

# Can [and Should] the Private Sector Lead the Fight Against Corruption?

Inter-American Development Bank  
\_\_\_\_\_, 2006

Ethan S. Burger, Esq.  
Scholar-in-Residence, School of International Service  
Adjunct Associate Professor, Washington College of Law  
American University  
Washington, D.C. 20016

[ethansb@american.edu](mailto:ethansb@american.edu)



# 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 – “but everyone does it.”

# 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.

# A Typology of Large Bribes

- Traditional Governmental Corruption – political leaders and ministers often involving tenders and state purchases (e.g. Nigeria, Indonesia and Pakistan).
- Entrepreneurial Governmental Corruption – state officials going into business, asset stripping, tax evasion/transfer pricing manipulation, private sector kickbacks, commercial fraud along with an absence of remedies (e.g. Equatorial Guinea Russia, Ukraine).

# 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?
- According to FCPA Treatise Author Donald Zarin, as of April 1995, DOJ had prosecuted only three dozen FCPA cases.

# Theory & Practice

- “The crime is not what is illegal, the crime is what is legal.” Michael Kinsley (i.e. foreign legislation lacks revolving door limitations, hiring of the relatives of officials not prohibited, etc.)
- Large corporations can offer local officials tangible benefits (enlarged tax base, increased number of jobs, etc).
- As a result, small and medium companies are at a distinct disadvantage.

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

- **Goal:** Level the playing field for international corporations.
- **Principal Approach:** Make OECD Member-States adopt legislation comparable to the FCPA.
- **Initial Problems:** (i) enforcement is a low priority (impact on staffing and resources); (ii) lack of information to prosecute; (iii) future consequences for harmed company in country where bribe was paid.
- **Practical Consequences:** (i) non-OECD Member-States are free to continue as they always have; (ii) since organizations are not unitary actors, constant risk that sales personnel will engage in unlawful behavior, and (iii) widespread absence of a corporate culture of compliance is likely to lead to problems.

## Some Views of the Cynics

- Corporations paying bribes represents a tiny part of the corruption problem.
- Western banks, accounting firms, and law firms profit from and facilitate corruption (and western governments will not stop it).
- Tax havens and shell companies benefit from corruption (e.g. Bermuda, British Virgin Islands, Lichtenstein, Nauru, etc.).
- OECD countries with civil law systems don't permit discovery and judges in inquisitorial systems are often not interested in cases occurring abroad (e.g. problem of forum *non conveniens* is real).

## 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.

# Why One Should Avoid a Rush to Judgment?

- While states may lack the will and resources to pursue OECD Convention violations, losing bidders on public tenders may have an economic reason to pursue remedies.
- Member-States have not yet adopted comprehensive legislation that might create a private cause of action to be brought either in the home country of the losing bidder or the country of the winning bidder.
- A plaintiff in such a case may be able to obtain the support of its 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 lender for many public tenders in the developing world are international financial institutions (like the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the World Bank, whose members and tender committees not of a single nationality).

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

- Korean Ministry of Defense holds tender where the losing bidder MacDonald Detwiler & Associates, Ltd (Canada) offered to provide better military equipment at a lower price than Loral Corporation (later bought by Lockheed). KSC loses out on sales commission, but alleges the outcome was the result of corruption.
- California Supreme Court rules in favor of KSC; finds Loral won contract since its local agent paid bribes and provided “sexual favors” to Korean military officers. While KSC failed in one of its claims under the California Unfair Competition Statute, it won on a common law claim of tortious interference with a business opportunity.
- California Unfair Competition Statute did not provide KSC with claim against Loral (but would have against Korean Government). Indeed it is possible that civil law countries have statutes under which a private party can bring a claim against bidder getting a contract due to bribery. Section 826 of the German Civil Code provides for damages “where a person intentionally injures another in such a way as to breach public morals.” It is significant that Germany OECD Convention’s compliance submission stated that “section 826 should apply to intentional bribery of a public official.”
- Large companies often experience large personnel turnover, thus a potential supply of “whistle blowers” may exist with the passage of time.

## Situations Can Be More Complex Than They First Appear

- If the country in which the bribe took place has a new government, the official(s) who accepted the bribe are more likely to be prosecuted.
- International financial institutions are increasingly concerned about corruption, both with respect to their loans as well as within the institution itself.
- Large infrastructure projects may represent a sufficiently large amount so as to justify the losing bidder to seek legal remedies.
- The OECD Convention is still relatively young – perhaps an insufficient amount of time has passed for “whistle blowers” to appear or governments to change.

## What's A Company to Do?

- Having Codes of Ethics and Anti-Corruption Training is insufficient if corporate employees receive mixed signals from management as to how important it is to obey both foreign and domestic law.
- Management must make employees aware of the huge potential costs of convictions for bribery (not only the sanctions and the investigatory costs to the corporation, but also the risk of being blacklisted and the loss of future business and damage to corporate reputation).
- A check and balance system of management controls should be established and personnel abroad closely monitored.

## **Possible Reasons for Unethical Behavior By Individuals: the Belief that . . . .**

- The conduct is not “really” illegal or immoral, which leads some employees into gray areas.
- If people acts in their or the corporation’s best interests, there is a (reasonable) expectation that management will protect and benefit from such behavior.
- Transgression will never be discovered (“Master of the Universe” Phenomenon).

# Final Thoughts

- Corporate governance is too complex to address through legislation and regulations alone. There needs to be effective corporate systems of checks and balances since management cannot be all-knowing.
- Corruption like greed is pervasive.
- There is a natural tendency to protect one's own colleagues and nationals.
- It is tough enough to obtain cooperation within one country's government, obtaining the full cooperation of foreign governments will be a constant problem?