

# **First Anti-Corruption Colloquium: *Fighting Corruption with Ethical Codes and Corporate Compliance***

18 April 2011, 2:00 – 5:00 pm

Faculty of Law, The Chinese University of Hong Kong

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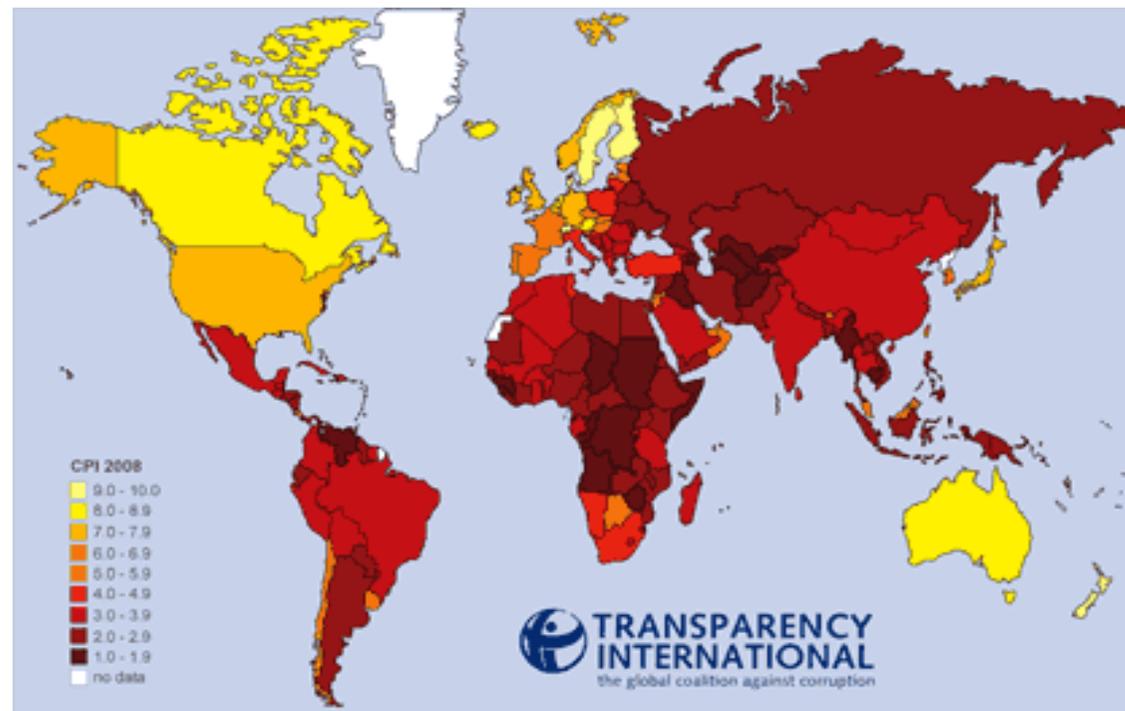
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## Dealing with ubiquitous crime across cultures – bribery

The concept of corporate integrity is central to corporate social responsibility. Ethical values such as honesty, fairness and transparency should inform business strategy. Corruption is widely accepted as morally reprehensible, since it erodes all these values. Corruption has no national boundaries and continues to be a particular issue for MNEs operating in developing nations where it is often endemic in both the private and public sectors. It can be seen as part of the fabric of society. In such an environment, participation in corrupt practices may seem unavoidable. <http://www.digitaljournal.com/article/260238>



‘Global corruption costs businesses billions of dollars every year, often forcing companies to choose between winning business through bribes or losing the ability to operate as successfully or at all in certain markets’

Michael Hershman, World Bank Institute Working Group and founder of Transparency International, TI’s Global Corruption report 2007

Not just for procurements but also for information:  
e.g. France/China Renault dispute

<http://www.bbc.co.uk/news/business-12160430> Renault and its Japanese partner Nissan have invested \$4bn (£2.5bn) to develop electric cars AND SEE new **China law** <http://blogs.wsj.com/corruption-currents/2011/03/02/china-criminalizes-foreign-bribery/>



The impact of corruption was summarised by Lord Falconer in his Forward to the Corruption Bill 2003.

‘Corruption is potentially devastating. If it is not kept in check, it has the potential to cause serious damage to government and business – indeed to every aspect of economic and social life. We need to be constantly on our guard against corruption – it is a complex crime, by its very nature insidious and its effects stretch across international borders. Corruption world-wide **weakens democracy**, harms economies, impedes sustainable development and **can undermine respect for human rights by supporting corrupt governments**, with widespread destabilising consequences.’



## Corruption and Children's Rights

### *Adoption*

Children possess a right to special protection during adoption, particularly in cases of intercountry adoptions. States must ensure that an adoption is authorised by a competent authority following legal procedure, taking into account the child's best interest. In addition, states are required specifically to take measures to ensure that an adoption does not result in improper financial gain for those involved in it (UN [Convention on Rights of the Child](#)) (CRC) ratified or acceded to by 193 countries.

**Article 21(d)** Despite this, corruption occurs in many cases of intercountry adoption. Judges and orphanages sometimes receive large bribes to speed up the adoption process; or judges may accept false documents, against payment, purporting to contain the consent of the birthparents. Such practices violate the right of the child to be protected, because parties involved in the procedure gain financially, legal procedures are breached and the child's best interest is not prioritised. All this violates Article 21 of the CRC. Corruption in intercountry adoptions can also violate other rights of the child, such as the right to identity.

## Corruption as a violation of the right to a fair trial and to an effective remedy

The right to a fair trial under [Article 14 of the International Covenant on Civil and Political Rights \(ICCPR\)](#) contains a broad range of rights which provide for a fair, effective and efficient administration of justice (the judiciary, the police, and prosecutors). Everyone is entitled to equality before the courts and tribunals, and have the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The relationship between corruption and human rights is particularly relevant with regards to the right to a fair trial.

There are many ways in which corruption can affect the administration of justice and the right to a fair trial. The most immediate way is through bribing judges to obtain a favourable judgment, to speed up procedures, or to obtain bail. Corruption can also occur before the case reaches the courts, mostly at the enforcement level if the police, for example, manipulate evidence in favour of one of the parties, or at the prosecution level if the prosecutor alters the facts of the case

pp 10 -27 of 'Corruption as a violation of human rights by Julio Bacio-Terracino January 2008



## The OECD Convention on combating Bribery of Foreign Public Officials in International Business Transactions

- came into force on 15th February 1999 and was ratified by all the thirty OECD members and eight non-members and it includes some of the most important exporting nations in the world. The OECD Convention's participating countries are spread over five continents and account for **over 70% of world exports and over 90% of foreign direct investment** . However, some significant trading countries are conspicuous by their absence, most notably China, India and Russia.
- Now 34 members and 8 non-member signatories Argentina, Brazil, Chile, Bulgaria, Estonia, Slovenia South Africa and Israel

the focus of the OECD has been to target bribery in international business transactions on the basis that it **distorts fair competition**.

The OECD Convention establishes a framework for countries to work in a coordinated way to tackle the bribery of foreign officials.

It requires the signatory states to create domestic laws to hold their citizens and companies accountable for the bribery of foreign officials, committed anywhere in the world. Highlights from the **Working Group on Bribery** enforcement data collected as of May 2010 include:

- **148** individuals and **77 entities** have been sanctioned under criminal proceedings for foreign bribery in 13 Parties between the time the Convention entered into force in 1999 and the end of 2009.
- At least **40** of the sanctioned individuals were sentenced to prison for foreign bribery.
- A record amount of **EUR 1.24 billion** was imposed in combined fines on a single company for foreign bribery.
- Approximately 280 investigations are ongoing in 21 Parties to the Anti-Bribery Convention.

The OECD Convention tackles the issue in several ways:

- It requires signatory states **to define the bribery of foreign public officials as a crime and to punish acts of bribery** in international business. They are required to do so within an adequate time frame.
- Signatory states are required **to treat the concealment of the proceeds of corruption as a money laundering offence**.
- It requires signatory states **to prohibit accounting practices used in order to bribe foreign public officials** or to hide such bribery. Thus signatory states are required to prohibit the establishment of off-the-books accounts and similar practices used to conceal bribery.



The OECD Convention is not self-executing and so the norms contained within it need to be reformulated and introduced into the legislation of each signatory state. Uniformity is not required. It looks to establish minimum standards or to 'assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials

The Convention adopts an **extra-territorial approach** requiring that signatory states assert jurisdiction over corrupt acts committed by their citizens who engage in bribery outside its national borders. This provides the means to tackle corruption in countries with a record of poor governance.



It ensures that businesses operating from signatory states cannot justify the continuance of the bribery on the basis that **not to do so would place them at a particular competitive disadvantage** with businesses who do.

## LIMITATIONS...

The OECD Convention has some significant limitations, it is one-sided in that it focuses on the 'supply' side of corruption only, it aims to deal with the source, or 'active' corruption of the business who offers the bribe.

It does not provide for the creation of sanctions against the foreign public officials or politicians who accept the bribe.

Nor does it apply to the bribery of those in the private sector.

It does not, as yet, apply to **small facilitation payments** which are commonplace and legitimate in certain countries . For definitinal challenges in a US context see: <http://tfoxlaw.wordpress.com/tag/facilitation-payments/>

**Article 3** of the OECD Convention requires that bribery of a foreign public official shall be punishable by ‘effective, proportionate and dissuasive’ criminal penalties. Where the jurisdiction of a signatory state does not recognise the criminal accountability of corporations, then the state concerned must ensure that corporations are subject to ‘effective, proportionate and dissuasive’ non-criminal sanctions, including monetary sanctions.’

Article 3 also provides that signatory states should take necessary measures to ensure that the bribe and any proceeds of the bribery are subject to **confiscation** or that the **equivalent money sanction** is imposed on the guilty party. Article 8 requires the creation of sanctions for the falsification of the records, accounts and financial statements of company engaged in bribery of foreign public officials.

**Article 5** is significant in that it provides that investigations and prosecutions into corruption **cannot be influenced by considerations of national economic interest, or the potential effect on relations with another state or the identity of the natural or legal person involved**. This is designed to ensure that signatory states cannot justify not enforcing their obligations under the OECD Convention on the basis that to do so would adversely affect the competitive position of its commercial sector.

# R (On The Application of Corner House Research and Others) V Director of The Serious Fraud Office [2008] UKHL 60

LORD BINGHAM OF CORNHILL

My Lords,

1. The issue in this appeal is whether a decision made by the appellant, the Director of the Serious Fraud Office, on 14 December 2006, to discontinue a criminal investigation was unlawful...

....By sections 108-110 of the Anti-terrorism, Crime and Security Act 2001 it was made an offence triable here for a UK national or company to make a corrupt payment or pay a bribe to a public officer abroad. The payment or bribe must not be authorised or approved by the officer's principal. The enactment of these sections gave effect to the UK's obligation under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)....”



R (On The Application of Corner House Research and Others) V Director of The Serious Fraud Office [2008] UKHL 60 the British Government stated that the Serious Fraud Office's (SFO) decision not to prosecute BAE Systems for corruption in the EL Yamamah deal was justified as being in the interests of national security as this was a legitimate reason not provided for in Article 5 of the OECD Convention. The Attorney-General stated his views on the effect of Article 5 in Parliament on 1 February 2007:

"I do not believe that the Convention does, or was ever intended to, prevent national authorities from taking decisions on the basis of such fundamental considerations of national and international security. I do not believe that we would have signed up to it if we had thought that we were abandoning any ability to have regard to something as fundamental as national security, and I do not believe that any other country would have signed up either". (*HL Debates, Hansard, col 378*):

A judicial review of the Director of the Serious Fraud Office (SFO) decision not to prosecute BAE Systems failed when the House of Lords held that this was a lawful decision that he was entitled to make. He believed that that the public interest in protecting security interests outweighed pursuing BAE for corrupt payments. With regard to the status of Article 5 of the OECD Convention, Lord Bingham doubted that Article 5 was intended to deny member states the right to rely on a severe threat to national security.

The report of the OECD WGB in 2008 provides a detailed evaluation of the implementation of the OECD Convention in the UK and is highly critical of the lack of progress made.

The latter section of the report focuses on [BAE Systems affair](#) in El Yamamah and the application of Article 5.

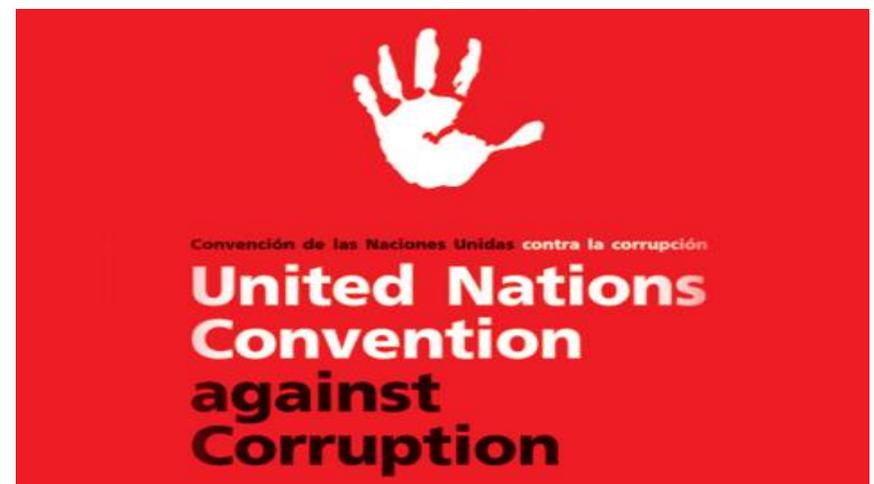
The Report emphasises that *even if* national security constitutes an exception under Article 5, the investigative and prosecutorial authorities must subject any non-Article 5 factors to [strict scrutiny in order to dispel doubts that the Article 5 factors are in fact influencing the decision not to prosecute](#). The Working Group concluded that this was not adequately done by the Director of the SFO in the BAE Systems case.

# The United Nations Convention Against Corruption 2003 (UNCAC)

In 2000 the UN General Assembly decided to establish a special committee open to all states in order to draw up an effective international legal instrument against corruption.

This committee negotiated the Convention between January 2002 and October 2003 and the United Nations Convention Against Corruption (UNCAC) came into force in 2005.

It has now had **146** ratifications/accessions including Russia and China.



**Chapter II** is significant as it is aimed at the prevention of corruption both in the **public and private sectors**. It details the different measures to be taken by the State Parties to prevent corruption. Its provisions are far ranging and detailed.

**Chapter III** requires that each State Party adopt legislation to create criminal offences for certain types of corruption. It is wider than the OECD Convention in several ways:

It provides for the bribery of **national and foreign public officials** and both the provider and the receiver of the bribe are criminally liable

It provides for a wider range of corrupt acts, and includes **embezzlement, misappropriation and diversion of property, trading in influence and abuse of functions**.

# US Foreign and Corrupt Practices Act 1977 (FCPA)

The FCPA is a notable piece of domestic legislation.

For a long time the FCPA was alone, with the exception of a similar statutory provision in Sweden, in prohibiting bribery outside its borders. Its approach led the way for the OECD Convention. It prohibits the bribery of foreign public officials by US corporations and citizens when trading abroad. US jurisdiction extends to US corporations and nationals regardless of where the bribery takes place. So, for instance, a US company may be held liable for a corrupt payment authorised by its employees or agents operating entirely outside the US, using money from a foreign bank account and without the involvement of any company personnel within the US.

The FCPA now also makes it clear that US parent corporations may be liable for acts of their foreign subsidiaries where there is a measure of control over the activity. Since 1998 the FCPA has been applied to any foreign entity who commits an act in furtherance of a foreign bribe while in US territory and this is interpreted widely. The US can prosecute a foreign national who has never set foot in the US, provided that the foreign defendant caused some act in furtherance of the offense to take place in the US

Fears of placing US businesses at a competitive disadvantage ensured the inclusion of exceptions in the FCPA which permit payments which facilitate or expedite performance of a 'routine governmental action' such as obtaining permits, licences or processing governmental papers such as visa and work permits. They are known as 'grease payments' as they oil the machinery of decision-making.

Payments to facilitate a service such as obtaining telephone connection, power and water supplies and the loading and unloading of cargo are permitted.

However, routine governmental action does not include any decision by a foreign official to award new business or to continue business with a particular party. Payments are also legitimate where they support legitimate business marketing.



## The enforcement of the FCPA

The FCPA is enforced by the US Department of Justice (DOJ) and the Securities Exchange Commission (SEC).

In 2010 there were **47 corporate prosecutions**. 11 companies charged were non-US companies, some being subsidiaries of US parents.

In 2010 **\$1.7 billion** in FCPA-related fines and penalties was collected from corporations. 80% of the total penalties were paid by non-US companies.

Penalties include fines, imprisonment and the recovery of the profits made as a result of the bribe.

In 2009, Haliburton, a US oil services company and its then subsidiary KBR agreed to pay a penalty of \$579m, made up of a \$402m fine plus \$177 disgorgement of company profits. This case involved a series of bribes paid to secure contracts to build **a natural gas plant in Nigeria** by a multinational consortium. The bribes were paid via a British solicitor and a Japanese trading company

Figures taken from FCPA Digest Cases and Review Releases relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977 – prepared by Sherman & Sterling LLP January 2011.

In December 2010 BAE Systems pleaded guilty to failing to keep adequate accounting records. It related to a payment of **£12.4m** paid by BAE's agents to officials in **Tanzania** which was incorrectly labelled in the accounts. The money was paid via a Tanzanian company and an offshore company and BAE did not ask questions about what it was for.



BAE Systems was **fined £500,000** and also agreed with the SFO to make an ex gratia payment of £30m to Tanzania. In return, the SFO has agreed to terminate all on-going investigations into BAE. The judge in the Crown Court criticised the SFO handling of the issue, stating that he was **"surprised to find a prosecutor granting blanket indemnity for all offences committed in the past, whether disclosed or otherwise."**

**The Bribery Act 2010** introduces a novel form of legislative drafting as it includes examples of prohibited behaviour.

s.1 sets out the general offence of bribery another person. It targets **the supply or active side** of bribery in making it an offence to offer or to give a financial or other advantage.

s.2 targets the **demand or passive side** of bribery, making it an offence to request, agree or to receive a financial or other advantage. s.1 and s.2 apply to both individuals and to corporations. 'Financial' or 'other advantage' is not defined but will be determined on the facts by the courts.

The intention under s.1 and s.2 is that the person being bribed should be induced to perform improperly a function that he expected to carry out impartially, in good faith or as a consequence of being in a position of trust. This includes any function of a public nature and any activity connected with business. The improper performance of the person being bribed will be judged by whether it breaches the expectation of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned even if the function or activity need have no connection to the UK.

**s.6** creates a specific offence to bribe a foreign public official by offering, promising or giving a financial or other advantage with the intention of influencing the foreign public official in his capacity as a foreign public official and of obtaining or retaining business, where the foreign public official was neither permitted nor required by written law to be so influenced. In this case there is no reference to 'inducing' the public official.

Under **s.7** commercial organisations will commit a strict liability offence where have not done enough to prevent bribery. They will be guilty of an offence where a person 'associated' with them bribes another person intending to obtain or retain business or an advantage in the conduct of business. An 'associated' person is defined in **s.8** as a person who 'performs services' on behalf of the commercial organisation. The examples given include agents, employees and a subsidiary. The issue of what constitutes the performance of a service will be determined by reference to all the relevant circumstances. The main justification for the introduction of this offence is to deter commercial organisations from giving direct or indirect support to the practice or culture of bribe taking.

