

**AMERICAN BAR ASSOCIATION
SECTION OF
INTERNATIONAL LAW AND PRACTICE**

RECOMMENDATION

1 **BE IT RESOLVED**, that the American Bar Association supports efforts by the international community,
2 by national governments, and by non-governmental organizations to encourage the adoption and
3 implementation of effective legal measures and mechanisms to deter corrupt practices in the conduct of
4 international business.
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6 **BE IT FURTHER RESOLVED**, that the American Bar Association urges the United States government
7 to take steps to support the adoption and implementation by national governments and the international
8 community of effective legal measures and mechanisms that are actively monitored and enforced to deter
9 corrupt practices in the conduct of international business.

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REPORT

I. Explanation of Recommendation¹

The purpose of this recommendation is to put the American Bar Association ("ABA") on record in support of efforts by the international community, including international organizations and international lending institutions, by national governments, including the United States government, and by non-governmental organizations ("NGOs") in the United States and elsewhere to address the problem of corrupt practices and, in particular, the payment of bribes to foreign government officials, in the conduct of international business.

II. Background

In the early 1970s, the international community began to examine the incidence and effects of corrupt practices in the conduct of international business. Much of the impetus for this examination came out of disclosures concerning the foreign activities of U.S. companies. Though limited in practical effect, the United States was able to obtain a resolution from the General Assembly of the United Nations condemning corrupt practices in international commerce and calling for unilateral and multilateral action against them.^{2 3} The United Nations also called on the Economic and Social Council ("ECOSOC") to establish a specific policy challenging corruption.

In 1976, ECOSOC created an Ad Hoc Intergovernmental Working Group to consider the problem of corrupt practices.⁴ International agreements, codes of conduct, model laws, unilateral national action, procurement codes, certification, and voluntary business codes were among the alternatives considered. ECOSOC chose to flesh out an international agreement which could be used to prevent illicit payments. By 1979, a draft agreement, known as the "International Agreement on Illicit Payments" (the "draft U.N. Agreement"), was nearly

¹The Task Force on Foreign Corrupt Practices of the Section of International Law and Practice's Committee on International Criminal Law took the lead in preparing this recommendation and report. The Task Force was chaired by Stuart H. Deming and John A. Detzner. Its members included Anthony J. Carroll, Curtis E. Hall, William M. Hannay, Steven J. Lepper, Elliot R. Lewis, Jill D. Rhodes, Douglas Stringer, Pamela B. Stuart, Peter F. Vaira, Bruce Zagaris, and Nancy B. Zucker.

²G.A. Res. 3514 (XXX), UN Doc. A/10034 (1976).

³Indeed, at this same point in time, there was support for U.S. submission of an anti-bribery proposal at a meeting of the General Agreement on Tariffs and Trade ("GATT"). Rubin, *International Aspects of the Control of Illicit Payments*, 9 SYRACUSE J. INT'L. L. & COM. 315, 319 (1982)

⁴E/C.10/38, 20 March 1978 at 123-24..

completed.⁵ It would have obligated states to prohibit all bribes to foreign public officials, including "grease" payments exempted under the Foreign Corrupt Practices Act ("FCPA") in the United States, which had been adopted in the United States in 1977. However, no action was ever taken to convene a conference to conclude and formalize the draft U.N. Agreement.⁶

Part of the reason for this inaction was the insistence of the developing countries to link the draft U.N. Agreement with the Code of Conduct for Transnational Corporations ("Code"), which was also being prepared under U.N. auspices.^{7 8} Though not a legally binding document, the Code urged corporations to refrain from using subversive activities to interfere in the internal affairs of host countries, including offering bribes to influence a public official's duties, and to maintain accurate records of payments. The Code also prohibits states from using transnational corporations as instruments to intervene in the affairs of another state and encourages states to take appropriate action to prevent companies from engaging in such intervention.

In 1976, the Organization for Economic Co-operation and Development ("OECD") issued the *OECD Declaration and Decisions on International Investment and Multinational Enterprises*.⁹ Though the Declaration did not include an enforcement mechanism for signatories, it stated that enterprises should not be expected to render improper benefits to holders of public office. Unless involvement local political activities is legal, enterprises are to avoid such activities, including making contributions to political candidates or organizations. The Declaration also contained disclosure standards similar to the internal control and accounting records provisions in the FCPA.

⁵U.N. Doc. E/104/1979 (May 25, 1979), reprinted in 18 INT'L L. MAT'LS 1025 (1979).

⁶At the Venice Economic Summit in July, 1980, the United States obtained in the communiqué the following commitment to further action on the U.N. initiative:

As a further step in strengthening the international trading system, we commit our governments to work in the United Nations towards an agreement to prohibit illicit payments to foreign government officials in international business transactions. If that effort falters, we will seek to conclude an agreement among our countries, but open to all, with the same objective.

See Interim Report to Congress: Implementation of Section 5003(d) of the Trade Act of 1988 (Aug. 25, 1989).

⁷J. Klotz, *Bribery of Foreign Officials - A Call for Change in the Law in Canada*, 13 CAN. B. REV. (Dec. 1994).

⁸In 1978, the ECOSOC Commission on Transnational Corporations issued an examination of transnational corporations in world development. E/C.10/38, 20 March 1978. ECOSOC also established an intergovernmental working group to draft an international agreement to prevent and eliminate the occurrence of illicit payments. *Id.* at 123-24. In 1984, ECOSOC issued the Code.

⁹OECD/GD(92)16.

Finally, during this same period, the International Chamber of Commerce ("ICC") initiated action to challenge corruption. In 1977, the ICC adopted rules of conduct to confront extortion and bribery.¹⁰ The rules of conduct prohibited transnational corporations from paying bribes directly or indirectly to secure business. A panel was established to interpret the rules. However, the panel's effectiveness was limited because its by-laws state that its deliberations are confidential and the panel cannot proceed without permission of the accused party.

III. The U.S. Experience

Investigations relating to the Watergate scandal in the U.S. disclosed widespread and illegal use of domestic political contributions and the establishment and maintenance of off-book slush funds by corporations as vehicles to fund the payment of these contributions as well as bribes to foreign officials.¹¹ As a consequence, the U.S. Securities and Exchange Commission ("SEC") instituted a voluntary disclosure program that ultimately induced more than 400 American public companies to conduct voluntary internal investigations, which revealed illicit payments to foreign officials. The results of these voluntary disclosures led to the passage of the FCPA in December of 1977.

The FCPA makes it unlawful for a firm or person subject to the statute to offer, pay, or promise to pay, money or anything of value to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.¹² A similar prohibition applies with respect to payments to a foreign political party or official, or to a candidate for foreign political office. The FCPA also requires issuers of publicly-traded securities to maintain books and records that accurately and fairly reflect the transactions of the corporation and to design an adequate system of internal accounting controls.

In addition to direct payments by "domestic concerns" (a broad term encompassing all forms of U.S. business enterprise, U.S. citizens and residents, and the officers, directors and agents of U.S. enterprises) and issuers of publicly-traded securities in the United States, the FCPA prohibits certain indirect payments. As originally enacted, the FCPA made it unlawful to make a payment to a third party with "reason to know" that the third party would use all or a portion of the payment to bribe a foreign official. Since 1988, liability for intermediary payments has been subject to a "knowledge" standard.

¹⁰See *Extortion and Bribery in Business Transactions*, Report adopted by the 131st Session of the Council of the ICC, Doc. No. 192/44, (Dec. 2, 1977).

¹¹Gareis & Linklater, *The Foreign Corrupt Practices Act: A Pragmatic Analysis*, in INTERNATIONAL TRADE: AVOIDING CRIMINAL RISKS at 13-5 (W. Hannay ed. 1991).

¹²15 U.S.C. §§ 78 dd-1 - 78dd-2.

Regardless of whether enforcement action is taken by the U.S. Department of Justice or the SEC, the FCPA has deterred corrupt practices in the conduct of international business by U.S. firms.¹³ Indeed, the legal and accounting professions have exerted leadership to assure compliance by U.S. firms.¹⁴ Some companies have even found it prudent to adopt stricter standards than what the FCPA requires.

IV. Recent Developments

administrative laws and regulations and taking "concrete and meaningful steps" to meet this goal as well as strengthening international cooperation. The recommendation also makes an appeal to non-Member countries to join with OECD Members in their efforts to eliminate bribery in international business transactions and it also provides for a follow-up mechanism to monitor implementation.

The General Assembly of the Organization of American States ("OAS") likewise adopted a resolution presented by a number of delegations that found that in international trade "corrupt practices are capable of frustrating the process of overall development, generating the diversion of resources necessary to the improvement of the economic and social condition of the peoples" The resolution, adopted on June 1, 1994, called for a Working Group to study the subject of honesty and civic ethics. The Working Group has now been established. It has also been reported that the Organization of African Unity ("OAU") is awaiting what action the OAS may take before initiating its own action.

More recently, on June 15, 1994, Justice Ministers from the Council of Europe adopted a program to combat corruption at the close of its XIXth Conference.¹⁵ This program calls for the establishment of a multi-disciplinary group, under the auspices of the Council of Europe, to promote research projects, training programs, and exchanges in practical experiences on corruption. It is suggested that the group will also address issues such as public and private

¹³See, e.g., Hill, *Foreign Representatives: Saudi Law and the FCPA*, in BUSINESS LAWS, INC. (FCPA) at 200.0128 (Apr. 1989).

¹⁴See, e.g., Low & Wellington, *The Foreign Corrupt Practices Act: Avoiding the Pitfalls*, 13 PREVENTIVE L. REP. at 13 (Spring 1994).

¹⁵*Europe: Justice Ministers of Council of Europe Engage in Fight Against Corruption*, Agence Europe (AE), June 16, 1994.

codes of conduct, fines for illegal payments, ways to discourage corruption by foreign officials, and the ability to extradite and facilitate mutual legal assistance when corruption is involved.

There are also recent developments with the United Nations in its efforts to work with nations to restrict corruption through its Commission on International Trade Law ("UNCITRAL"). On July 23, 1993, UNCITRAL adopted a Model Law on Procurement of Goods and Construction. A similar model law was adopted for the procurement of services in July, 1994. These model laws, which contain a section that challenges bribery within a host country, are offered as advisory legislation to countries establishing procurement regulations.

Finally, the leadership in many developing countries is at the forefront of efforts to seek concerted action against corruption. In particular, Ecuador has implemented an antibribery commitment requirement for corporations bidding on specific public procurement projects. Transparency International is working with government officials throughout the hemisphere on a declaration and action plan on corruption to be endorsed at the upcoming Summit of the Americas in December, 1994.¹⁶ At the heads of government meeting of the Group of Rio on September 7-11, 1994, the Venezuelan government proposed international criminal cooperation in combatting crimes against the public trust.

V. Recommended Action

Corrupt practices in the conduct of international business activity lead to the creation of inefficiencies, distort the allocation of resources, and hinder the process of development. It is therefore in the interest of both the developed and the developing world to take effective measures to deter such practices. International cooperation of the type that has begun to evolve can make an important contribution to this process. Such cooperation can increase consensus on the specific types of conduct to be proscribed, provide for enforcement modalities, and establish uniform mechanisms for enforcement.

The international action to date, however, represents the evolution of "soft" rather than "hard" law. The obligations stated in the OECD Recommendation and other instruments will only be converted into binding obligations on states not currently having such obligations and private persons doing business in such states if national governments and the international community are committed to making the development and enforcement of proper national and international laws a priority. The ABA can play an important role in supporting this process, and in assisting in the development of effective mechanisms to prevent bribery and related conduct.

Respectfully submitted,
Jay M. Vogelson
Chair

February, 1995

¹⁶Established in the spring of 1993 as an NGO registered in Germany, Transparency International serves as a coalition against corruption in international business transactions. It is composed of leading current and former political leaders, international business executives, and experts in international development.

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice

Submitted By: Jay M. Vogelson, Chair of the Section of International Law and Practice

1. Summary of Recommendation.

The Recommendation urges that the American Bar Association support efforts by the international community, by national governments, and by non-governmental organizations to encourage the adoption and implementation of legal measures and mechanisms to deter corrupt practices in the conduct of international business.

2. Approval by Submitting Entity.

This Recommendation was approved by the Council of the Section of International Law and Practice at its meeting on November 12, 1994, in Mexico City.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This Recommendations has not previously been submitted to the House of Delegates or Board of Governors.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

No existing policies would be affected by approval of this Recommendation.

5. What urgency exists with requires action at this meeting of the House?

Approval of this Recommendation and Report by the House of Delegates at this meeting is needed because it is anticipated that the issue of foreign corrupt practices will be a central issue at the meetings of the Organization for Economic Co-operation and Development ("OECD") in March, 1995. Aside from lending the ABA's support to addressing this issue, there may be an opportunity for non-governmental organizations to participate in some way in these meetings.

6. Status of Legislation. (If applicable.)

Not applicable.

1. Summary of the recommendation.

The recommendation puts the American Bar Association on record in support of efforts by the international community, by national governments, and by non-governmental organizations to address the problem of corrupt practices in the conduct of international business.

2. Summary of the issue which the recommendation addresses.

Since the early 1970s, the issue of corrupt practices in the conduct of international business has been raised in a number of fora. However, until recently, except for the adoption of the Foreign Corrupt Practices Act ("FCPA") by the United States in 1977, the issue has not been seriously addressed in other countries nor in the international community. There are now developments in the international community that suggest a renewed impetus to adopt and implement measures to deter corrupt practices in the conduct of international business.

3. Please explain how the proposed policy position will address the issue.

The recommendation puts the American Bar Association behind these efforts in the international community to deter corrupt practices in the conduct of international business. But aside from lending the ABA's support, the recommendation puts in place a policy that will enable the membership of the ABA to take an active role in these efforts and in furnishing pertinent technical advice.

4. Summary of any minority views or opposition which have been identified.

No articulated concerns have been raised from any source. To the contrary, there has been overwhelming support, including that of the U.S. Department of State and the U.S. Department of Commerce, for the proposed recommendation of the ABA.