

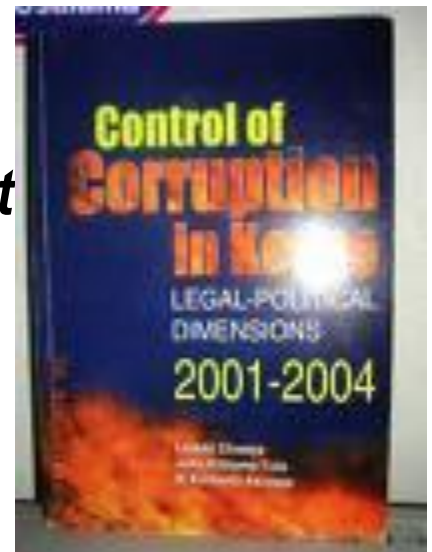


Can the Private Sector Lead the Fight Against Corruption?

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Combating Corporate Bribery



- 1. Corruption and Development.
- 2. Human & Corporate Conduct.
- 3. American Unilateralism.
- 4. A Unified OECD Approach?
- 5. An Insoluble Problem?
- 6. Privatizing Enforcement?

Ray Baker's Typology of Corruption



- Traditional Governmental Corruption.
- Criminal Corruption.
- Entrepreneurial Governmental Corruption.



Corporate Governance in Practice



- “The crime is not what is illegal, the crime is what is legal.”
- Large corporations can offer local officials tangible benefits.
- Small and medium companies are at a distinct disadvantage.



Every Day A New Scandal



William H. Miller, Deputy Secretary



- British Prime Minister Blair had the Serious Fraud Office terminate its investigation into an arms deal between BAE Systems PLC and Saudi Arabia due to fear of harming British-Saudi relations. Prince Bandar received £2 Billion in bribes. OECD blasts UK and Serious Fraud Office re-opened case. Now Russia is selling weapons to the Saudis – the Russians do not have the equivalent to the FCPA.
- Germany is now going after officers and directors at Siemens – will shareholders follow suit?
- Nigerian Government under Umaru Yar Adus orders probe of awards of oil blocks under former President Obasanjo – Billions of dollars at issue (June 2008).
- U.S. Expenditure of billions of dollars unaccounted for in Iraq -- incompetence or corruption?



1977 Foreign Corrupt Practices Act – 15 U.S.C. §78-dd et seq.

- Congressional response to international corporate scandals.
- Extra-territoriality (but how does one obtain foreign cooperation?).
- U.S. corporations, subsidiaries, persons at a disadvantage – “everyone does it.”
- No private cause of action established.



FCPA Approaches to Enforcement



- Criminalize the direct or indirect payment of bribes to foreign officials – Enforcement by U.S. Justice Department.
- Books and Records Provision – Enforcement by U.S. Securities and Exchange Commission.



Episodic FCPA Enforcement

- Low priority: personnel and resources are not extensive.
- Lack of information and foreign governmental cooperation.
- Why prosecute one's own corporations for doing what foreign multinational corporations are doing?





What's A Company to Do?

- Having Codes of Ethics and Anti-Corruption Training is insufficient.
- Management must make employees aware of the huge potential costs.
- A check and balance system of management controls should be established and personnel abroad closely monitored.

OECD's Convention on Combating Bribery of Foreign Officials in International Business Transactions, adopted 1997, in force 1999

- **Goal of Convention:** Level the playing field for international corporations.
- **Principal Approach:** OECD Member–States adopt FCPA–like legislation.
- **Initial Problems:** (i) low priority; (ii) lack of information; (iii) future consequences.
- **Practical Consequences:** (i) non–OECD Member–States; (ii) organizations are not unitary actors, and (iii) absence of a corporate culture of compliance.



Views of the Cynics

- Bribery is a tiny part of the corruption problem.
- Western banks, accounting firms, and law firms profiting.
- Countries offering tax havens and permitting shell companies benefit from corruption.
- Civil law systems don't permit discovery.

Possible Reasons for Unethical Behavior By Individuals: the Belief that

- The conduct is not “really” illegal or immoral.
- Management will protect its employees.
- Transgression will never be discovered (“Master of the Universe” Phenomenon).

Georgetown Professor and Former Clinton Official Daniel K. Tarullo Concludes that the OECD Convention Will Not Fulfill Its Goals



1. It does not obligate signatories to prosecute violators.
2. It lacks an enforcement mechanism.
3. It only deals with “supply side” bribery.
4. It lacks a monitoring mechanism, unlike most trade agreements (e.g. tariffs).
5. It is not a priority of OECD Member–States.
6. Corruption occurs in the shadows – there is almost always an “information” problem.

1999 Council of Europe's Civil Convention on Corruption



- Article 2 - Corruption (is broadly defined).
- Article 3 – Compensation for Damages.
- Article 4 – Liability (if there is causation).
- Membership covers most major European Economies (but should Berlusconi, Blair, Chirac, and others have problems?).

United Nations Convention Against Corruption (Concluded 2003, Entry into Force December 2005)



- Article 1 – Definitions (corruption not defined).
- Article 34 - Consequences of Acts of Corruption require states to annul or rescind contracts awarded as a result of corruption .
- Article 35 of this instrument requires the parties to adopt measures to compensate victims of corruption.
- Aspiration or cynical?

Don't Rush to Judgment?

- Corporations may have the will that states lack.
- Member-States' legislation and law enforcement structures not in place.
- A plaintiff in a bribery case may be able to obtain the support of its own government (but what about that of a foreign government?).
- A private plaintiff may be willing to expend the resources to investigate a situation where it believes it lost a tender as a result of bribery.
- The lenders for many public tenders in the developing world are international financial institutions.

Korean Supply Company (KSC) v. Lockheed Martin, 63 P.3d. 937 (Ca. 2003).

- KSC loses out on sales commission, but alleges the outcome was the result of corruption.
- California Supreme Court KSC fails under the California Unfair Competition Statute but wins on common law claim of tortious interference with a business opportunity.
- Germany OECD's Compliance submission notes Section 826 applies to intentional bribery (damages "where a person intentionally injures another in such a way as to breach public morals").
- Large companies often experience large personnel turnover, thus a potential supply of "whistle blowers" may exist with the passage of time.

Closing Thoughts

- Corporate governance is too complex to address through legislation since greed is pervasive.
- Is the DaimlerChrysler admission in March 2006 of having paid bribes in Eastern Europe, Africa and Asia over a 12-year period an aberration?
- OECD criticizes UK Government for non upholding its duties under the OECD Convention.

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