PART I

Introduction

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Preamble to the OECD Convention

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, inter alia, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which

requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows: . . .

Chapter contents

I. History and development of the legal framework

1. Why attempt to combat corruption now?

Corruption is by no means a new phenomenon. It is as old as human nature itself; however, political and economic corruption has taken on a specific meaning during the latter half of the twentieth century. With decolonisation, former colonial states, but also newcomers amongst exporting nations, tried to maintain or establish their power basis with the emerging elites in the southern hemisphere by buying allegiances. Whereas the motivation to bribe will have been primarily economic, to a large extent corruption was also used as a political means in the struggles of the Cold War to secure influence across the world. If therefore the East-West *détente* has not immediately brought a substantial reduction in political and economic bribery, the opening of the East and the growing pace of globalisation are essential conditions for a process towards openly addressing corruption as a serious impediment to worldwide

development.[1] It is no coincidence that, since 1990, a dramatic change in public attitudes regarding corruption has taken place. This development can be identified both in the northern and southern hemispheres. There are commentators who maintain that the rampant bribery in industrialised centres of, for instance, Italy, could be attacked by law enforcement only following the East-West *détente*, since the highly corrupt former political structures were until then perceived as necessary bulwarks against Soviet influence. In a similar way, it became possible to criticise persons holding high political or legal office in other European states, such as Germany, France, and Belgium, for their lack of sensitivity to conflicts of interest.[2]

This is not to say that political change or globalisation as such have led to a reduction of bribery. In fact, in an initial period the contrary may have been the case.[3] Whereas the extent of 'graft' by political exponents in potentially rich countries in the South (e.g. Angola, Brazil, Nigeria or the Philippines) is now common knowledge,[4] we still need to develop a clear understanding of the full dimensions of commercial bribery. So far, we are getting used to dramatic headlines about payments worth hundreds of millions of dollars, or euros, in order to acquire contracts, obtain exploitation rights or permits to build pipelines, etc.[5] Reliable analyses of the dimensions of the problem are, however, still rare,[6] and we are only just beginning to understand some of the reasons for the persistence of the problems.[7]

Legislative action against transnational commercial bribery in fact began well before these geopolitical changes, for reasons primarily linked to the local political agenda of the United States. The enactment of the Foreign Corrupt Practices Act (FCPA) in 1977 marked the first important step.

[1] Crutchfield George, Lacey and Birmele 1999, 9; Pieth 1997a, 119 et seq.
[2] Belgium: *Neue Zürcher Zeitung*, 9 December 1994, 1; France: *Neue Zürcher Zeitung*, 13 November 2003, 5, *New York Times*, 14 November 2003, 9, *Guardian*, 13 November 2003 (online edn); Germany: BBC News, 29 June 2000 (online edn), Focus, 11/2004, 18 et seq.
[3] Even the preamble of the OECD Revised Recommendation of 1997 (henceforth cited as OECD 1997a) suggests that 'bribery is a widespread phenomenon in international business transactions' (2nd indent); see also the Official Documents at the beginning of this book.
[4] Angola: Global Witness Report, March 2004, 36; Brazil: Neue Zürcher Zeitung, 26 July 2005, 5, *Financial Times*, 22 July 2005, 11; Nigeria: *Basler Zeitung*, 21 October 2002, 44, BBC News, 20 October 2000 (online edn), *Neue Zürcher Zeitung*, 4 October 2000, 25; Philippines: BBC News, 1 February 2002 (online edn), *Neue Zürcher Zeitung*, 22 April 1998, 7.
[5] Acres: M2 Pressure, 23 July 2004; World Bank List of Debarred Firms, available at: http://www.worldbank.org > projects&operations > procurement; Giffen: *Neue Zürcher Zeitung*, 2 April 2003, *Financial Times*, 30 May 2003, 4; Halliburton: Financial Times, 30 March 2004, 6, *Nene Zürcher Zeitung*, 14/15 February 2004; Siemens-Enelpower: *Süddeutsche Zeitung*, 20 August 2004 (online edn).
[6] Mauro 1995, 681 et seq. [7] Cartier-Bresson 2000, 11; Rose-Ackerman 1999, 40.

2. The US initiatives against 'Foreign Corrupt Practices'

2.1. Early legislative activities[8]

2.1.1. SEC disclosure programme and enactment of the FCPA

In the mid 1970s media reports revealed that US companies were acquiring business at home and abroad through clandestine payments to foreign public officials. Such questionable practices were exposed in particular by the Watergate Special Prosecutor examining questionable contributions to President Nixon's re-election campaign.[9] Following a public outcry, the US Securities and Exchange Commission (SEC) created a voluntary disclosure programme and announced an amnesty for companies under the condition that they disclosed past payments to foreign public officials and introduced internal anti-bribery compliance procedures.[10] Shocked by the extent of the revelations,[11] the administration of President Ford suggested legislation requiring US companies to disclose bribes. The draft of 1976, however, failed to pass the Democratic-dominated Congress. The administration of President Carter shortly afterwards pushed for legislation criminalising the bribery of foreign public officials and demanded the definition of additional accounting and auditing requirements and 'in-control standards' to be supervised and, if necessary, sanctioned by the SEC. The new law entered into force in December 1977.[12]

2.1.2. Interpreting the developments

Scholars have taken the enactment of the FCPA more or less for granted; few discuss the reasons for such an unusual step in the 1970s. It is true that an international debate about the behaviour of large Multinational Enterprises (MNEs) had already reached a critical stage. The fact that the OECD enacted its first version of an 'OECD Guideline for Multinational Enterprises' in 1976 was an expression of the need perceived by governments to contain public discontent with the role of MNEs. On the other hand, there must have been strong domestic reasons for the US

[8] Corr and Lawler 1999, 1255; Low 2003a, 3; Schoenlaub 1999, A-1057.
[9] Hines 1995, 3 et seq.; Tarullo 2004, 673.
[10] Hearings on Activities of American Multinational Corporations Abroad Before the Subcommittee on International Economics Policy of the House Committee on International Relations, 94th Cong. 57, 63 et seq. (1975). For the findings of the SEC cf. the Report of the Comptroller General of the United States to Congress in 1981.
[11] More than 400 companies, over 100 of them amongst the 500 largest in the world, owned up to having paid substantial bribes in the recent past.
[12] FCPA 1977 (Pub. L. No. 95-213, 91 Stat. 1494 (1977)).

legislator to take this step unilaterally, reasons going beyond the general sympathy of the Carter administration for business ethics.[13] Case law and legislative materials suggest that the US legislator believed it was acting to protect the free market system against the erosion of public confidence. On a more concrete level it had an interest in preventing US companies from becoming dependent upon such behaviour and thereby losing their competitive edge over others. Additionally, it was feared that businesses with an ethical track record would cave in under the pressure of competition and lower their standards. Still, it remains interesting that the United States acted unilaterally without prior consultation with major trading partners. This may be explained with reference to the size and nature of some of the cases revealed. Notably, the Tanaka-Lockheed scandal, involving Japan's Prime Minister and one of the largest defence contractors in the United States, was highly embarrassing for US foreign policy. Defence industry insiders of that time offer additional explanations: lobbyists in Washington apparently feared that the defence industries could attempt to open up new markets, including with the help of illicit means, especially in the Middle-East, if transnational bribery was tolerated. Even if this additional explanation cannot be corroborated, together with the other theories it indicates that enacting the FCPA was probably not only an effort to protect the US image abroad, but a very straightforward and fundamentally utilitarian step to keep the private sector from interfering with US foreign policy and national security interests, as defined by the Government.[14]

2.2. Efforts to internationalise the FCPA

It rapidly became evident to the US business sector that the FCPA (at least seen from a short-term perspective) placed it at a competitive disadvantage compared to its foreign competitors.[15] It was therefore quite an obvious step to support the drafting of an anti-corruption Convention in the context of the Economic and Social Council (ECOSOC) of the United Nations (UN). In fact, the UN made great efforts to negotiate such a Treaty in the late 1970s; due to North-South and also East-West differences the efforts ended without success and had to be abandoned in 1979.[16]

[13] Tarullo 2004, 673.
[14] Pieth, 1999b, 1; Schoenlaub 1999, A-1057 with reference to US court decisions (e.g. *U.S.* v. *Donald Castle* 1925 F. 2d 831 [5th Circ. 1991]).
[15] Langer and Pelzmann 2001, 3; Tarullo 2004, 676 (note 31): reference to Warren Christopher, Deputy Attorney-General when the FCPA was passed.
[16] Cf. the work of, first, the ECOSOC's Commission on Transnational Corporations, and later of its Committee on an International Agreement on Illicit Payments; Pieth 1999c, A-1039.

Similarly, the rules of conduct developed by the International Chamber of Commerce (ICC) in parallel to the UN negotiations, and aiming to supplement an international public standard, were finalised. They too remained, however, a more or less dead letter without the public backing of the Convention, until new efforts in the 1990s proved more successful.[17]

2.3. What did work?

Towards the late 1980s, pressure mounted within the US business sector to either tone down or even abolish the FCPA or to encourage major competitors to follow suit. Successive publications of the US Department of Commerce, based on complaints by the private sector and frequently adding references to intelligence sources, presented figures showing lost business due to foreign bribery by foreign competitors.[18]

2.3.1. FCPA 1988

In 1988, the FCPA was reformulated.[19] Documents of the time raise the question whether the intention was 'clarification' or 'evisceration'.[20] Some of the amendments, e.g. the shift from the 'knowledge standard' for indirect bribery and the widening of the exceptions, seemed to weaken the law.[21] Essential for the future, however, was the President's obligation under the new law to pursue negotiations with major competitors to conclude an international agreement against foreign bribery. This provided the domestic legal justification for the US request to the OECD in 1989 to initiate work on an instrument on combating bribery of foreign public officials.[22] There was to be debate then and later within various US administrations about the choice of an organisation to pursue the issue. As a consequence of the traditional US distrust of the UN, it was obvious that this organisation was not considered. However, the GATT would have been an option.[23] In 1989

[17] For the history of the ICC Rules of Conduct, cf. Heimann 2003, 13 et seq.
[18] The carping became more than ever explicit: cf. Hines 1995, 19 et seq., with reference to the US Department of Commerce, Unclassified Summary of Foreign Competition, October 1995 (pre 1994: 100 cases, amounting to $45 billion, and 1994–98: 239 cases amounting to $108 billion); Kantor 1996, in Sacerdoti 2003, 43; *Wall Street Journal*, 23 February 1999 (calling OECD members the worst offenders); Gareis 1999, A-1013; cf. also Schoenlaub 1999, A-1058.
[19] FCPA Act 1988 (Pub. L. No. 100-418, 102 Stat. 1107 (1988)); Tarullo 2004, 674.
[20] Bliss and Spak 1989, note 16.
[21] Crutchfield George, Lacey and Birmele 1999, note 109; Hines 1995, 21; Low 2003a, 1; Tarullo 2004, 679.
[22] OECD 1999, F-1005.
[23] An option suggested even as late as 1997 by the US Trade Representative, M. Kantor.

the G-7 had just taken a similar decision in a related area — following on from the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances it had created the Financial Action Task Force on Money Laundering (FATF). And it asked the OECD to supply secretariat services, in particular because it was hoping to make use of the OECD's well-established 'peer review' and 'soft law' procedures.[24] Moreover, the OECD, as the organisation of the major exporting and investing nations, seemed to be best suited to develop international rules on foreign commercial bribery.[25]

2.3.2. Initiative in the OECD

The Paris-based Organisation for Economic Co-operation and Development (OECD) was created in 1960 and had a crucial role in the post-war reconstruction of Europe. It was created to facilitate the implementation of the US European Recovery Program or Marshall Plan. Together with the Bretton Woods institutions, the OECD managed to implant into European politics a shift of paradigm from aggressive mercantilism to economic co-operation.[26] The 1960 OECD Treaty stated its main goal as follows: to enable its state Parties to consult and co-operate in order 'to use more effectively their capacities and potentialities so as to promote the highest sustainable growth of their economies and improve the economic and social well-being of their people'.[27]

Over the post-war period, the OECD has evolved into the pre-eminent organisation of the industrialised nations for international economic research. The OECD has a key role in economic analysis; on a policy level, securing free market access is still the paramount concern of its members. After the fall of communism and the opening of East European markets, bribery is more than ever perceived as a non-tariff trade barrier to European and global trade. The issue therefore blends well into the OECD's work programme of promoting exports and foreign investment.

Within the some 120 committees and subgroups of the OECD consensus politics has become well established.[28] Peer review has become an accepted method of securing compliance by state Parties with their

[24] Financial Action Task Force on Money Laundering, Reports, Paris, February 1990.
[25] Cf. the reference to the mandate of the OECD as an organisation in OECD 1997a, preamble: see also note 3 and OECD 1999, F-1005.
[26] Guilmette 2004a, 28. [27] OECD 1960, 7th recital. [28] Guilmette 2004a, 44.

Treaty obligations.[29] Its subtlety commends itself to states, and its effectiveness can be enhanced by the exercise of peer pressure, depending on the topic.

3. The OECD initiatives against corruption

3.1. 1989–1994

3.1.1. The first tentative steps

The idea that, in 1989, the topic of corruption was new in a forum dealing with international business would be wrong. Just as the private sector, through the ICC, had worked on the issue between 1975 and 1977 (Shawcross Committee).[30] So the OECD, as early as 1976, had itself already addressed corruption – even if in a still rather general manner – in its 'Guidelines for Multinational Enterprises'.[31] However, the political context of the 1970s was quite different from that of the 1990s. Beyond the issue of unfair competition, the Guidelines had aimed to come to terms with the general discontent and criticism pertaining to the behaviour of MNEs in the 1970s; they were widely condemned for basing their action entirely on profit-maximisation. Moreover, it must be added that these early instruments did little to change endemic corrupt practices around the world.

The nature of the discussions concerning commercial bribery in the 'Ad Hoc Group on Illicit Payments'[32] at the OECD, which began its work in 1989, was thus entirely different from what it is today.[33] Even though the efforts were being undertaken in parallel to the work of high-powered task forces like the FATF and Carribean Action Task Force (CATF), the issue was treated with distrust by the state Parties. The representation was rather on the low-level (including the US delegation) and the work rhythm slow in the beginning.[34] The OECD Council insisted on cautiously worded mandates on an annual basis, first requesting a comparative review of national legislation, then a series of feasibility studies of possible substantive actions and procedural approaches. Only after several years of preliminary work was it possible to envisage proposing a Recommendation on specific actions to be taken by the state Parties.[35]

[29] OECD 2003a. [30] Heimann 2003, 13. [31] Para. VI OECD 2000b.
[32] A Working Group which was created by the Committee on International Investment and Multinational Enterprises of the OECD (CIME): cf. OECD 1999, F-1005.
[33] OECD 1999, F-1005 et seq.; Pieth 2000a, 54 et seq.; Sacerdoti 2003, 72 et seq.
[34] Tarullo 2004, 675, 677.
[35] Council Decisions of March 1989 C(89)49; of June 1990 C(90)87; of February 1992 C(92)16; Ministerial Communiqué of 2 June 1998 (CES(93)22).