the international community, by national governments, and by non-governmental organisations to entourage the adoption of effective legal measures, which are actively implemented and enforced, to deter corrupt practices in the conduct of international business;

2. the May 27, 1994 OECD Recommendation on Bribery in International Transactions;

3. the resolutions, recommendations, and reports on this subject of

- the United Nations and its affiliate organisations,
- the Organisation of American States,
- the Organisation of Economic Co-operation and Development,
- the European Parliament, Committee on Civil Liberties and Internal Affairs,
- the Council of Europe, Multidisciplinary Group on Corruption,
- the Communiqué of the 1980 Summit of Industrialised Nations,
- the International Chamber of Commerce,
- The Transatlantic Business Dialogue, and
- the American Bar Association;
As all qualified by the undermentioned Recommendations,

Suggest and recommends to its member organisations that they adopt this Resolution; that they enter into a dialogue with their national governments to deter corrupt practices in the conduct of international business by adopting, implementing, and enforcing legal measures that deter such practices; and they that enter into a dialogue too with their national governments to persuade them to initiate, support, and facilitate efforts by international institutions to deter corrupt practices in the conduct of international business, and

Recommends the adoption by national governments of legislative, executive, and other measures that:

1. deter corrupt practices in the conduct of international business;
2. establish as offences under domestic law acts or omissions undertaken to make or to conceal corrupt payments in the conduct of international business;
3. facilitate international co-operation for the purpose of deterring corrupt practices in the conduct of international business;
4. deny the tax deductibility of bribes to foreign officials in the conduct of international business."

The background paper to the resolution relied heavily on the report of Paulo Bernasconi to the Council of Europe's multidisciplinary group on corruption which, in turn, produced the 1998 Convention. That paper noted that there were jurisprudential lacunae in most countries which, up to that time, had omitted to penalise the corruption of foreign public officials or officials of international organisations. Where the penal provisions were in place, few, if any, mutual assistance resources were available to make those provisions effective. The goal should be the punishment of those acts of corruption irrespective of the place where they were committed and the nationality or residence of the recipient of the bribe.

Although one must look to the United States’ experience in the early 1970s for the genesis of the modern concern with the incidence and effect of corrupt practices, its roots lie much further back in time.

It was reported by Associated Press in December 1997 that archeologists in Syria had unearthed an administrative centre of the Assyrian civilization containing evidence that bribery was prevalent even 3,400 years ago. An interior minister's special archive listed data about employees accepting bribes, the names of senior officials and even the name of an Assyrian princess. Vito Tanzi, in the introduction to his valuable monograph Corruption Around The World, published by the International Monetary Fund, recalls that 2,000 years ago Kautilya, the Prime Minister of an Indian Kingdom had already written a book Arthashastra, discussing corruption. Seven centuries ago, he says, Dante placed bribers in the deepest parts of hell. 200 years ago the American constitution made bribery and treason the two explicitly mentioned crimes that could justify the impeachment of a United States President.

Although few can doubt that the systematic corruption of foreign public officials proceeded without interruption in the intervening centuries, there was little national, or indeed international initiative in this area until the 1970s. Tanzi attributes this inertia partly to the advantage of being on the right side in the Cold War if you wanted to have a blind eye turned to the corruption of your ruler or his inner circle, and also, possibly, to the fact that donor countries were not keen to advertise the fact that their expensive aid programmes were going into the pockets of petty dictators.

Whatever the reason, it was not until the mid-1970s that the media started to publicise the occurrence of corruption and that international organisations appear to have noticed, then started to read. 1974 sees the establishment in Hong Kong of the Independent Commission Against Corruption and two years later the General Assembly pass a resolution condemning corrupt practices in international commerce and calling for unilateral and multilateral action.

The United Nations then called on its economic and social council "ECOSOC", and here one is again indebted to Paulo Bernasconi for his erudite analysis of the history of international reaction, to establish a specific policy on challenging corruption. ECOSOC chose to draft an international agreement which could be used to prevent illicit payments and this was ready by 1979, but was entirely inoperative because little or nothing was done to see it implemented, or indeed to provide any kind of sanction or machinery for its implementation. At the Venice Economic Summit in July 1980, as a result of pressure from the United States, which has been sustained ever since, the following communiqué was announced.

"As a further step in strengthening the international trading system, we commit our Governments to work in the United Nations towards an agreement to prohibit illicit payments to foreign government officials in international business transactions. If that effort falters, we will seek to conclude an agreement among our countries, but open
In parallel with work on the agreement was the drafting of a Code of Conduct for transnational corporations, which was being prepared under the auspices of the United Nations. This was a self-regulating document urging corporations to refrain from using subversive activities to interfere in the internal affairs of those countries, including offering bribes to influence a public official's duties and to maintain accurate records of payments. Like the draft United Nations agreement, this code was largely a dead letter.

The Organisation for Economic Corporation and Development (OECD) which has done so much to help its 29 Member States to reach agreement on a decisive international instrument, made its first initiative back in 1976. The organisation issued a declaration and decision on international investment and multinational enterprises which stated that enterprises should not be expected to render improper benefits to holders of public office. Unless involvement in local political activities was legal, enterprises were to avoid such activities—including making contributions to political candidates or organisations. The declaration also contained disclosure standards similar to the internal control and accounting record provisions in what was later to become the Foreign Corrupt Practices Act (FCPA) of the United States. Again, little followed from this commendable statement of principle, because there was no enforcement mechanism for any of the countries that signed up.

A year later, 1977, the international Chamber of Commerce adopted rules of conduct to confront extortion and bribery. These rules prohibited transnational corporations from paying bribes directly or indirectly to secure business. Again, while worthy in intent, there was no way by which these rules could be imposed upon any party or government.

Two questions are posed by this brief chronology. First, why did it take major scandals in the United States to prompt the world's most powerful trading power to legislate, and secondly, why, after the FCPA became a familiar touchstone of commercial compliance in the United States, did it take Western Europe and the other major trading powers another two decades to begin to catch up?

Before 1977, United States law did not prohibit American companies from paying bribes to foreign government officials. The report of the Watergate special prosecutor triggered an SEC inquiry which revealed that corporations were almost routinely engaging in questionable practices in overseas countries. They invariably covered up by indulging in false accounting.

The SEC then began a determined investigation of United States companies bribery activities, aided by a policy of encouraging voluntary disclosure. Astonishingly, by the end of 1976, more than 450 companies had voluntarily admitted that together they had made over U.S.$400 million in questionable payments. Of those 450 companies, 115 were among the top 500 United States public corporations. Delinquencies revealed ranged from bribery of high foreign officials to show favour, to the making of so-called facilitation or grease payments. The birth of the FCPA is particularly linked to the "Lockheed" scandal. The Lockheed corporation reportedly paid U.S.$22 million to foreign public officials and its activities extended to allegations against Prince Bernhardt of the Netherlands. He was forced to resign from his official positions after allegedly receiving U.S.$1 million. The Italian Government of the day was shaken by claims that some of its members had received payments from a number of major United States corporations.

The SEC had uncovered what must be assumed to have been long-standing practices by major United States corporations and others, and although it had demonstrated its ability to root out the facts, it had insufficient powers to deal with overseas activities, nor could it investigate them or prevent future delinquency in that area.

Critics of the FCTA would come to sneer at what they saw as its overblown moralism, but few would now quarrel with the sentiments of Senator Proxmire that:

inefficient to compete in terms of price, quality, or service, or too lazy to engage in honest salesmanship, or too intent on unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company's image, lead to costly law suite, cause the
cancellation of contracts and result in the appropriation of valuable assets overseas."

Congress resolved that only criminalisation would do, while recognising that the proposed act would not cover all reprehensible overseas payments. Significantly, for what was later to be set out in the OECD Convention, and the consequent amendment to the FCPA, the 1997 Act was not going to cover payments by foreign national acting solely on behalf of foreign subsidiaries where there was no element of interstate commerce or the use of the United States mails, and where the United States regulated company could not be proved to have had knowledge. Nor indeed, would it cover non-United States companies.

Donald R. Cruver, to whose Complying With The FCPA (1994, American Bar Association) the authors are indebted, in reviewing compliance with the Act, was able to write only five years ago:

"It has long been apparent that the methods of doing business in the United States and the strictures thereon, may be completely alien to, and inconsistent with, that of many foreign countries. In those countries the payment of bribes and other forms of foreign corrupt practices are normal customary and acceptable business practices."

He then lists 28 countries which he describes as "high risk".

When considering the two decades after the FCPA and the resistance to its implementation as an international model, one has only to consider Cruver's description of normal customary and acceptable to discover one of the causes of the inertia. Why try to alter conduct by the receivers by punishing the suppliers? Professor Mark Pieth, one of the academic architects of the OECD Convention, believes that it was not until the opening up of the East and the access to new markets, as well as the new and rapid technological development, especially in telecommunications, that the extent of the globalisation of the world economy become apparent to the European body politic. European companies, he says, had now to contend with dictators like Mobutu and Suharto as barriers to accessing two emerging markets. Perhaps more significantly, he points to the development of a broad coalition of international organisations, governments, development banks, the business community, trade unions and NGOs. Most spectacular he says "is the rapid development of inter-governmental programmes in the second half of the '90s" referring to the OECD Convention of 1997, the Council of Europe Convention of 1998 and the four Treaties and Protocols of the European Union.

The authors would also point to the rapid development in the last decade of international corporation in the field of money laundering and with it the construction of inter-governmental bodies like the Financial Action Task Force (hereafter, FATF) and the creation of Europol and other activities in which states have come together to combat serious organised crime. This willingness to adhere to internationally accepted norms and to join together to combat common threats has inevitably led to the identification of and translation into action of that moralism which informed Senator Proxmire and his colleagues, and which for a long time was either ignored or condemned as pious naïveté.

It has been a long walk from 1977 to the present day because, as one recent commentator observed, the unilateral export of morality is rarely effective. One can easily understand the enthusiasm of the United States for worldwide initiatives when one considers that between 1994 and April 1998 the United States Government received 239 complaints of lost contracts due to the bribery of foreign public officials by competitors, totaling some U.S.$108 billion. Critics of the FCPA point to the fact that these have been little more than 30 prosecutions in two decades, but these can be little doubt that its deterrent effect has been huge and that these will be a similar reaction to the changes in international measures that are presently taking place in international measures against corruption elsewhere in the world.

Changes in international measures against corruption

All European countries are in the process of concurrently preparing legislation to ratify and implement between two and six instruments against corruption. These constitute the OECD Recommendation and Convention of 1997 (which came into force in February 1999), the Council of Europe Convention of 1998 and - for those who are members of the European Union - the four relevant Treaties and Protocols of the European Union on the protection of financial interests of the community. As we write, changes to criminal legislation are uppermost, but countries are rapidly moving into new areas of administrative and civil preventive and repressive measures on the one hand, and, on the other hand, into the entirely new sphere of private to private corruption in commercial transactions. As Professor Mark Pieth acutely observed:

"The question is no longer, should action be taken, but how can one co-ordinate this inflation of prescriptive
material and control the adequacy of the implementing texts: Do concepts fit into each other or are we facing competitive action by agencies and possible legal chaos?*

We shall concentrate in this article on the instruments of the OECD, the Council of Europe and the European Union, and, to a more limited extent, the OAS and the United Nations, before going on to discuss some national legislative changes that are in train. Readers should also note the work done by the Multilateral Development Banks and the International Chamber of Commerce.

1. OECD

(a) The approach of the OECD is towards supply-side controls—aimed at reducing the influx of corrupt payments into relevant markets by punishing the active bribe-givers and their accomplices as well as by establishing a preventive framework. It makes no special effort to deal with the demand-side of corruption, and it applies also to the bribery of officials of non-participant countries. On the other hand the OECD avoids violation of legitimate areas of national sovereignty, so the behaviour of foreign officials itself is not a topic for the Convention.

The OECD concept is clearly influenced by the fair trade approach taken by the United States since 1977, not least in having an extra-territorial reach. It does, however, not merely replicate the FCPA which, as we shall see later, has itself had to be amended substantially.

Consistent with the principal rationale of creating a level playing field of commerce, it, however, attempts a consistent global definition of the public official. Having said this, it becomes evident that the OECD so far is limited to covering active corruption of foreign public officials. Private to private corruption is under examination in a further stage of its work, but it is perceived as a quite different problem. Finally, the measures are restricted to "serious" or obvious corruption (in the sense of furthering illegal behaviour), excluding mere facilitation or grease payments. The OECD limits itself to economically relevant corruption.

(b) Institutionally the OECD Initiative is based on two main documents: The Revised Recommendation of May 1997, which contains those preventive and repressive measures, both criminal and non-criminal in nature; and the Convention of November 1997, which picks up the criminalisation issue and puts it into a legally binding framework. The entire system depends on a strict political framework, a timed implementation schedule, and a systematic and serious evaluation of implementation, legislation and practice as well as a procedure for advising and extending good practice.

We shall now turn to efforts to deal with corruption by the two principal European bodies, the European Union and the broader Council of Europe.

2. European Union

(a) The Community itself has no powers to enact criminal law directly. According to the Maastricht Treaty, it is developing its co-ordinated legislation in justice and home affairs in a system of international treaties which, however, have to be adopted and then ratified and implemented nationally (under the Third Pillar). The issue of corruption consequently was approached by the European Union indirectly.

(b) The 1995 Treaty on the Protection of Financial Interests of the Community of 1995 is the basis for a first Protocol of 1996 which, for the first time in Europe, focused on criminalisation of transnational bribery. It is understandably limited to bribery endangering the Community's financial interests and to the geographical area of the Union.

(c) Protocol has in turn been used to drop the requirement of endangering the community's interests, in a 1997 Convention on Bribery which was aimed, inter alia, at creating criminal liability for European Commission staff and for others whose legal responsibility was ambiguous under merely national legislation. These instruments are currently being ratified and implemented and have an obvious political resonance in the current Euro-climate.
(d) The European Commission is trying to develop supranational law against corruption under the First Pillar provisions of core Community law, side-stepping its Jack of legal competence in criminal law matters by considering FCPA and OECD issues such as tax treatment of bribes and audit rules. It also intends to regulate private to private corruption in a commercial context, using the same sort of logic as in its Money-Laundering Directive of 1991 of creating a "level playing field".

(e) Finally, there are initiatives to unify criminal law, including transnational and supranational bribery in the context of the European Union, in the form of a Corpus Juris, which has met great support from the European Parliament (if little support in the U.K. Parliament). Theoretically, it could eventually develop into a unified core-criminal code for the European Union, permitting a European supra-national prosecutor to investigate cases or require their investigation or prosecution in the growing number of member countries, initially on matters restricted to frauds against the financial interest of the European Community but thereafter, who knows?

3. Council of Europe

By way of contrast, the approach of the Council of Europe followed up on an initiative by Ministers of Justice of 1994, and in 1997, Heads of State adopted 20 "Guiding Principles". The Council of Europe has also prepared a Criminal Law Convention, adopted in November 1998 by the Council of Ministers and which, like OECD and the European Union, contains provisions for implementation review. Unlike the OECD, it adopts a very broad notion of corruption, including active and passive domestic bribery of all sorts of officials, transnational bribes and the bribery of private persons in a commercial context as well as "trading in influence" (see below). This connects with previous work of the Council of Europe on mutual legal assistance and extradition, as well as work during the 1990s on money laundering and on confiscation of the proceeds of crime. Apart from this broad notion of corruption, a striking difference from the OECD approach to transnational bribery is its reference (as in the E.U. Convention) back to the law of the victim country for definitions of who constitutes an official. The Council of Europe’s formulations are very broad and are combined with equally extensive opt-out clauses (reservations), though the latter were fewer than initially envisaged. By contrast with what Pieth has termed "the focussed and collective unilateralism of OECD", the Council of Europe Convention creates a pattern for legal harmonisation of rules addressing both domestic and transnational corruption which, if implemented, will enable more efficient mutual legal assistance within its geographical reach.

The Criminal Law Convention on corruption. Adopted by the Committee of Ministers on November 4, 1998 and opened or signature on January 27, 1999, this Convention forms part of follow-up action on the Summit of Council of Europe Heads of State and Government and helps to implement the Council's Programme of Action against corruption.

The Criminal Law Convention on Corruption - which is open for accession by non-Member States-is an ambitious instrument aiming at the co-ordinated criminalisation of a large number of corrupt practices. It also provides for complementary criminal law measures and for improved international co-operation, in the prosecution of corruption offences. Its implementation will be monitored by the "Group of States against Corruption-GRECO", which started functioning on May 1, 1999.

The Convention is wide-ranging in scope, and complements existing legal instruments of the European Union and the OECD. It covers the following forms of corrupt behaviour normally considered as specific types of corruption:

- active and passive bribery of domestic and foreign public officials;
- active and passive bribery of national and foreign parliamentarians;
- active and passive bribery of members of international parliamentary assemblies;
- active and passive bribery in the private sector;
- active and passive bribery of international civil servants;
- active and passive bribery of domestic, foreign and international judges and officials of international courts;
- active and passive trading in influence;
- money-laundering of process from corruption offences;
- accounting offences (invoices, accounting documents, etc.) connected with corruption offences.

States are required to provide for "effective and dissuasive sanctions and measures", including deprivation of liberty that can lead to extradition. Legal entities will also be liable for offences committed to benefit them, and will be subject to effective criminal or non-criminal sanctions, including monetary sanctions.

The Convention also incorporates provisions concerning aiding and abetting, immunity, criteria for determining the
jurisdiction of States, liability of legal persons, the setting up of specialised anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities, gathering of evidence and confiscation of proceeds of corruption.

It provides for enhanced international co-operation (mutual assistance, extradition and the provision of information) in the investigation and prosecution of corruption offences.

It will come into force when it has been ratified by 14 states. As soon as they ratify it, states which do not already belong to GRECO will automatically become members.

To date the Convention has been signed by Albania, Belgium, Bulgaria, Cyprus, Denmark, Finland, Georgia, Germany, Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Norway, Poland, Romania, Russia, Slovakia, Sweden, Ukraine and the United Kingdom. No state has so far ratified it.

The draft Civil Law Convention on Corruption. In March 1999, this Convention was sent by the Council of Europe Committee of Ministers to the Parliamentary Assembly for debate and for an opinion, to be submitted within three months.

This is the first attempt to lay down common principles and rules at international level in the field of civil law and corruption. It requires states to make provision in their domestic law for effective remedies for people who have been harmed by corruption.

Inter alia, the provisions of the draft Convention entail:

- compensation for damage: the draft Convention provides for the right to bring civil proceedings in order to obtain compensation for all the damage suffered - pecuniary damage, loss of earnings and non-pecuniary damage;

- the liability of individuals who have engaged in or authorised corruption and of the state itself - though the draft Convention leaves it to each state to determine the conditions under which it may be held liable;

- contributory negligence: compensation may be reduced or refused if the behaviour of the persons who have suffered damage has aggravated that damage;

- limitation periods: the draft Convention provides that it must be possible to bring civil proceedings to obtain compensation at least three years after corruption or damage has been ascertained and the person responsible identified; proceedings may not, however, be brought more than 10 years after corruption has taken place or damage has been suffered;

- employee protection: the states concerned must take steps to ensure that employees who, in good faith, report corrupt practices and behaviour are not victimised in any way.

The draft Convention also contains provisions concerning company annual accounts, the acquisition of evidence, interim measures, international co-operation and monitoring. The GRECO will be responsible for monitoring the honouring of undertakings given by the states under this Convention.

Other initiatives. There are two further international initiatives that also seek to establish minimum standards for Member States:

(i) The OAS Convention. The aims of the OAS Convention come rather close to those of the Council of Europe, even if the method applied is somewhat different. The Inter-American Convention Against Corruption of 1996 also applies a broad concept of bribery, broadening traditional approaches by including "illicit enrichment", a kind of criminally-sanctioned reversal of the burden of proof of explanation for sudden increases in the assets of officials. This instrument combines the potential for mutual legal assistance and extradition, with the conventional United States agenda in criminalising active transnational commercial bribery. To date, there are no mutual evaluation or other monitoring
mechanisms for implementation, but the OAS is broadening its focus to include non-criminal measures.

Among its preventative provisions are:

(a) "Instruction to government personnel to ensure proper understanding of their responsibilities and the ethical rules governing their activities.

(b) Systems for disclosing the income, assets and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such disclosures public.

(c) Systems of government hiring and procurement of goods and services that assure the openness, equity and efficiency of such systems.

(d) Government revenue collection and control systems that deter corruption.

(e) Laws that deny favorable tax treatment for any individual or corporation for expenditures made in violation of the anticorruption laws of the states' Parties.

(f) Systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal systems.

(g) Oversight bodies with a view to implementing modern mechanisms for preventing, detecting, punishing and eradicating corrupt acts.

(h) Deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.

(i) Mechanisms to encourage participation by civil society and non-governmental organisations in efforts to prevent corruption."

(ii) The United Nations. Finally, within the broadest geographic scope, the initiatives of the United Nations need to be mentioned. The United Nations passed two General Assembly Resolutions in 1996, essentially welcoming existing instruments and seeking to integrate them with work in progress on organised crime. Currently ECOSOC is targeting the abuse of offshore havens; including their use for laundering the proceeds of bribery.

The criminalisation of transnational bribery: some key issues

Approaches to the criminalisation issue

As Professor Pieth has observed, the wording of the criminalisation Convention of the OECD is not necessarily precise enough to meet the standards required for a self-executing international text. The aim has been from the outset - and this is highlighted in Commentary 2 of the OECD Convention - to establish functional equivalence. The Convention does not attempt substantive unification, and countries have the choice of means to achieve the substantive objectives, but in a broad sense, the outcomes are required to be comparable. The Council of Europe and the European Union Conventions, by contrast, are far more oriented than the OECD towards actual harmonisation or even unification of criminal law amongst countries with similar legal systems and standards (though common law and civil code countries have their conflicts here, as in many other spheres, especially in relation to procedures).

Definition of public official

As we have noted earlier, the Convention of the European Union and the Council of Europe refer back to the "victim-country" for their definition of "public official", while the OECD has a universal definition (explained in Article 1, s.4 and Commentary 12), disregarding whether - as a matter of national law - people are state employees or are in the private
sector. This may seem to broaden the definition, but it may also make it narrower, as where a business is state-run for historic reasons but is in full, non-preferential competition with the private sector, making it private sector on OECD criteria. The instruments limit themselves to prohibiting the corruption of public officials. The OECD Convention did not include payments to foreign political parties, officials of foreign political parties and candidates for foreign political office. In Convention Commentary 16 it was noted that political party officials in single party states do, in some circumstances, hold public authority, and through such de facto performance of a public function may be considered to be public officials, and covered by the Convention. However, there is a risk that if corruptees (including demanders of bribes) shift payment from themselves personally to their political parties, they may escape liability. Given slush funds, this may be tolerable and, in any event, we note that many of the Japanese (and even recent U.S. allegations) have involved corruption done substantially, if not entirely "for the party".

Definition of the offence

A wider spectrum of differences in implementation is to be expected regarding the definition of the actual offence. The bottom line is signalled in Commentary 3: to prevent lengthy arguments about domestic definitions of the duty of officials, the Convention states that partiality in the use of discretion is regarded universally as a breach of duty (e.g. auctions of contracts amongst valid bidders for private benefit).

Responsibility of legal persons and sanctions against companies

A brief look at all Conventions shows that they contain the principle of corporate liability. However, as OECD articles 2 and 3 and Commentary 20 indicate, the sanctions could also be administrative in nature, side-stepping problems in those countries that cannot contemplate corporate criminal liability even in theory. The minimum requirement, however, is a financial sanction meeting the standard of an "effective, proportionate and dissuasive" penalty. A similar approach may be found both in the Council of Europe draft and the European Union instruments. In 1997, the European Union enacted a Second Protocol to the Convention of Protection of Financial Interests, 1995, which is also applicable to those forms of corruption that endanger the European Union budget. This instrument talks of vicarious responsibility and of necessary measures, but evades direct reference to criminal responsibility or punishment (Arts 3 and 4, Protocol II, 1997). The detailed texts on the responsibility of legal persons in the Council of Europe Criminal Law Convention (Arts 18/19) explicitly allow for non-penal sanctions.

The OECD concept of "functional equivalence" enables the forfeiture of bribes and benefits by means of "monetary sanctions of comparable effect", avoiding the necessity of working out precise proceeds of bribery, substituting instead culpability-based penalties. (There is no equivalent elsewhere of the U.S. Sentencing Guidelines.) However, this obviously gives rise to evaluative problems when analysing regime equivalence, though this is more a problem for regulators than it is for corporations or their lawyers. (It may give rise to interesting possibilities of court debates on comparative sentencing theory, at least in those jurisdictions that consider themselves high on the sentencing scale: this is important also for the collateral commercial reputational effects of sanctions, independent of conviction. 13

Jurisdiction

One of the main concerns has been to reduce the loopholes between country jurisdictions in transnational corruption. Territoriality is to be interpreted broadly, as in the recent (June 1999) coming into force of the expanded jurisdiction of the United Kingdom Criminal Justice Act 1993. The OECD requires extradition of nationals, though some countries may have constitutional difficulties in meeting this.

Difficulties are to be expected where foreign subsidiaries through foreign operators engage in bribery. The parent company and its officials can be held responsible where they are in any way linked to the crime as accomplices (Art. 1, section 2 OECD Convention), including through authorisation. Where they are (or can plausibly argue that they are) unaware of the bribes, the host-state of the parent company may have jurisdiction on the basis of nationality or, depending upon the facts of the case and upon the (variable) existence of corporate liability, for negligent lack of control. 14

Enforcement
The OECD-Convention respects the established domestic rules of prosecution (including traditional rules on prosecutorial discretion). However, Article 5 forbids those countries that have an "opportunity", rather than "legality" principle of prosecution to exercise their discretion not to prosecute on the grounds (i) of national economic interest, (ii) of the potential effect upon relations with another state or (iii) of the identity of the natural or legal persons involved. Thus, overseas capital lending projects or the arms trade would find it hard to claim exemption.

Money laundering and accounting offences

The Conventions primarily deal with criminalisation of the bribery of foreign public officials. However, they also contain ancillary provisions on money laundering and falsified accounts. Frequently the significance of these rules is underestimated. Widespread, long-term corruption requires special management of funds, which have to be readily available in advance. Given modern anti-laundering measures, large cash payments may have become problematic, so legitimate-looking financial transfers have to be made, especially on the recipient side. The OECD currently refers only to the national treatment of bribery and proceeds, and this may have to be extended in future.

One legal issue that remains to be resolved is whether or not gains generated through corruption-affected contracts are "proceeds of crime", to be dealt with under money-laundering and asset forfeiture penalties. In particular, what would happen if the corporation (or personal defendant) argued that the bribe was merely incidental to the award of the contract? This is not an issue that commonly arises in relation to "normal" crimes of drugs trafficking, street extortion and fraud. In systems in which proceeds rather than simply profit from crime are forfeitable, this may mean that no legitimate as well as no illegal expenses can be deducted from proceeds for asset confiscation purposes.

Changes in legislation pursuant to the OECD Convention

There have been substantial changes in the wake of the OECD Convention which, as we write, will be expected to accelerate. We anticipate that some states (including, perhaps, the United Kingdom) who consider themselves to be compliant at present, will find that they are not, as the mutual evaluation regime begins to bite. In particular, even the United States - the trailblazer in this arena - will come under criticism for the modesty of its implementation and prosecution levels (with approximately 30 prosecutions since 1979). It will not be sufficient for countries to claim that they do not have enough resources to prosecute or to regulate more: the question will be posed why they do not allocate more resources. Notwithstanding these prefatory remarks, we discuss below the implementation of the OECD Convention in national law, up to the time of writing.

Argentina

The text of the Convention in Spanish has been finalised. Ministerial consultations are underway on the amendments to the Penal Code. The draft bills to ratify and implement the Convention are expected to be presented to Parliament in September.

Australia

An exposure draft of legislation to criminalise bribery of foreign public officials in international business transactions was tabled in the Australian Federal Parliament on March 3, 1998. The legislation and the Convention were referred to the Joint Standing Committee on Treaties for examination in accordance with the practice followed in this country for the Parliamentary scrutiny of all treaties prior to signature. The Committee tabled its Report on July 2, 1998. Australia signed the Convention on December 7, 1998.

The Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 was passed and received Royal Assent on June 17, 1999. The legislation will come into effect by December 17, 1999 at the latest.

Austria

Legislation implementing the Convention has been in force in Austria since October 1, 1998. After adoption by the Second Chamber, the instruments of ratification were deposited with OECD on May 20, 1999.
Belgium

Ratification and implementation of the Convention involve two different steps. The Council of Ministers sent the draft bill to the State Council for advice; and the ratification bill received Royal Assent on June 9, 1999.

With respect to revision of penal law to comply with the obligations under the Convention, the legislative proposal was passed by Parliament at the beginning of February 1999, was published on March 23 and entered into force on April 3.

Brazil

A draft text has been sent to the Brazilian Congress by the executive branch of Government and is under examination by the Chamber of Deputies. The ratification process should be completed by the end of 1999. Internally, bribery falls under a law on crimes related to money laundering and use of financial system for illicit purpose which was passed by Congress in March 1998. The law establishes, inter alia, the Council on Financial Activities Control.

Bulgaria

Bulgaria ratified the Convention on June 3, 1998 and deposited its instrument of ratification on December 22, 1998. A Law on Amendment to the Penal Code was passed by Parliament on January 15, 1999 and came into force on January 29, 1999. An explanation of the term of "foreign public official", in line with the terms of the Convention, has been incorporated into Article 93 of the Penal Code and a new paragraph 2 to Article 304 of the Code has been inserted. Since July 6, 1999 the text has been part of domestic legislation.

Canada

The new legislation was adopted by the Senate on December 3, 1998 and by the House on December 7, 1999 and received Royal Assent on December 10, 1998. The Convention was ratified on December 17, 1998. The law came into force at the same time as the Convention on February 14, 1999.

Chile

The draft law for ratification and implementation of the Convention was presented to the Chamber of Deputies on January 5, 1999 in order to inform the commission for external relations. It is expected that the Bill will be approved by Parliament by November 1999, before the Presidential elections.

Czech Republic

The draft amendment to the Criminal Code was approved by the new Parliament formed after the June 1998 legislative elections during its first reading. The draft amendment to the Criminal Code was adopted by Parliament and came into force on July 1, 1999. The draft ratification law is expected to be approved by Autumn 1999.

Denmark

Denmark has prepared draft legislation on both ratification and implementation of the Convention. The Government submitted this to Parliament in spring 1999. The parliamentary process may take between three and seven months before the bill is adopted and comes into force.

Finland


France
The Council of Ministers (Conseil des Ministres) has approved the drafts on ratification and implementing legislation, after consideration by the State Council and submitted them to Parliament. The ratification law was adopted on May 25, 1999 and the implementing legislation will be re-submitted to Parliament after the summer.

Germany


Greece

The Convention was ratified by Parliament on November 5, 1998. The implementing legislation was passed by Parliament the same day. Greece deposited its instrument of ratification on February 5, 1999.

Hungary

The texts of ratification of the Convention and implementing legislation (the Amendment of the Criminal Code) were submitted to Parliament in May 1998. The texts for ratification was approved on December 4, 1998 and Hungary deposited its instrument of ratification on December 4, 1998. The Amendment of the Criminal Code was passed in December 1998 and came into force on March 1, 1999.

Iceland

The Icelandic government deposited its instrument of ratification on August 17, 1998 and the implementing legislation was passed by Parliament on December 22, 1998.

Ireland

The Government has approved the drafting of legislation to enable ratification of the OECD Convention on Bribery. The law, in large measure, meets the requirements of the Convention. However, there are one or two areas where additional legislation has been considered necessary and these issues are being addressed in the legislative proposals. The bill is expected to be published in late 1999.

Italy

The Italian Chamber of Deputies approved on March 24, 1999 the bill for the ratification and enforcement of the OECD Convention, together with various European Union instruments against fraud and corruption. The bill is now pending approval before the Senate which is expected to pass it in the next weeks. The Chamber has amended the bill reinforcing the framework for imposing non-criminal sanctions against legal persons under Article 3.2 of the Convention, a new feature in the Italian legal system. The Government has been delegated to introduce these sanctions - including fines up to Euro 1.5 million - within six months from the final approval of the bill.

Japan


Korea

The Korean Government formally submitted the bill to ratify the Convention along with its implementing legislation to the

**Luxembourg**

The draft bill to ratify and implement the Convention is under review by the Conseil de l'Etat. It is expected that the legislative procedure will be completed by the end of 1999 or early 2000.

**Mexico**

A Spanish language version of the Convention was submitted to the Senate for ratification as a treaty on November 5, 1998, and was approved April 22, 1999. The draft implementing legislation was introduced in the Senate, as part of a comprehensive package of reforms to the criminal code in Mexico, on November 17, 1998. The instrument of ratification was deposited with the OECD on May 27, 1999.

**Netherlands**

Bills to ratify and implement the Convention were sent to parliament in April 1999. At the same time three European Union treaties were submitted. The Convention needs to be ratified by the Kingdom of the Netherlands which includes the Netherlands Antilles and Aruba. Both chambers of parliament will have to approve the bills.

**New Zealand**

The New Zealand Government has approved the policy to amend New Zealand law to enable it to ratify the Convention. Drafting instructions for the necessary legislative amendments have been issued and passage of the requisite implementing legislation and ratification is expected by the end of 1999.

**Norway**

After consultation with the relevant private and public authorities, at the end of May 1998, the Government submitted to Parliament the bills to ratify and implement the Convention. The amendments to the Penal Code were passed on October 27, 1998, and came into force on January 1, 1999. The instrument of ratification was deposited on December 18, 1998.

**Poland**

The Ministry of Justice has finalised a draft implementing law. Inter-ministerial consultations have been held since February 15, 1999. The whole procedure for ratification and implementation is estimated to be finalised before the end of 1999.

**Portugal**

The ratification procedure has nearly been completed, the Convention having been submitted to Parliament and being currently there under review by the specialised committees. The Portuguese competent authorities within the Ministry of Justice are finalising the draft legislation needed to alter the criminal legislation currently in force in order to implement the OECD Convention.

**Slovak Republic**

Slovak Parliament approved the ratification of the Convention on February 11, 1999. The implementing legislation (Criminal Code amendment and Banking Act amendment implementing Article 9 of the Convention) is under discussion by Parliament. The draft of the Criminal Code amendment also includes provisions implementing the Criminal Law Convention of the Council of Europe. It is expected that both amendments will be approved by Parliament in September.
1999 at the latest and the deposit of the instrument of ratification will take place at about the same time. The entire process of ratification and implementation should be complete by October 1999.

Spain

The draft legislation for ratification, as approved by the Council of Ministers, was submitted to Parliament Autumn 1998. Since then, the Parliament has given permission to the Government to ratify the Convention. As to implementing legislation, a draft text has been approved by the Council of Ministers after being reviewed by the General Law Council on January 29, 1999. The text of the implementing legislation has been sent to Parliament and the bill will be examined in Autumn 1999.

Sweden

The bill embracing the necessary amendments of Swedish legislation in order to be able to ratify and implement the Convention was passed by Parliament on March 25, 1999. The instrument of ratification was deposited with the OECD on June 7, 1999. The implementing legislation entered into force on July 1, 1999.

Switzerland

The draft law, based on the results of consultations among cantons and other interested parties, has been signed by the Minister of Justice and was submitted to Parliament on April 19, 1999. Parliament debated the draft in Summer 1999. The Convention will be ratified as soon as the bill enters into force, probably by the end of 1999.

Turkey

The draft bill to ratify the Convention has been submitted to Parliament. The interministerial consultations on the text to implement the Convention have been completed. A bill is now being drafted.

United Kingdom

The United Kingdom deposited its instrument of ratification on December 14, 1998. Although limited internal consultations have confirmed that the scope of existing laws allows the United Kingdom to meet the requirements of the Convention, the United Kingdom is currently considering the formulation of a new public statute on corruption, in the light of a report from the Law Commission and responses thereto. It is hoped that a public discussion document - a "Green Paper" - on proposals for new legislation on corruption will be published before the end of 1999.

Steps are being taken to bring the Channel Isles and the Isle of Man within the scope of the Convention. Whilst these territories have indicated their willingness to do this, they need to enact new legislation to ensure their domestic laws match the provisions of the Convention. In addition, a process has begun which is intended to bring the United Kingdom's Overseas Territories under the scope of the Convention. This will involve a bilateral consultative process with each Territory. The intention is for these Territories to adhere to the Convention via the United Kingdom's own ratification. The Territories will not adhere individually. In relation to the Overseas Territories, a White Paper entitled "Partnership for Progress" was published on March 17, 1999. One element of this refers to the requirement for the Overseas Territories to match the best international standards in financial regulations and stipulates that, by the end of 1999,

they will be required to meet, in full, international standards on money laundering, transparency and co-operation with law enforcement authorities and independent financial regulations.

United States

On July 31, 1998 the Senate approved both the Convention and the implementing legislation. Congress completed action on implementing legislation in October 1998 and on November 10, 1998 both the ratification instrument and implementing legislation, the International Anti-Bribery and Fair Competition Act 1998 - discussed below - were signed by the President.
The United States deposited its instrument of ratification with the OECD on December 8, 1998.

For reasons of space, we shall deal principally with some key features of the law as amended, rather than with the entirety of the FCPA in its pre-1998 form. We focus on the United States here to demonstrate how even the jurisdiction generally acknowledged to have the most advanced and OECD-like legal provisions has had to adjust somewhat in the light of the Convention: the hidden factor here is investigation and prosecution resources, which determine the practical limits of what is done about corruption. As a general model, we would suggest that the more focused countries are on the "level playing field", the more likely there is to be an upwards drift in prosecutions.

The 1998 Amendments expanded application of the FCPA to "United States Persons" when "engaged in proscribed activity outside of the United States." "United States Persons" are defined as U.S. nationals, and corporations, partnerships, associations, "joint-stock companies, business trusts, unincorporated organisations and sole proprietorships, including issuers and domestic concerns, organised under the law of the U.S., State, territory or commonwealth of the U.S." The Amendments also extended application of the FCPA to all legal and natural persons of whatever nationality "who, while in the territory of the United States, make use of the mails or interstate commerce to do any act in furtherance of proscribed activity."

In summary, the FCPA, as amended in 1998, established jurisdictions over five categories of offenders:

(a) Issuers and their officers, directors, employees, agents, and stockholders acting on behalf of an issuer, using the mails or interstate commerce.

(b) Issuers, and United States Persons who are officers, directors, employees, agents, and stockholders acting on behalf of an Issuer, outside the United States, irrespective of the use of the mails or interstate commerce.

(c) Domestic Concerns, and their officers, directors, employees, agents, and stockholders acting on behalf of a Domestic Concern, using the mails or interstate commerce.

(d) "United States Persons," engaged in proscribed activity outside of the United States, irrespective of the use of the mails or interstate commerce.

(e) "Persons," and their officers, directors, employees, agents, and stockholders acting on behalf of a Person, while in the territory of the United States, using the mails or interstate commerce.

Although Stock Issuers in the United States do not appear to be affected by the amendments in relation to acts undertaken on their behalf by their officers, directors, employees, agents, or by stockholders outside the territory of the United States who are not United States nationals, United States Stock Issuers will still be vicariously liable for their acts.

Foreign official. The 1998 Amendments brought the FCPA into compliance with Commentary 15 of the OECD Convention by expanding the definition of "foreign official" to include officers or employees of public international organisations, and persons acting in an official capacity for or on behalf of any such organisation.

Corruptly. The OECD Convention uses the term "intentional", which requires only that the proscribed act be done on purpose: it is thus wider than the FCPA. However, "corruptly", as used in the FCPA, and left unchanged in the 1998 Amendments, implies a wrongful design to acquire some pecuniary or other advantage. As explained in United States v Liebo, An act is "corruptly" done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The term "corruptly" is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position." Thus, an intent that is not corrupt will not violate the statute.

Payment. The provisions of the FCPA apply regardless of who initiates or suggests the payment or the gift or offer. It is not a defence (though it may be sentencing mitigation) that a bribe was suggested or even demanded by the purchaser of a contract or the donee.

The FCPA, as amended in 1998, provides for seven separate offences:

(a) Payment to a foreign official for the purpose of influencing an act or decision of that official in his official capacity.
(b) Payment to a foreign official for the purpose of influencing him to do or omit any act in violation of his lawful duty.

(c) Payment to a foreign official for the purpose of securing an improper advantage for the offender.\(^{18}\)

(d) Payment to a foreign official for the purpose of inducing him to use his influence with a foreign government or instrumentality to assist the offender in obtaining or retaining business, or directing business to any person.

(e) Payment to a foreign political party or official thereof, or a candidate for foreign political office, for the purpose of influencing an official act or decision, influencing official action or failure to act in violation of a lawful duty, securing of an improper advantage, or inducing the use of influence to obtain, retain or direct the placement of business.

(f) Payments to any person knowing that all, or all or a portion, of the payment will be offered, given or promised, directly or indirectly, to a foreign official, political party or official thereof, or a candidate for foreign political office, for the purpose of influencing an official act or decision, influencing official action or failure to act in violation of a lawful duty, securing of an improper advantage, or inducing the use of influence to obtain, retain or direct placement of business.

(g) Any act outside of the United States in furtherance of a payment to a foreign official, political party or official thereof, or a candidate for foreign political office, for the purpose of influencing an official act or decision, official action or failure to act in violation of a lawful duty, securing of an improper advantage, or inducing the use of influence to obtain, retain or direct the placement of business.

The 1998 Amendments added as a violation of the Act, the securing of any improper advantage for the paying party in obtaining, retaining or directing the placement of business (rather than in the conduct of international business, as in the Convention).

Complicity and attempt. Aiding and abetting in the commission of offences were already crimes under United States law, so the FCPA required no amendment. Under United States law, acquittal on a substantive count therefore does not bar a conviction for conspiracy unless exactly the same proof is necessary for conviction.\(^{19}\)

Anyone who willfully causes an act to be done which, if directly performed by him or another would be an offence against the United States, or who aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. The payor of a bribe indirectly, through one or more third parties, is aiding and abetting under this section.\(^{20}\)

Indirect bribery. In addition to prohibiting the direct bribery of foreign public officials, (and foreign political parties, party officials, and candidates under the FCPA), in order to obtain or retain business, both the OECD Convention and the FCPA prohibit indirect bribery through third party intermediaries.

In United States v. Liebo, the defendant, vice president of an American company seeking approval of a maintenance contract with the Niger government, gave air tickets to the First Consul of the Niger Embassy in Washington, D.C. for use on his honeymoon. Doubtless coincidentally, the Consul's cousin and best friend was the Niger Air Force, Chief of Maintenance, whose recommendation was required before aeroplane maintenance contracts would be approved by the Niger president. The tickets were referred to by Liebo as a "gesture" but, unfortunately for him, were classified by him for accounting purposes as a "commission payment", and were charged to Liebo's company Diners Club account. The court held this evidence sufficient for a reasonable jury to infer that Liebo gave the tickets to the Consul intending to influence the Niger government's contract approval process. (It is interesting to speculate as to what would have happened if he had been less concerned to take a tax advantage.)

Agents and marketing representatives. To save money on permanent representatives, many United States and other nations' companies use local agents/representatives for marketing and pay them fees contingent upon sales. The FCPA, as amended in 1988, prohibits the use of intermediaries as conduits for the payment of bribes. Any payment to a third party, including an agent, consultant or representative, while knowing that all or a portion of the payment will be used to bribe an official of a foreign government, violate these provisions of the law.

These sections, as originally enacted, prohibited such payment if a person "had reason to know" that all or a portion of the
payment would be used to bribe officials, though in 1988, this quasi-objective test was replaced by the subjective "knowledge". However, even this gave rise to defensive "due diligence" investigations into the general reputation and style of conduct of accounts, but even this was deemed insufficient by some critics. If funds are paid other than to the agent, the agent's bills are not itemised, or company officers become foreign government officials, this can arouse suspicions subsequently. If a company behaves in a manner inconsistent with its formal position, for example via instructions to an agent or consultant, the courts will look behind the official documents to the "true process". Corporate criminal liability is fairly extensive in the United States.

Foreign subsidiaries. Prior to the 1998 Amendments, United States companies were held vicariously liable for the acts of their foreign subsidiaries. Bribes made by a foreign subsidiary on its own, violating company policy and without the knowledge of the parent, did not result in parent company liability. As some financial institutions have discovered to their cost, cover-ups or even slowness in informing the authorities can indicate culpability on the part of the parent, and form the basis for parental liability.

Other business relations. Another area of risk arises from the illegal activity of a prime contractor to whom a United States company is a subcontractor or a joint venture partner. If, when a contract is signed; the company is aware of the manner in which the contract was obtained, it will probably be found guilty. If it knowingly contributes to a bribe - for example, by accepting a reduced fee for its share - after the fact, at any point, it may be held criminally liable. Hitherto, the courts have tolerated "grease payments", or "speed money". These include the issuance of permits, licenses, or other documents needed to do business in the foreign country; the processing of other governmental papers, such as visas and work permits; delivery, phone, power and water service; loading, unloading, or protection of perishable products or commodities; and other actions of a similar nature. The exception, however, covers only those actions of lower level foreign officials.

Accounting provisions. Article 8 of the OECD Convention contains requirements similar to those of the FCPA, requiring each participating country to take such measures as may be necessary, within the framework of its laws and regulations, regarding the maintenance of books, records, financial statement disclosures, and accounting and audit standards, as may be necessary to prohibit off-the-books accounts and transactions, recording of non-existent expenditures, inadequate identification of liabilities and use of false documents, which might conceal the bribery of foreign public officials.

Mutual legal assistance. Article 9 of the OECD Convention requires that each participating country, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to other participating countries in criminal investigations and proceedings concerning offences within the scope of the Convention and for non-criminal proceedings within the scope of the Convention brought by a participating country against a legal person. This could be one of the most effective enforcement tools provided by the Convention. When a company becomes aware of bribery by a competing company of another participating country, it is possible - subject to its longer-term commercial considerations which may inhibit intervention - that that company will notify its government, which will in turn request assistance by the other government in the investigation of the complaint, or will demand intervention by the OECD Working Group. The United States government position is that it will co-operate in mutual legal assistance to the fullest extent possible (though in reality, there are resource constraints which may give rise to limits).

Extradition. Article 10 of the OECD Convention requires that bribery of a foreign public official be deemed to be included as an extraditable offence under the laws of participating countries and the extradition treaties between them. United States ratification incorporates this in its extradition lists.

Punishing corruption. The OECD Convention requires that the range of criminal penalties for bribery of a foreign public official be comparable to that for bribery of that country's own public officials: in the case of natural persons, this includes deprivation of liberty sufficient to enable mutual assistance and extradition. The Convention also provides that the bribe and its proceeds, or property of equal value, be made subject to seizure or confiscation, or that there be monetary sanctions of comparable value.

In order to meet the OECD Convention standards, the penalty provisions of the FCPA were changed by the 1998 Amendments to provide both civil and criminal penalties for all agents and employees of United States businesses, whether foreign or American, by providing criminal sanctions against any "natural person" who is an agent or employee of a domestic concern, irrespective of nationality or residency.
Organised crime measures and commercial bribery

Racketeer Influenced and Corrupt Organisations Act

In U.S. v. Young & Rubicam, Inc., defendants were charged with conducting the affairs of an enterprise through a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organisations Act (RICO) through violations of the FCPA and the New York Commercial Bribery Statute. The court held FCPA and state commercial bribery offences to constitute multiple violations of the Travel Act. In Dooley v. United Technologies Co., it was held that uses of mails in furtherance of an illegal and criminal scheme are sufficient to support a claim that defendants committed the predicate acts of mail and wire fraud.

Civil remedies

United States Federal courts have consistently ruled that the FCPA created no private cause of action in persons injured by actions in violation of it. (See, for example, Lamb v. Philip Morris, Inc.) Nevertheless, although a private cause of action under the FCPA is not available, in Environmental Tectronics v. W. S. Kirkpatrick Inc., the court held that allegations of bribery of foreign government officials were a sufficient basis for an actionable violation of section 2(c) of the Robinson-Patman Act aimed at anti-trust behaviour. This provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid."

Section 2(c) had previously been applied in cases involving domestic commercial bribery. The court further held that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a section 2(c) claim against the briber for injury to its business resulting from the bribery.

Civil RICO. Preceding any more general measures that may become available internationally under the Council of Europe Civil Law Convention, in the United States a civil RICO action may also be available to recover losses due to FCPA violations. To state a claim under 18 U.S.C. § 1964(c), a plaintiff must prove only: (1) a violation of section 1962 (Racketeer Influenced and Corrupt Organisations Act), and (2) an injury directly resulting from some or all of the activities, comprising the violation. In Environmental Tectronics v. W. S. Kirkpatrick, Inc., the courts concluded that standing to assert a civil RICO claim was demonstrated when a plaintiff alleged an injury to its business or property resulting from some or all of the predicate acts that comprise the RICO violation: a complaint alleging commercial bribery of a foreign official would suffice for this purpose.

Conclusions

The legal and political environment in which contractors and financial services firms, as well as lawyers, operate has been transformed and will continue to be transformed by the combined pressures of measures against corruption, drugs trafficking, fraud and tax avoidance/evasion. This is both a problem and an opportunity to focus on principles of governance which will be increasingly consistent, and will require transnational businesses to apply more consistent global principles in their compliance function than they have been required to do in the past. Obviously, there will continue to be substantial compliance differences in different parts of the world, reflecting cultural traditions, transparency and realistic enforcement capacities and motivations. The systems of self-evaluation and mutual evaluation established by OECD and by the Council of Europe, European Union, and, OAS will pressurise individual governments into displaying more activism than most have done in the past, and we can expect more prosecution activity as an external "activity indicator", irrespective of whether or not this is the optimal method for dealing with corruption. Political party funding will eventually come increasingly into the frame, since in advanced industrial countries - France, Italy, Japan and the United States are obvious illustrations - it is a strong element in corruption scandals involving corporate donors. This has
implications not just for transaction lawyering but also for accountants auditing corporations and political parties. In concert with measures imposing more transparency and mutual legal assistance on offshore finance centres, the result is unlikely to be simple displacement with increased transactions costs for corruption. However, the precise benefits are hard to estimate, since the incidence and prevalence of high-level commercial corruption are largely unknown.

The obligations stated in the OECD Recommendation and other instruments will only be converted into binding obligations on states not currently having such obligations and private persons doing business in such states if national governments and the international community are committed to making the development and enforcement of proper national and international laws a priority. The IBA can and should play an important role in supporting this process, and in assisting in the development of effective mechanisms to prevent bribery and related conduct.29

1Professor Michael Levi is Professor of Criminology at Cardiff University. Monty Raphael is a Senior Partner at Peters and Peters and Chairman of the Anti-Corruption Working Group of the International Bar Association.

2In a paper at the Institute for Advanced Legal Studies, London, February 1999.


5Treaty of the European Union on the Protection of Financial Interests of the Communities of July 26, 1995 (95/C 316/03).

6First Protocol to the Treaty on the Protection of Financial Interests of the Communities of September 27, 1996 (96/C 313/01).


8Resolution (97) 24, relating to the 20 Guiding Principles in the struggle against corruption, adopted by the Council of Ministers, Strasbourg, November 6, 1997.


10GRECO, set up in the form of a partial and enlarged agreement, is responsible for monitoring the measures taken by States to combat corruption. It is open to Member States of the Council of Europe and non-Member States on an equal footing. GRECO will evaluate not only the implementation of this Convention, but also the application of the 20 Guiding Principles in the fight against corruption and that of other conventions and legal instruments drawn up by the Council of Europe as part of its Programme of Action against corruption. Fourteen States have already notified their wish to participate in GRECO: Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Romania, Slovenia, Spain and Sweden.

11In 1979, a draft anti-corruption convention failed to be adopted, but General Assembly Resolution 51/59 and 51/191 were indicators of higher profile support.

12See n. 1, above.


14cf. EU Protocol II, art. 3, p. 2; Council of Europe, art. 18, p. 2.

15We are indebted to Fred Schoenlaub of Shook, Hardy & Bacon LLP for his insights into U.S. law, and to the U.S. government's further responses to the OECD proposals.


17U.S. v. Donald Castle, 925 F2d 831, (5th Cir. 1991).

18Under the FCPA even before amendment, the United States charged a corporation and two of its executives with authorising a payment to Panamanian officials to obtain a favourable lease in the Panama Canal Zone. The United States, and the jury construed this payment as being intended to assist the defendant corporation in obtaining or retaining business because the lease would improve its competitiveness and profitability. See United States v. Saybolt Inc. (98 Cr 10266 WGY) D. Mass. 1998; United States v. David Mead & Frerik Pluimers (Cr. 98-240-01) D.N.J., Trenton Div. 1998.

19U.S. v. Soteras, 770 F 2d. 641, 646 (7th Cir. 1985).


21op. cit., 923 F.2d 1308, 1312 (8th Cir. 1991).


24915 F2d. 1024 (6th Cir. 1990), cert. denied, 498 U.S. 1086, 111 S.Ct. 961.


26ibid.

29 cf. Murphy, "Corruption in Democratic Societies. Patterns, Implications, Remedies".

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery