Corruption and Bribery in Foreign Business Transactions:
Seminar on New Global and Canadian Standards
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The International Fight Against Corruption Today
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I see my role here today as taking the discussion forward from the 1977 *Foreign Corrupt Practices Act* (FCPA) to the 1990s and in particular, setting a broad context for the speakers that follow to develop particular themes leading up to an examination of the Canadian statute.

Most of us appreciate that what we now think of as corruption has been with us a very long time. Some articles on this subject begin with an appropriate quote from Shakespeare. However, I prefer the report that in 1998, Dutch archaeologists uncovered lists of corrupt officials kept by the Assyrian Interior Minister three and a half millennia ago. Corruption has been with us ever since.

The traditional view of many business people was articulated as recently as 1994 by the then Chairman of Cable and Wireless:

> "The moral problem to me is simply jobs. Now when you're talking about kickbacks, you're talking about something that's illegal in this country, and that - of course, you wouldn't dream of doing… But there are parts of the world I've been to where we all know it happens. And if you want to be in business, you have to do - not something that is morally wrong…. In many countries in the world the only way in which money trickles down is from the head of the country who owns everything. Now that's not immoral, or corrupt. It is very different from our practice. We must be very careful not to insist that our practices are followed everywhere in the world."[1]

The essence of what the Chairman was saying is that we, Cable and Wireless, observe the rules of the relevant country, and that we shouldn't presume to impose our morals upon others. A Zambian Minister who resigned over alleged corruption in the government in which he served, took a different view, "Corruption is corruption, whether it manifests itself in England or in Zambia. It is a drain on the resources of a country."[2]

Earlier, the Singapore Foreign Minister, addressing the view of some western scholars that corruption was a natural stage in the development process, responded in typical forthright Singapore fashion:

> "I think it is monstrous for these well intentioned and largely misguided scholars to suggest corruption as a practical and efficient instrument for rapid development in Asia and Africa…. The current defence of Kleptocracy is a new kind of opium by some western intellectuals, devised to perpetuate Asian backwardness and degradation."[3]

So, now your know.

Change began to occur in the 1990s in the aftermath of the Cold War. However, like many sea changes, it took a while to get under way and it is only in the last four or five years that one can see a combination of circumstances coming together to drive real, quantifiable change. Indeed one commentator has suggested that in the late 1990s, anti-corruption, like human rights and the environment, had become a key issue on national and international agendas.

What has prompted this change? Well in short, many factors have come together. There is corruption's evident cost in economic development terms; there are its effects on internal governance which came to be seen as going far beyond the financial; there are the manifold influences of globalization; there is a new concern with ethics and a new sensitivity to outside pressures for accountability in both the cabinet and the boardroom. Other contributing factors may have been new perspectives on corruption as a trade competition issue, as an impediment to investment as has been seen so dramatically in Russia, as an obstacle to the transition of the former communist societies to market economics, and very generally as an impediment to the spread of democratic governance.

Does this new focus on corruption suggest that the world is a more corrupt place today? Those who have looked at this carefully suggest that the answer is probably not. Rather, public opinion has come to focus on such activity in such a way that it is becoming socially, politically and economically unacceptable.

A word about definitions. There have been many attempts to define corruption from many different perspectives. The meaning, causes and effects have been viewed in remarkably different ways. Shihata has canvassed these in detail.[4]

> "Some economic writings tend to define corruption as a situation where the benefit (to a corrupt agent) of acting against the expectation of a principal out weighs the cost, or where a public good, service or office is sold for personal gain. Others describe it in terms of the exploitation of economic rents which arise from the monopoly position of public officials…. Political science speaks of corruption as a symptom of more deeply rooted problems in the society's structure related in particular to the means of attaining and maintaining power and the weak or non-existent safeguards against its abuse…. Legal literature generally treats corruption in the context of the deviation (for private gains) from binding rules, the arbitrary exercise of discretionary powers and the illegitimate use of public resources.… Sociology finds corruption a 'social relationship' represented in the violation of socially accepted norms of duty and welfare….
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> Public administration specialists are concerned with bureaucratic corruption, even though they realize this is but one form of a more complex phenomenon…. Business organizations treat corruption mostly as a trade and investment policy issue.… Practically all people who publicly address corruption, condemn it, even though it would not exist at a wide scale without the participation of many.… Most people recognize corruption as an additional cost, which some consider

> necessary to get things done (and by doing so, contribute to making it necessary). Some see corruption broadly as a violation of human rights, and, at the extreme, as a 'crime against humanity'. All agree it may increase the wealth of those practising it but almost certainly reduces the revenue of the state and the welfare of society as a whole."

It is obviously very important to have a clear set of assumptions about meaning, causes and effects before sitting down to draft some legal norms. However, it is perhaps safe for our purposes to settle on the elements of a working definition so that we avoid becoming bogged down in attempts to formulate a definitive definition. Shihata sees two basic types of situation. The first arises in the allocation of benefits or opportunities in such a way as private gain prevails over the duty to other, usually common, interests. The second is where, in the application of rules, the opportunity to grant special favours undermines the general obligation to apply public rules without discrimination.[5]

Another approach to the problem of definition is more cautious still; accept that a host of behaviours - nepotism, fraud, buying and selling of information and in general the abuse of authority - could arguably be fitted within the rubric of corruption but then decide it would make more sense to settle on a simpler core concept. One such attempt defines corruption as the offer or solicitation of improper consideration, particularly to or by those in government positions. It involves the use of governmental office for private gain most often but not necessarily in money, goods or services.

As the 1990s progressed, there was an outbreak of initiatives in many fora around the world. The United States government was under pressure from its businessmen who were obliged to play by the FCPA and they asserted they were losing substantial business as a result. It is not surprising that United States government has been a major figure pressing for anti-corruption initiatives at the multilateral level.

A major forum for this activity has been the Organization for Economic and Co-operation Development (OECD) which is composed in general terms, of the developed world. In May, 1994 the 26 OECD governments put the subject on their agenda in the form of a Recommendation on Bribery in International Business Transactions. That Recommendation called upon member states to take effective measures to deter, prevent and combat the bribery of foreign public officials. A 1996 Recommendation of the Council called upon member states to discontinue the practice of providing tax deductions for bribes made by their companies overseas. At the same time, the ministers made a political commitment to criminalize bribery "in an effective and co-ordinated manner", and to examine the "modalities and appropriate international instruments to facilitate criminalization and consider proposals in 1997". At its 1997 meeting the Council adopted a statement of principal to include anti-corruption provisions in bilaterally funded procurement contracts. At the G7 meeting that year there was a call to combat corruption and international transactions through supporting on-going efforts in other multinational organizations. Developments continued very quickly; on November 21, 1997 OECD members states and five non-member countries adopted a Convention on Combating Bribery of Foreign Public Officials and International Business Transactions. There are official commentaries on the

text of the Convention adopted at the same time the Convention was signed less than a month later on December 17, 1997. This is now the corner-piece of multilateral efforts on this subject, at least on the part of the developed world.[6]

As of February 3, eleven countries had deposited their instruments of acceptance, approval or ratification (Iceland, Japan, Germany, Hungary, United States, Finland, the U.K., Canada, Norway, Bulgaria and Korea). The Convention enters into force on February 15.

Two significant areas were left out of the compromise that led to the Convention. One is so called private to private corruption, which, in an era of privatization of traditional state activities, leaves a major gap in the regime. The other is political contributions which in some contexts, amounts to the corruption of legislators. There have been strong calls that both of these areas be tackled in the course of OECD follow up activities.

Moreover, the OECD Convention addresses so called "active" bribery being the offence committed by the person who promises or gives the bribe compared with so called "passive" bribery being the offence committed by the recipient. Clearly, passive bribery must also be criminalized if the regime is going to be really effective. Some commentators suggest the WTO is the appropriate forum in which to pursue this objective.

Of some importance in practical terms are the likely differences in the definitions of corruption adopted by member states in their implementing legislation. Another issue is that of extraterritoriality, that is, the extent to which member states, particularly those with common law legal traditions, will assert jurisdiction over their nationals who perform corrupt acts outside the state.

Two additional facts are important to note. The first is that this Convention is only one of a number of OECD initiatives that are under way. Secondly, the OECD family of activities is only one of many fora in which action is being taken. With regard to the OECD itself, it should be noted that the 1994 and 1996 Recommendations, a sort of menu or agenda for OECD activities in this field, were brought together as a revised package in 1997. That year's Recommendations contain important provisions including the abolition of tax deductability for overseas bribes, the establishment of accounting and audit requirements, the establishment of internal company controls including standards of conduct and the promulgation of specified measures to control bribery in bilateral development assistance.

In the April, 1998 Communiqué of the OECD Council, there were several relevant paragraphs.[7] Under the heading of "Strengthening the Multilateral System", the Council asked for a report in 1999 on the implementation of the Convention, and on the progress made in the work planned on a number of issues:

- bribery in relation to foreign political parties,
- advantages, promised or given to any person in anticipation of that person becoming a foreign public official,
- bribery of foreign public officials as a predicate offence for money laundering legislation,

- the role of foreign subsidiaries and of offshore centres in bribery transactions.

The Council also noted the recent OECD Recommendation on Improving Ethical Conduct in the Public Service in Member Countries, and the activity of the Financial Action Task Force (FATF) an important but much neglected G-8 officials committee. Among other things, this task force monitors the implementation of the money laundering laws of 26 countries.

Turning to other fora, the Organization of American States (OAS) has been active in the fight against corruption. In March, 1996 after several years of discussions, an Inter-American Convention Against Corruption was adopted.[8] The Convention criminalizes transnational bribery and provides for institutional development to fight corruption including legal assistance and technical co-operation. Mechanisms are contemplated concerning extradition, seizure of assets, and mutual legal aid. Canada is not yet a party to this Convention.

The subject has also been on the agenda of the World Trade Organization at the initiative of the United States. At the Singapore Summit meeting in December, 1996, a working group was set up to study transparency in government procurement practices and to development elements for inclusion in a future agreement on transparency. Earlier, the WTO had adopted a Government Procurement Code which substantially increased the scope and importance of the previous GATT procurement code as well as improving procedural disciplines. A relatively small number of countries have so far adopted this Code including in particular the European Union, the U.S., Japan and Canada.

Another U.S. initiative has been an item on the United Nations' agenda in ECOSOC. This led to two resolutions in the General Assembly in December 1996 (51/59 and 51/191) one adopting an International Code for Public Officials, and the other a U.N. Declaration Against Corruption and Bribery in International Commercial Transactions.[9] This is one of the few initiatives involving the developing world. And, in the jargon of the discourse, both the demand and the supply side of the equation, passive as well as active bribery, need attention. Arising out of these Resolutions was an expert group meeting in Buenos Aires, March 17 - 21, 1997 which produced a number of recommendations on the implementation of both resolutions, for technical assistance, and for the elaboration of an international convention.

The Council of Europe has a convention project under way in which both Canada and the United States are actively involved. In its criminal law provisions, the Council of Europe Convention is expected to mirror the OECD text.[10] In May, 1997, the European Union adopted a Convention on the Fight Against Corruption involving officials of the European Communities and officials of member of states.[11] This Convention is essentially a mutual legal assistance arrangement and focuses on the particular needs of the European Union. Non-European countries such as Canada and the United States are not involved.

There has also been a remarkable change of attitudes within the International Financial Institutions (IFI) such as the World Bank, the IMF and the regional development banks. Under President Wolfensohn, the World Bank, followed by the other IFIs, has begun addressing corruption directly and taking measures such as the suspension of particular countries from assistance

programs until their act has been cleaned up. In June, 1998 the Asian Development Bank produced a 30-page anti-corruption policy paper which sets out a wide range of measures that the ADB will be taking both internally and towards its client states.[12]

In addition, there have of course been substantial developments on the private sector side such as the establishment of Transparency International which has had a remarkable public impact in only a few years. Much less noticed have been the changes introduced by the International Chamber of Commerce (ICC) in its 1997 revised Rules of Conduct for businesses.[13]

One point all this activity suggests is the inherent relationship of corruption with many other activities, and the need to coordinate the many initiatives. The first and perhaps most prominent is the criminal nexus between criminals, police and judges in some countries. A second is that despite government and inter-government efforts, money laundering is probably becoming easier and more audacious. In the words of one commentator "the getaway car is getting faster". This has led to the view that it has now become imperative to enlist both the accountants and the bankers as active partners in anti-corruption efforts. A third connection is the need to control organized crime and particularly narco criminals. A fourth are the illicit enrichment initiatives which address among other things, bank secrecy laws.

There is also a widely held view that corrupt behaviour is not immutable and that we will always have to be looking for new ways to defeat corrupt purposes. This means that any static system will likely fail and that it is important to develop forward strategic planning, supported by a large tool box of agreed counter measures.

It has also been emphasized that while a normative basis for anti-corruption efforts is undoubtedly important, formal laws are not usually enough in themselves. Anti-corruption efforts have to proceed in step with the development of sympathetic values within the society. Ways have to be found to encourage the evolution of criteria of integrity. Some describe the objective as "civil society". In this effort, Transparency International has a critical role in many ways not least of which is keeping all sorts of feet to the fire.

In conclusion, it is very clear that another type of "coalition for change" has come into existence and that while a lot has been achieved in the past few years, there is much still to be done. There will certainly need to be a variety of legal instruments. Work will have to continue at both government and non-government level to consolidate a growing public concern as well as a political will for change. The fight against corruption is indeed a work-in-progress.

Endnotes

[1]van Hulten, Netherlands Ministry of Foreign Affairs, undated paper, "Third World Corruption," p. 4

[2]ibid

[3]Almond and Syfert, "Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global economy," 22 North Carolina Journal of International Law and Commercial Regulation, (1997) p. 430

[4]Shihata, "Corruption - a General Review with an Emphasis on the Role of the World Bank," 15 Dickinson Journal of International Law, (1997), p. 453-458

[5]op. cit. p. 458-459

[6]For a description of the history of the Convention, see Gantz, "Globalizing Sanctions Against Foreign Bribery", 18 Northwestern Journal of International Law and Business (1998) p. 483

[7]The full text appears as an annex to the April 28, 1998 press release of the Department of Foreign Affairs and International Trade, No. 104

[8]For a fuller description, see Sutton, "Controlling Corruption Through Collective Means: Advocating the Inter American Convention Against Corruption," 20 Fordham International Law Journal, (1997) p. 1427 at 1453; Gantz, "Globalizing Sanctions Against Foreign Bribery" in 18 Northwestern Journal of International Law and Business, (1998) p. 477. The text of the Inter American Convention appears at 35 ILM (1996) p. 724.

[9]The texts appear at 36 ILM 1039 (1997) and 36 ILM 1043 (1997)

[10]"Criminal Law Convention on Corruption," GMC (98) 41, Provisional Edition, December 1998

[11]The text appears at 37 ILM [1998] 12

[12]"Anti Corruption Policy," ADB Strategy and Policy office, June 1998. For a discussion of recent developments, see Wesberry, "International Financial Institutions Face the Corruption Eruption," in 18 Northwestern Journal of International Law and Business, (1988) p. 498

[13]The text of the Revised Rules appears at 35 ILM [1996] 1308. For a brief discussion, see Gantz, "Globalizing Sanctions" in 18 Northwestern Journal of International Law and Business (1998) p. 473