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Fighting Corruption Across the Border

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INTRODUCTION

In the twenty-first century, the textbooks on international law, it is submitted, will all include a chapter on fighting corruption across the border. In the following, the first section will be devoted to pointing out why it seems worthwhile to fight corruption at all. It will then be explained more fully in the second section why that fight should be carried across state frontiers. Upon establishing the transnational character of the problem, an outline of an international solution will follow in the third section. In conclusion, a short word will be added on how the cross-border fight against corruption will relate to future international law in general.

I. *THE NEED TO FIGHT CORRUPTION*

The tumbling of the Berlin Wall on November 9, 1989 precipitated the spread of democracy and free market economy throughout Eastern Europe, including the whole of what was then the Soviet Union. Less identifiable by a specific date but equally fundamental proved a shift of economic policy from utopian central planning to vigorous free marketeering in many countries of the Third World. Even the First World of well-settled industrialized states started moving again and entered a new phase of deregulation and privatization.

Times of transition are times of corruption. To some extent one will therefore simply have to wait for the new structures to become firmly established. In the East of Europe, however, the process of consolidation could easily be overtaken by a gradual or even sudden return to authoritarian structures. Corruption both in government and private business has no little role in discrediting freshly installed democratic procedures and freshly installed free market systems.

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Corruption is more than a moral issue. Corruption contradicts the very notion of one person-one vote democratic government. It limits the efficiency of competition and creates social injustice, if not misery. Corruption should therefore be eliminated with a sense of urgency.

II. *FIGHTING CORRUPTION FROM WITHOUT*

There is corruption in every state of the world. In most states, it can be fought from within, with the press and the judiciary as the primary agents of internal control. Journalists, prosecutors, and judges, however, are not totally immune to corruption either. Cases of improper conduct are regrettable but of no general harm as long as there remains some newspaper, television station, or court that can be relied upon to take up an incident of corrupt practices. By contrast, a situation where no one in the media or judiciary cares, or dares, to put forward even meticulously documented cases of corruption is quite alarming, no matter whether the situation results from the pervasiveness of corruption, an atmosphere of personal threats, or both. The deep involvement of members of the political class in Italy, only recently revealed thanks to judges and public prosecutors, gives an idea of what the situation could be like.

It is actually for the sociologist, however, to propose methods to overcome indifference and immobility in a society. Lacking such training, this author confines himself to submitting some legal observations on how to make use of the foreign element of corruption in the fight against it.

To be sure, it is common to leave front-line activities, such as arranging for the bribery itself and effectuating payments, to nationals of the state where it takes place. Given the amount of cross-border trade and investment, however, the more substantial corruption cases usually include links to foreign states. Foreign hard currency often provides the strongest incentive for bribes. Non-domestic firms that use bribery to obtain orders, or the approval of investment projects including tax holidays, usually keep a detailed record of successful and unsuccessful business operations of that kind. After all, in Germany and most other states such "useful expenditures" are tax deductible. Double invoicing of foreign trade, moreover, might prescribe payment to be made to accounts held with foreign banks. Occa-

sionally, international arbitral tribunals or foreign courts may be confronted with cases requiring a ruling on the validity of contracts that were obtained by means of placing bribes.

Concerns of foreign states have so far focused on follow-up crimes, for instance, on tax evasion where commissions received remain undeclared. The corrupt scheme itself has been given a blind eye. The underlying sentiment appears to be one of shrugging the shoulders regarding the conditions of the country where bribery seems a way of life. It is taken for "Realpolitik" to content oneself with the mercantilist argument that if domestic companies were prevented from offering bribes, competitors from another state would have paid the bribe and obtained the order.

It may be wondered how long tax-payers in the parent states will continue to tolerate such a state of affairs. For it is the tax-payers as a whole who must compensate for the loss of revenues resulting from bribery induced tax deductions. It is also for the tax-payers to finance the regular bail-outs for defaults of public and private debts incurred in the states where corruption occurs. Additionally, the taxpayers suffer the loss of efficiency if contracts are awarded to the bidder offering the highest bribe. If there is ever a backlash towards authoritarian regimes, it will be for the tax-payers to bear the burden of financing additional expenditures on national security.

There should be no lack of motive for fighting corruption across the border. But is it legally permitted to look after corruption in other states? And, if so, how should it be done? It is at these points that international law comes into play.

III. *THE INTERNATIONAL LAW PERSPECTIVE*

A. *The Jurisdictional Problem*

Combatting corruption across the border raises a problem of state jurisdiction under international law. If corruption takes place within a country, especially if it involves the bribing of officials of that country, it is first and foremost the task of that country to deal with the matter. Jurisdiction of one country, however, does not necessarily bar another country from having jurisdiction too. The traditional test of general international law would be to examine (1) whether there is a sufficient link to the other country and (2) whether such additional exercise of jurisdiction

could be considered an illicit interference with the exercise, or, to put it more accurately, the deliberate "non-exercise" of jurisdiction by the first country:

> (1) The nationality of a person involved in the bribery or the nationality of the employer company may provide the necessary connecting factors. Should, however, cases actually be taken up on the basis of links of nationality, bribery techniques are likely to be remodeled so as to escape the application of the law of states capable and willing to exercise jurisdiction. Enforcement would then depend on whether the effects principle or some principle of universality is considered to justify the coverage of foreign bribery by domestic law.
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> (2) The exercise of jurisdiction could be considered intrusive whenever a state promotes bribery, for instance, as a scheme of remunerating its public employees. An official policy to that effect will be hard to establish. At most states could be found to differ with regard to the more marginal issues of corruption, such as supporting political parties in exchange for favorable treatment. In cases of that kind, a country exercising jurisdiction under its stricter laws could be obliged to adapt the terms of remedies to the more favorable treatment accorded by the territorially applicable law.

On the whole, the jurisdictional issue should not be overemphasized. It will become moot as soon as treaty law permits and indeed prescribes the pursuit of corruption cases in states other than the one where the corruption took place. The conclusion of a convention on foreign corrupt practices seems indispensable. Present practice shows that states are not prepared to volunteer prosecution of foreign corruption cases against their own companies as long as they have reason to fear that competitors will take advantage of the situation to increase market share in the state where corruption exists.

B. *Taking Up Previous Efforts*

The need for international action against corruption may never have been more acute than today. This is not to say that such need has not been felt before, nor that international action has never before been advocated. In fact, the U.N. General Assembly recommended action back in 1975. The International

Chamber of Commerce followed soon after, as did the Organization for Economic Cooperation and Development. In view of the problems surfacing in Eastern Europe, both the Council of Europe and the Organization for Economic Cooperation and Development recently placed the fight against corruption on their agenda.

There may be more organizations that have advocated doing something about the problem. So far, however, efforts have nowhere passed beyond the stage of mutual encouragement or, technically speaking, of soft law recommendations. In the case of fighting corruption across borders, unlike other cases, this is not enough. Mere recommendations are bound to be abortive. The reason is simple: states that follow a recommendation can never be certain that others will do so as well.

C. *Towards an International Convention on Foreign Corrupt Practices*

If a distortion of competition among states eager to support the export and foreign investment of their multinational companies is to be avoided, the conclusion of a convention points to the only effective solution. For the same reason, such a convention should enter into force only after it has been ratified by all of the major nations involved in world trade and foreign investment. Furthermore, the remedies provided for by the convention should not depend on whether or not particular contracting states decide to proceed to enforcement. It should therefore be considered to put enforcement into the hands of interested private parties.

In contrast to numerous projects of international conventions where effectiveness was successfully upgraded step by step, a project dealing with corruption has to warrant the utmost effectiveness right away. Otherwise, it will not be accepted for fear that the proceeds of foreign trade and investment will be shifted to competitors that stick with today's cavalier approach to foreign corruption.

The contents of a convention on fighting corruption across borders will certainly require careful discussion. A few proposals, most of them inspired by forerunners in U.S. law, must suffice:

(1) The double standard of fighting corruption domestically

and offering benign neglect to corruption abroad must be terminated. It is for criminal law to define standards by expanding its coverage so as to include foreign related cases. In addition, tax law must stop creating incentives to promote business through corrupt practices.

(2) Enforcement must be privatized by offering competitors an action for damages or, better still, treble damages upon proving injury because a competitor obtained a contract through the use of corrupt practices. Criminal prosecution of cross-border cases would be costly and could be resented because it would not be directed against the primary culprits who could safely continue the activities abroad.

(3) Discovery and evidence must take a step forward by using modern technology. Computer technology recording each transaction within a global operation generally exists. The procedural laws giving access to documentation of that kind, strictly supervised by the courts, have yet to follow.

CONCLUSION

Referring to a First, Second, and Third World makes less sense today than it did five years ago. The common ground of shared purposes has expanded so as to make the world merge gradually into one world with most states subscribing, in principle at least, to democratic standards and to a market system of economy. Taking up the fight against cross-border corruption would contribute substantially to sustaining and promoting that development. The public, regularly annoyed by front-page news revealing corrupt practices, has become sensitive to the problem in general. Not many people, however, are aware of the fact that foreign corruption cuts into their personal budget. All the same, it will take some resolve to go ahead and proceed with the drafting, signing, and ratifying of a convention on foreign corrupt practices. Such a convention, which serves democracy and market economy alike, would highlight the one-world character of international law in the next century.