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A COALITION OF INDUSTRIALIZED NATIONS, DEVELOPING NATIONS, MULTILATERAL DEVELOPMENT BANKS, AND NON-GOVERNMENTAL ORGANIZATIONS: A PIVOTAL COMPLEMENT TO CURRENT ANTI-CORRUPTION INITIATIVES

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I. Background

International business transactions carry the inherent threat and temptation for bribery and corruption. Bribery is arguably the most detrimental corrupt practice to extraterritorial business transactions, and bribery of foreign public officials for the purpose of influencing the award of international contracts is ubiquitous. Statistics show that in the five years from April 1994 to April 1999, bribes to foreign officials played a role in the award of 294 contracts worth about $145 billion. According to U.S. Commerce Department figures, U.S. businesses collectively lost $37 billion worth of overseas contracts in 1998 because of foreign bribery.

Bribery in business transactions occurs in a variety of industries, including military procurement, aerospace, infrastructure, energy, and transportation. Corruption has even been alleged to have penetrated the inner circles of the World Bank (Bank), the multilateral financial organization that ostensibly campaigns against corruption when loaning money to countries. Only a handful of large multinational corporations based in wealthy industrialized nations commit the vast majority of corrupt transactions.

Bribery assumes many forms and, due to its characteristically clandestine nature, it is often difficult to detect. The origins of bribery can be traced back for centuries from several cultures and religions. Today, bribery of public officials and government workers may assume the form of a cash payment, a deposit to a designated offshore account, or a consulting fee. A bribe may be disguised as a gift, a token of appreciation for some completely separate and legitimate purpose, or as a travel disbursement to finance a resort vacation. Also, there are questionable areas of alleged corruption, such as cronyism, favoritism, nepotism, and patronage.

Bribery is usually an effective means of obtaining business contracts. Companies that allegedly engage in systematic bribery regularly become the successful bidders. However, it is possible for these companies to be out-bribed by competitors.

A. Why the Emerging Global Economy Creates an Environment that Requires Integrity in the Marketplace

Globalization is a modern phenomenon that has ushered in a new business dynamic and era of social stability. The Cold War era, which ended in 1989 with the fall of the Berlin Wall, was characterized by its emphasis on nation-states divided by political ideologies. The international system of globalization which followed the Cold War has created an integration of nation-states, bound together by the Internet and other barrier-breaking technologies.

For business, technology has contributed to the creation of a borderless economy; for society, both the removal of restrictions on international commerce and the integration of nation-states into collectives such as the European Union diminish the likelihood of a third World War. The globalization trend is likely to continue as a result of these benefits.

A recent study on globalization shows that those nations which most opened their markets to free trade enjoyed not only tremendous economic growth but also striking social improvements. Globalization brings with it an increase in economic growth and an expansion of trade and commerce. Unfortunately, with the expansion of commercial opportunity comes the specter of corruption fueled by increased competition for lucrative contracts. James Wolfensohn, President of the World Bank, asserts that "corruption is the biggest issue on the minds of voters and the single inhibiting factor for private investment." Tolerance for inefficiencies, such as corruption, has become much lower as a result of globalization. A country cannot remain competitive and attractive to foreign investors if it has a reputation for a corrupt and inefficient government.

Despite the immense amount of negative publicity surrounding globalization, as evident at the World Trade Organization's (WTO) 1999 meeting held in Seattle and, more recently, in Prague, globalization conceivably could forward anti-corruption initiatives by coordinating the efforts of multilateral organizations. As one example of this potential, Dai Xianglong, Chief of China's central bank, recently announced reforms intended to combat fraud and corruption, which were motivated primarily by China's efforts to gain entry into the WTO. "Such reforms are intended to assist the transition of China's state banks from ailing institutions into sound commercial enterprises."

TI's Chairman has offered a good explanation for why bribery cannot be allowed to continue unchecked in a globalized society. Eigen asserts that "[c]orruption . . . undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor." "[B]y undermining trust in political institutions and public officials and by distorting government policy against the best interests of the majority, corruption impairs the process of democracy." Democratic ideals may not appeal to all members of the global economy; however, as countries with vastly different political, social, and economic ideologies are drawn into the world market, each must realize the necessity of providing a level playing field, if only in order to increase the confidence of their prospective trading partners.

Some economists have advanced the argument that bribery can be very useful in underdeveloped economies, serving as an "oiling of the wheels" to accelerate economic growth. However, in the context of the modern global economy, and according to clearly defined institutional organization charts, this argument no longer appears credible. One need look no further than the crisis caused in Indonesia, where President Suharto amassed a family fortune of $30 billion by bestowing lucrative contracts to his children and ignoring bids by contractors who would otherwise have been successful under a competitive bidding process. The economic distortions caused by Suharto's nepotism crippled Indonesia's intra-national competition and seriously curtailed foreign investment, contributing to Indonesia's 1998 economic crisis.

B. Prevailing Cultural Attitudes That Affect Prevention of Business Corruption

The culture of the country in which a business transaction occurs often determines the character of the transaction. As examples, political payments are a feature of Middle Eastern life, where the payment of baksheesh in the Arabic and Turkish-speaking countries, and of roshveh in Iran is embedded in the social and cultural fabric of these countries. In Nigeria and other former

British West African colonies, functionaries often expect or seek a tip, referred to as "dash," for services rendered to the public. If no dash is given, the service may be denied. In the former British colony of India/Pakistan, decades of corruption of government officials by local businesses have firmly established payoffs as an integral part of business-government relations. Bribery in some nations is so entwined in normal business practice that many of the home countries of active corporate bribers had, until recently, laws making the bribes tax deductible.

In the United States, the motivation to pass the FCPA [Foreign Corrupt Practices Act] probably derived from the strong Puritan religious background fostered among the settlers. Puritan religious ideology fundamentally influenced the American sense of morality. Many Puritans equated success in business with proof of divine favor and predestination for salvation. Given this origin of American morality, the passage of the FCPA during President Jimmy Carter's term in office seems to have been a by-product of the righteous indignation and political backlash following the Watergate affair. In many Asian, African, and Middle Eastern countries, the basic view of morality may be quite different from that found in the United States.

In general, a symbiotic relationship often arises between cultures of industrialized and developing nations. As a result of colonial domination and poverty, government officials in developing countries rely upon bribes to ensure their livelihood. These government have come to rely on the receipt of payoffs, and businesses within industrialized nations have tasted the vast profits inherent in corrupt transactions. A vicious cycle of corruption arises out of this symbiotic relationship.

C. Inability of Legislative Measures to Eradicate Corruption

The United States began the effort to achieve a legislative solution to extraterritorial bribery in 1977 with the FCPA, the first legislative measure to criminalize bribery. Despite the strong support of the Department of Justice (DOJ) and Securities and Exchange Commission (SEC), enforcement of the FCPA was minimal. U.S. businesses secretly continued to bribe foreign government officials. Its passage signified the U.S. government's unilateral stance against business corruption and resulted in prolonged, vehement objection by the U.S. business community.

The principal objection to the FCPA was that American companies doing business abroad were now placed in the untenable position of competing for contracts against other businesses that were free of FCPA-like restrictions. Businesses applied pressure to members of Congress to repeal the FCPA. Congress capitulated to some extent by amending the FCPA provisions to clarify the parameters of conduct categorized as bribery. The FCPA amendments, contained in the 1988 Omnibus Trade and Competitiveness Trade Act, considerably reduced the strength of the harshest provisions of the FCPA but increased penalties for other violations. Despite the various amendments to the FCPA, the mere passage of legislation criminalizing extraterritorial bribery has not adequately addressed the problem of bribery by U.S. firms.

Fortuitously, a number of precipitating factors during the same time period as the 1988 amendments to the FCPA directed global attention towards the eradication of bribery of government officials by businesses. Notably, the legislative approach contained in the FCPA was adopted by two major multilateral organizations. In 1996, the Inter-American Convention Against Corruption (OAS Convention) was adopted by member nations of the Organization of American States (OAS). Additionally, OECD members became signatories in 1997 to a similar treaty making extraterritorial bribery of government officials illegal, the Convention on Combating Bribery in International Business Transactions (OECD Convention). However, both the OAS and OECD require their signatories to pass domestic implementing legislation, and the success of these conventions ultimately will depend upon the penalty structure and enforcement measures adopted by individual signatories.

The issue remains whether legislative measures can sufficiently deter businesses from engaging in bribery. The effectiveness of such a legislative approach is undermined in a market economy where the drive for profit dominates. A foreign company's quickest route to maximizing profits in developing and transitional nations may indeed be bribery of a public official. Although some view the legal system as a cure for market imperfections, one of the reasons that law sometimes fails to compel ethical conduct in the operation of businesses may simply be that the potential for huge profits makes violation of the law seem worth the risk of punishment.

Businesses may have a sufficient interest in the continuance of profits connected with bribery such that legislation alone cannot cure the problem. An example is the continued operation of the drug cartels in Mexico and other Central and South American countries despite the presence of strict anti-drug laws and the dedicated efforts of law enforcement. The lure of tremendous profits sometimes can drive otherwise ethical people to engage in unacceptable, and even illegal, activity.

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Conclusions

Global economic integration will only increase in the future. The world today is dramatically different than it was during the Cold War era. Now, with globalization, the geographical boundaries of the nation-states assume ever-diminishing importance in business transactions.

One consequence of the international system of globalization is that multilateral organizations have begun to move more actively toward prohibitions against extraterritorial bribery to gain favorable treatment in contractual negotiations in the early 1990s. Another manifestation of the thrust toward globalization is that many former socialist economies are becoming market driven systems. In the present global environment, countries are beginning to realize that there is a direct relationship between foreign investment and prosperity. The uncertainty and the instability of corruption serve as a deterrent to foreign investment. Transnational firms are most likely to invest in countries where "the rules of the game are clear."

The authors argue that the threat of lost business opportunities in the integrated global marketplace will provide one of the most important incentives for change. It is imperative that a unified solution to corrupt practices arises from the participation of multilateral organizations, NGOs like TI, government, the private sector, and civil society.

A critical first step in the campaign against global corruption is to change cultural norms and perceptions regarding bribery and corruption. When anti-bribery norms are not internalized, cultural environment and individual greed can overcome moral leanings. A global, behavioral anti-bribery norm must first be developed to provide a stable foundation for an effective international legal order. In order for it to be effectively curtailed, bribery and business corruption must eventually become viewed by the business community, the global community, and society at large as intuitively improper. Although the task of eradicating business corruption may appear daunting, history teaches us that universal norms against formerly accepted reprehensible behavior can and do develop over time.

A pertinent analogy exists in the shift in the global attitude towards slavery. Through centuries of history, civilizations such as Assyria, Babylonia, Egypt, Persia, China, India, and the Americas regarded slavery as an acceptable way of life. However, people gradually but increasingly began to view the slave trade as immoral; so too are people now beginning to change their views about corrupt business transactions. The passage of the FCPA, and the implementing legislation of the OECD and the OAS Conventions, can roughly be equated to the stage at which laws prohibiting slavery were finally adopted. However, legislative adoption of antislavery laws alone was insufficient to alter internalized norms regarding the propriety of slavery. While other countries had already made slavery illegal, grudging acceptance of antislavery norms evolved in the United States only after the Civil War and resulted in the adoption of the 13th Amendment to the U.S. Constitution. Today, the global community as a whole generally rejects the concept of slavery.

A similar cultural and institutional transformation will have to take place in the world's attitudes toward business corruption-from acceptance of bribery as a profitable and lucrative activity to its rejection as a morally reprehensible and economically unacceptable behavior. Anti-bribery laws standing alone cannot overcome the lust for greater profits by bribe-givers (usually international businesses) nor the need or greed of those that demand the bribes (usually public officials). Laws will have little effect on secret bribery negotiations until cultural, governmental, and business attitudes shift and the bribe-exchange transaction becomes an embarrassment. It is imperative that certain alliances be utilized fully in the fight against corruption. One such critical alliance consists of civil society, business, and government.

The recent worldwide explosion in the forces of democratization and globalization brought about significant changes in the composition of civil society. There are many new and emerging democracies now opening the door to the public policy debate on issues of corruption and bribery, and several civil organizations exist that can publicize injustices and press for institutional reforms. Civil society, with the aid of NGOs such as TI, provides a much needed impetus to the global campaign against corruption by focusing attention on the injurious consequences of corruption. Civil society plays a pivotal role in forging the necessary alliance of the three pillars of social structure-government, the private sector, and civil society itself. These three sectors must unite in order to successfully address the relevant issues of corruption.

Finally, a coalition of the industrialized nations, developing and transitional nations, multilateral development banks, and NGOs representing civil society, plus other pertinent entities at the multilateral, national, and grassroots levels are pivotal complements to current anticorruption initiatives. Such a coalition would ideally utilize the following means: multilateral conventions and international treaties (with their associated harmonization of domestic legislation that carry penalties with a high level of severe enforcement); anticorruption guidelines tied to funding in the public procurement process; activities of NGOs (like TI with its Integrity Pacts in the public procurement process and Corruption/Bribery Perception Indices); and grassroots initiatives by civil society that work to alter cultural attitudes toward business corruption. The dynamic energy and focus of such coalitions, utilizing these various strategies, will contribute greatly to the fight against corrupt business activities.