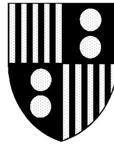

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THE 1996 ICC REPORT ON EXTORTION AND BRIBERY IN BUSINESS TRANSACTIONS

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Abstract

In 1977, the *International Chamber of Commerce* (ICC) approved a *Report on Extortion and Bribery in Business Transactions,* written by the Shawcross Committee. This report signified a major step in the international movement against extortion and bribery. It was also the first document prepared, at international level, by the business community. Almost two decades later, the ICC commissioned an Ad-Hoc Committee chaired by Mr. François Vincke (Belgium) to carry out an indepth revision of this *Report,* which was approved in 1996. The purpose of this article is to explain and discuss this *Report* within the framework of the international efforts to eradicate extortion and bribery, with particular emphasis on the problem as viewed from business ethics.

THE 1996 ICC REPORT ON EXTORTION AND BRIBERY IN BUSINESS TRANSACTIONS

Introduction (1)

The *International Chamber of Commerce* (ICC) is a non-governmental organisation serving world business. Its members in over 130 countries represent tens of thousands of companies and business organisations. The ICC represents the world business community at national and international levels, promotes world trade and investment based on free and fair competition, harmonises trade practices and formulates terminology and guidelines for importers and exporters, and provides a range of practical services to business. (2)

In 1977, the ICC approved a *Report on Extortion and Bribery in Business Transactions,* which became a basic reference document on extortion and bribery for governments and, above all, for companies, at international level. Nineteen years later, the ICC approved an extensively revised and improved version of this *Report.*

The purpose of this article is to discuss the *1996 Report,* particularly from the viewpoint of business ethics. It starts by discussing the nature of bribery and extortion as economic, political and moral issues, and describes the main measures taken in recent years to solve international problems connected with extortion and bribery, both by national governments and intergovernmental organizations and by non-governmental organisations and companies. It goes on to explain the origin and nature of the *1977 ICC Report on Extortion and Bribery in Business Transactions* and its revision by the Vincke Committee. This is followed by an analysis of the contents of the *1996 Report.* The paper closes with the Conclusions.

Extortion and bribery as a problem

A first important point to be borne in mind is that the *Report* we are talking about here does not seek to offer a doctrinal analysis on extortion and bribery. Rather, it is a practical document, aimed primarily at offering solutions to a serious problem of our days. Another point is that the ICC's interest lies primarily in the legal, economic and political areas, although it does not exclude the ethical aspect.

From the *economic* viewpoint, extortion and bribery are undesirable because they reduce the economic system's efficiency, that is, they prevent or hamper the attainment of the greatest possible degree of social wellbeing by creating a "negative externality" that increases the costs or reduces the efficiency of at least some economic agents (without the greater

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welfare of the beneficiaries compensating for the loss of the injured parties). They therefore generate a “negative sum game” which may provide considerable benefits to some agents but which is (relatively) harmful to society as whole (3). Furthermore, the habitual presence of extortion and bribery in society generates perverse incentives as it diverts personally and socially efficient economic activities towards inefficient rent-seeking. And finally, “offering or giving bribes may constitute acts of unfair competition” (*1996 Report,* Foreword).

As the *Report* points out, this problem is now an international problem due to the liberalisation of trade in goods and services: “freer trade must be matched by fair competition, failing which trading relations will be increasingly strained to the common detriment of governments and enterprises” (Foreword). And we have already pointed out how extortion and bribery may limit this free competiton. However, this very internationalness acts as an additional incentive for this type of behaviour: national governments are aware of the problems caused by corruption in their own country but act as free riders when bribery or extortion takes place beyond their frontiers.

Extortion and bribery are also a *political* problem. A corrupt government will tend not to fulfil its obligations to its citizens. It will be controlled by interest groups or, at least, will be vulnerable to them, destroying the equity rationale on which relations between citizens and groups should be based. Furthermore, the atmosphere of corruption will lead to the government’s legitimacy being questioned (and even the political regime itself, irrespective of whether it is democratic or totalitarian). It is not surprising, therefore, that the *1996 Report* states that a situation of political corruption “could undermine the most promising development of the post-Cold war era, i.e. the spread of democratic governments and of market economies worldwide” (Foreword).

From the *ethical* viewpoint, bribery and extortion are characterised by differing features. Bribery can be defined as the offering of money or other gifts (in the present or future) to a person linked with a company or public office in order to obtain some type of benefit, for the person offering the bribe or for others, such as obtaining an unfair sentence or arbitration, concealment of a crime, the awarding of a contract, or the obtainment of subsidies, franchises, positions, exemptions, permits, recommendations, etc. Extortion is originated by a person who has deciding power (or by an intermediary) and consists of demanding money or other gifts, to which the extortioner is not entitled, in return for a benefit, or simply in return for doing what he is duty bound to do by the nature of his post, threatening to commit some harm (delay the decision on an application, for example) if such money or gift is not received.

The person who accepts a bribe commits an act of disloyalty and injustice towards the company or office he works in, as he receives remuneration he is not entitled to. He may also commit an act of injustice towards the other agents that interrelate with him and that are not included in his game (if, for example, he discriminates against them in awarding a contract), or towards the company or office itself (if, for example, he makes a purchase that is not the most suitable on the basis of price, quality, service, etc.). And he commits an act of unsolidarity (insofar as it encourages unfair competition, distorts the normal functioning of the market and generates other similar behaviour by imitation). The person who extorts commits the same wrongs, in addition to the injustice committed to the extorted party, by demanding a payment he is not entitled to.

As far as the other party is concerned, the person who offers a bribe or accepts an act of extortion is inducing the perpetration of an unjust and unfair act, which is often associated with other types of immoral conduct, such as lying, forgery, falsification of accounting entries, attempting to conceal criminal acts from auditors and inspectors, etc. (4)

However, the ethical problem of bribery and extortion goes beyond the act in question. In fact, the distinctive feature of immoral conduct is a negative learning process that affects the person who engages in such behaviour, other people (managers, employees, competitors, etc.) and, potentially, society as a whole.

These considerations do not claim to be a comprehensive analysis of extortion and bribery but only to present some of the arguments which, on the economic, political and ethical planes, justify measures such as those of the ICC. We have already pointed out that the *1996 Report* does not offer such an analysis but rather only two or three considerations in isolation. However, our albeit brief analysis does provide the basis for justifying a measure such as that we discuss in this paper. Nor, indeed, would it be desirable to conduct an extensive discussion of the theoretical foundations of the ICC's recommendations, as this could well propitiate a degeneration into unnecessary controversy. It is enough to know that the *Report* is based on an interdisciplinary consensus, which without doubt exists, on the need to take steps against extortion and bribery.

Having said this, we believe that maintaining a strict separation between the different aspects of the problem - economic, political, ethical, etc. - is not only unnecessary but also counterproductive. Corruption - extortion and bribery - is a multifaceted problem but, when all is said and done, it is only one problem. For example, it is meaningless to say that negative learning refers to the ethical aspect but not to the economic aspect. Once society has started this learning process, the economic problem becomes more complicated and purely economic solutions are either insufficient or generate "perverse effects".

International measures against extortion and bribery

Unlike previous decades, the economic growth of the Western world after the Second World War was based on a profound liberalization of trade and international transactions. This liberalization forms the basis of the current globalization. The development of international businesses contributed significantly to stimulating economic activity but also led to a number of scandalous cases of corruption which caused concern among national governments and international agencies alike, aware of the harmful effects that such scandals could have on the smooth functioning of the economy, the ordered development of competition, the expansion of markets and even on the progress of democracy itself.

The *national governments* responded by enacting laws against corrupt practices, applicable to citizens of such countries involved in transactions carried out within the country concerned. Only the United States, with the 1978 *Foreign Corrupt Practices Act* (FCPA), considered it a criminal act to offer a bribe to a foreign government official in order to win or retain business, whether directly or through intermediaries (that is, when the company knows that part of the payment made to the intermediary will end up in the hands of a foreign government official), including the mere offering of money or "anything of value". An amendment in 1988 distinguished between "grease" or "facilitating payments", whose purpose was to accelerate the conclusion of a matter, and "bribes", which sought to influence the official to make a decision other than that which he would have made without the money, the latter being subject to prosecution under the Act.

At the time - and still today - the FCPA caused quite a few discussions on various levels: legal (Can a country consider as an offense acts committed in another country whose legislation does not consider them liable to prosecution?), political (Can this Act be considered

an interference by the United States government in the internal affairs of another sovereign country?), economic (Is it effective as a means of repressing corruption?), and also ethical (Does it help make companies and their managers more ethical in their behaviour?) (5).

The FCPA establishes the status of anti-corruption practices as a "public good." (6) If one country enacts legislation that is stricter than that of others, the companies operating in the latter countries will have a competitive advantage in their international trade relations because they will be able to pay bribes to foreign officials without suffering the consequences (fines and prison sentences). Indeed, bribes paid to foreign officials abroad are tax deductible in some countries (7), which provides a further incentive to make such payments and implies the creation of a "dual morality" that sacrifices ethical criteria to economic expediency. This explains the pressure brought to bear by the United States on other countries to adopt the same criterion and consider payments made to officials of foreign governments as bribes. (8)

Another block of actions correspond to the *intergovernmental agencies.* In 1978, the UNCTC drew up a draft *International Agreement on Illicit Payments* for the UN General Assembly, which it did not consider, and a draft *Code of Conduct of Transnational Corporations,* which was subsequently dropped (later on, the UNCTAD continued working along these lines). The Council of Europe drew up a convention on money laundering. The Customs Cooperation Council (CCC), now the World Customs Organisation (WCO), has also discussed the issues of bribery and extortion with respect to customs officials and has drawn up a series of guidelines that customs officials are asked to adhere to. The European Union (UE) has also developed a number of anti-corruption measures.

For the purposes of this article, the most interesting initiative is the *OECD Recommendation on Bribery in International Business Transactions,* adopted in May 1994. It is the first multilateral agreement to combat the bribing of foreign officials, and it is hoped that it will act as a catalyst for global action and help companies refuse to engage in such practices in host countries. Among other points, it recommends that the governments of member countries include in their criminal legislation the bribes offered or paid to officials of foreign governments, abolish the tax deductibility of bribes, and adopt measures to ensure that non-compliance with anti-corruption legislation is taken into account when granting public subsidies, licenses, and government procurement contracts. Member countries' governments are also asked to create mechanisms for intergovernmental consultation and cooperation in investigations and legal proceedings, implement international agreements for mutual legal assistance and harmonise their legislation. (9)

The OECD recommendations are the strictest and most far-reaching yet, but have no legal force and cover only a small number of countries, most of them in the developed world. (10) However, they are a significant step forward in adopting an international stance against extortion and bribery, and exert a considerable moral pressure.

A completely different area of activity in the fight against corruption is that of the *Non-Governmental Organisations* (NGO), such as *Transparency International* (TI), created in 1993. TI has developed *Standards of Conduct* as a frame of reference for business and government, wishes to "serve as a clearing house of expertise" on corruption, and acts as an anti-corruption lobby in several countries at international level. And, of course, the ICC's 1977 *Report*, which we will discuss further on.

Finally, many *companies* have implemented ethical codes, codes of conduct or credos, which regulate, in greater or lesser detail, the economic, legal and ethical criteria that govern their national and international operations and, specifically, the types of behaviour

that are accepted and that are not accepted within the company as regards extortion and bribery.

This brief historical overview suggests that there has been definite progress: first, in the awareness of corporate managers, governments and society in general of the seriousness of the problem and the undesirable consequences that corruption has for international business; second, in the enactment of more stringent legislative measures; and finally, in the conviction of the need to act at international and intergovernmental level if the problem is to be solved effectively and in a manner that is equitable for all. Of course, this does not mean that there have not been setbacks nor that all of the moves have been made in a decided fashion. (11)

The *1977 ICC Report on Extortion and Bribery in Business Transactions*

One of the NGOs that pioneered the adoption of anti-corruption measures in international business was the *International Chamber of Commerce* (ICC), which, in December 1975, set up an Ad Hoc Committee under the chairmanship of Lord Shawcross (UK). After studying the status of legislation on the subject, this Committee concluded that most countries had appropriate laws, but that the enforcement of these laws varied considerably from one country to another. In 1977, the Committee produced a *Report on Extortion and Bribery in Business Transactions,* which was adopted by the ICC Council at the proposal of the Executive Committee Board in November 1977. (12)

The *1977 Report* is divided into two parts: Recommendations to Governments, and Rules of Conduct to Combat Extortion and Bribery. The former include: 1) the invitation for cooperation between companies and governments; 2) the signing of an international treaty, which should be enacted urgently with UN backing to pressure governments to enact effective legislative measures to effectively combat corruption; and 3) a call to national governments to initiate measures on disclosure and the recording of political contributions, and to provide adequate machinery for surveillance and investigation. The Rules of Conduct sought to be the model which companies could draw on to write their own codes, benefitting from a common framework designed for national and transnational companies throughout the world.

Article 11 of the *1977 Report* provided for the creation of a Panel "to interpret, promote and oversee the application of these Rules of Conduct". This Panel's by-laws, approved in June 1978, stated that it would have nine members and that its purpose was to actively promote the application of the Rules, to assist in the development of company codes, "to examine alleged infringement of the Rules by any Party, including non-members of the ICC, and any public authority or official thereof", and to "mediate or conciliate, without its findings of facts or recommendations being made public".

This approach to the Panel's functions could be construed as giving it quasi-legal powers over the business community, which does not concur with the ICC's functions. For this reason, and also because many companies were already implementing strict anti-corruption codes and some national committees were opposed to it, the Panel never actually came to exist. However, this also implied that the Report's recommendations were in danger of becoming mere empty words and could even give the impression that the ICC was washing its hands of the problem.

The revision of the *1977 Report*

Therefore, in June 1994, at the proposal of the Executive Board (13), the ICC Council agreed to appoint a new Ad-Hoc Committee, under the chairmanship of Mr. François Vincke, Secretary General of Petrofina (Belgium), to revise Articles 1-10 of the 1977 *Report,* if they required revision, to coordinate the ICC's involvement in international - governmental or non-governmental - discussions and to provide suggestions on how to educate the international community about the long-standing commitment by business to eradicate corruption.

The Vincke Committee understood that its mission was not to discuss theoretical issues but to make practical recommendations, aimed, first of all, at providing criteria for officials and businessmen - i.e. at educating - and, only in second place, at creating sanctions for those that broke the law. In other words, its purpose was to focus not only on direct actions to combat extortion and bribery, but on creating an environment in which bribery has no place. It sought to carefully analyse existing legislation and its enforcement in the various countries, as well as the efforts made by other institutions (particularly the OECD) (14) and the experiences of the companies that had drawn up codes of conduct on corruption. And it was agreed that the *Report* should focus on the problems of bribery and extortion involving public officials, within a country or across borders, leaving to one side any problems involving relations between companies.

The Vincke Committee held a number of meetings between December 1994 and December 1995. Out of these meetings came a new version of the Report, which was approved by the ICC Executive Board in its 83rd Session on 26 March 1996. The document consists of a Foreword, Part I (Recommendations to Governments and International Organisations) (15), Part II (Rules of Conduct to Combat Extortion and Bribery) (16), and Part III (ICC Follow-up and Promotion of the Rules). In the pages that follow we will summarise the main points of this document and make a few comments on them.

The contents of the *1996 Report*

Foreword

The Foreword is an extensive rewriting of Part I of the *1977 Report.* It recounts very succinctly the history of the previous document and its reworking. Two reasons are given for this reworking: 1) the danger that "scandals involving extortion and bribery" could destabilise the governments of some countries, which "could undermine the most promising development of the post-Cold war era, i.e. the spread of democratic governments and of market economies worldwide", and 2) the idea that "freer trade [achieved through the Uruguay Round] must be matched by fair competition, failing which trading relations will be increasingly strained to the common detriment of governments and enterprises". Obviously, the Committee did not undertake to draw up a list of ethical, economic, political or sociological arguments against extortion and bribery; in any case, the two reasons mentioned above are not the most important, although they do answer to criteria of historical timeliness, given the atmosphere prevailing in the international business community at the time the Committee was conducting its deliberations.

The Committee did not try to arrive at a definition of extortion or bribery, which, in any case, some authorities would disagree with and would not fit in with some countries'

legislative framework. The purpose of the document - to make recommendations to governments, intergovernmental organizations and companies -, the abundance of legal, ethical and economic studies on the matter, and the unequivocalness of most cases of extortion and bribery obviate the need for a precise definition, which, in any case, is clearly apparent in the cases and situations discussed in Part III. Another important point is that the Report almost always uses the term "extortion and bribery", avoiding more ambiguous formulas, such as "corruption" or "unfair practices" (this is a point in which the *1996 Report* differs from the *1977 Report*).

Most of the Foreword is devoted to underlining three main points that were already discussed in Part I of the *1977 Report:*

1) The fight against extortion and bribery is a *joint task,* that arises from "the need for action by international organisations, governments and by enterprises, nationally and internationally, to meet the challenging goal of greater transparency in international trade". The 1977 document stated that "neither governments nor business can alone deal effectively with this problem. Therefore, complementary and mutually reinforcing action by both governments and the business commmunity is essential". This need for joint, coordinated action is mentioned frequently in the Report, for example, when discussing the responsibility of national governments in Part II.

2) "Major responsibility in this area undoubtedly rests with governments", in clear reference to the Recommendations of Part I, stressing that this task requires cooperation between governments and referring to the intergovernmental agencies that have taken steps in this field or that could do so with greater effectiveness. We have already pointed out that this document is geared towards action and it is obvious that governments must act before companies can act, as it is the governments that must establish the legal framework within which companies operate. Furthermore, as the problems mainly involve public officials, it seems logical that the government should make the basic rules and implement them, since, as the 1977 document reminded us, in some countries "corruption appears to be almost so common as to have been accepted as a way of life which the national authorities seem unable or lack the political will to overcome". Obviously, this does not mean that the development of ethical criteria and behaviour in companies is not important; in fact, the Rules of Conduct of Part II seek to provide a practical expression of such criteria and the document as a whole pursues, primarily, an educational purpose in this area.

3) The *Report* acknowledges that "for its part, the international business community has the corresponding responsibility to strengthen its own efforts to combat extortion and bribery". (17) Two remarks can be made about this. First, this responsibility was already very explicitly recognised in the *1977 Report.* The *1996 Report* insists on this idea but avoids expressions that could be taken to exonerate the business community from all blame for the problem. Thus, the new version has removed a paragraph contained in the 1977 version which said, "Public opinion has sometimes tended to assume that corruption is generally initiated by enterprises. This is not so, and ignores the often subtle but effective pressure by recipients of bribes or agents acting on their behalf. The truth is that much bribery is in fact the response to extortion." This is still true, but the *Report* now goes beyond this.

Second, the Foreword states that the Rules of Conduct (Part II) "are in many respects more stringent than those issued in 1977. The 1977 Rules only prohibited extortion and bribery in connection with obtaining or retaining business; the new Rules prohibit extortion and bribery for any purpose. Thus, extortion and bribery in judicial proceedings, in tax matters, in environmental and other regulatory cases or in legislative proceedings are now

covered by the rules." This extension of scope is logical and is a sign of a greater degree of maturity in the business community, represented by the ICC. Thus, it is added that "new emphasis is placed on implementing mechanisms within companies to enforce corporate codes of conduct", as we will see when we discuss Part II.

The Foreword closes by referring to the Standing Committee provided for in Part III. In fact, the entire document considers this Committee to be the acceptance by the ICC of its responsibility "to promote and monitor the acceptance and application of the Rules of Conduct". As befits the ICC's functions and organization, the aim is "to stimulate action by enterprises and business organisations in support of self-regulation", rather than to engage in activities in its own right.

Part I. Recommendations to Governments and International Organisations

This Part contains a broad range of recommendations to national governments, aimed at improving legislation against extortion and bribery, as well as its enforcement, both at national level and in the area of international cooperation (which is that which most concerns the ICC but which also requires adequate development in each country). The introduction to this Part contains three recommendations: (18)

1) In those countries that already have legislation on extortion and bribery, "in the interest of developing consistent standards of criminal legislation in this field, each government *should review its statutes* to ensure that they effectively prohibit, in conformity with its jurisdictional and other basic principles (19), all aspects of both the giving and the taking of bribes including promises and solicitation of bribes." (20) It is, therefore, a very challenging recommendation, which should move governments to continually improve their legal instruments in all aspects.

2) "Where no such legislation exists, the governments concerned *should introduce it.*"

3) In any case, "each government should take concrete and meaningful steps *to enforce vigorously* its legislation in this area."

What should the legislation and measures taken by national governments against extortion and bribery contain? In the case of the National Measures, the *1996 Report* makes the following points: (21)

1) *Preventive measures*

1.1) *Disclosure procedures.* A basic principle in the fight against extortion and bribery is transparency. Consequently, two recommendations are made in this section. First, the establishment of procedures "*to supervise government officials* involved directly in commercial transactions" through "periodic reports to an authorised government body". The risk of adding more bureaucracy is obvious, as also is the problem of who controls the controller.

Second: "For enterprises engaged in transactions with any government or with any enterprise owned or controlled by government, *disclosure procedures* should provide for access, upon specific request, by the appropriate government authorities to *information as to agents dealing directly with public bodies or officials* (...) and as to the payments to which

such agents are entitled." Note that it is only required that, "upon specific request", information be provided regarding which agent, whether inside or outside of the company, has dealt "with public bodies or officials in connection with any particular transaction", assuring, in any case, "the confidentiality of any such information received from enterprises" and safeguarding "the trade secrets incorporated therein". There is no doubting that the international business community, represented by the ICC, is putting its head on the block, because this information, if it is true, opens the door to possible investigations.

1.2) *Economic regulations.* Experience shows that the abundance of regulations and the excessive discretion granted to public officials encourage the offering of bribes and the use of extortion. Hence, the *Report* recommends to governments that they "*minimise the use* of systems under which the carrying out of business requires the issuance *of individual authorisations, permits, etc.*", and that "where individual permits and authorisations remain in place, governments should take appropriate measures to prevent their abuse". These are, indeed, highly useful measures, if there is the will within the governments to implement them.

1.3) *Transactions with governments and international organisations.* Two recommendations are included here:

– Disclosure, if possible, to the public, or if this is not possible, to an independent government entity, of the criteria for awarding public contracts and the reasons justifying each criterion.

– Link public contracts with undertakings to refrain from bribery, and include in these contracts the undertaking to comply with specific company, national or international codes against extortion and bribery. Experience shows that these undertakings are usually ineffective.

1.4) *Political contributions.* The following is rightly recommended:

– Strict regulation "of the conditions under which political contributions can be made".

– The obligatory requirement that "such payments are publicly recorded by the payers and accounted for by the recipients".

2) *Enforcement measures.* For these recommendations to be effective, governments should take steps to ensure:

2.1) "That adequate mechanisms exist for surveillance and investigation."

2.2) "That those who offer, demand, solicit or receive bribes in violation of their laws are subject to prosecution with appropriate penalties."

3) *Auditing.* The *Report* insists on the need for independent auditing "of the accounts of economically significant enterprises".

Finally, under the heading *"International cooperation and judicial assistance",* the *Report* makes three recommendations:

First: that all governments, including non-OECD members, sign the *May 1994 OECD Recommendation on Extortion and Bribery in International Business Transactions* and take action to implement the steps set forth in the Recommendation. (22)

Second: the *exchange of information between governments* "for the purpose of criminal investigation and prosecution of cases of extortion and bribery" and their cooperation "on the basis of treaties providing for assistance in judicial and penal prosecution matters."

Third: that the *international financial institutions* (e.g. the World Bank, the European Bank of Reconstruction and Development, etc.) take steps "to ensure that corrupt practices do not occur in connection with projects which they are financing", and that the *regional institutions* (European Union, NAFTA, ASEAN, etc.) ensure that "appropriate legislation and administrative machinery to combat extortion and bribery exists in the countries concerned". Obviously, such measures must respect in all cases each nation's freedom regarding the type of legislation enacted for its citizens.

Part II. Rules of Conduct to Combat Extortion and Bribery

Part II is the core of the *Report,* in that it contains the Rules of Conduct that the ICC offers to the international business community it represents, as "a method of self-regulation" which "should also be supported by governments". In the *"Introduction"* to this part, it is said of the Rules that "their voluntary acceptance by business enterprises will not only promote high standards of integrity in business transactions, whether between enterprises and public bodies or between enterprises themselves, but will also form a valuable defensive protection to those enterprises which are subjected to attempts of extortion".

Obviously, acceptance of these Rules does not guarantee that company managers' and employees' behaviour will always be in line with the rules of ethics and legality; that is why they are presented as "what is considered good commercial practice" and it is stressed that they "are without direct legal effect". (23) However, like any code of ethics, the Rules of Conduct imply a positive attitude on the part of companies' management and personnel against reprehensible conduct, place a (more or less strict) limit on such conduct, and may have a significant educational effect on the attitudes and behaviour of the people concerned, particularly if such a code were to be adopted with all the affected parties being involved in discussing the relevant issues, adopting the basic criteria and applying them to specific cases.

However, the "Introduction" contains a paragraph that clouds somewhat the *Report*'s clarity of purpose. Indeed, after stating categorically that "the business community objects to all forms of extortion and bribery", it continues: "It is recognised, however, that under current conditions in some parts of the world, an effective programme against extortion and bribery may have to be implemented in stages. The highest priority should be directed to ending large-scale extortion and bribery involving politicians and senior officials. These represent the greatest threat to democratic institutions and cause the gravest economic distortions. Small payments to low-level officials to expedite routine approvals are not condoned. However, they represent a lesser problem. When extortion and bribery at the top levels is curbed, government leaders can be expected to take steps to clean up petty corruption."

The first thing that strikes one is that, being a recommendation to governments and not to companies, it should be in Part I. However, above all, the text admits ambiguity in

interpretation. Its authors seem to think that the best way of combating extortion and bribery is by legal means, in which case it is obvious that the greatest efforts should be aimed at eradicating large-scale extortion and bribery. However, in spite of the care with which the text is written, it can also be interpreted as granting a "grace period" for smaller payments ("facilitating payments"), which in fact allows companies to continue using them, in spite of their being immoral and illegal, overlooking the harmful habits that such conduct generates within the company and society as a whole. And it is this omission of other indirect but indispensable ways of solving the problem, such as improving the ethical quality of companies and public administrations, that introduces the element of ambiguity we have mentioned and which seems to contradict the categorical statements contained in the Basic Rules, as we will discuss further on.

The *Report* presents as a *"Basic Principle"* the observance of "the relevant laws and regulations of the countries in which they are established and in which they operate, and should observe both the letter and the spirit of these Rules of Conduct". The ICC seems to consider that, although it has no legislative function, the rules it gives underlie any legal and honest business and, as such, should be observed. This implies that they are rules that are valid for any place and time. In other words, they are ethical rather than legal rules. Likewise, by requiring compliance with laws both in the home country and in the country where the business is being done, the *Report* seems to reject the acceptance of certain types of behaviour that are considered unethical in one country but are accepted in another.

The *"Basic Rules"* are developed in seven articles.

Article 1. Extortion. "No one may, directly or indirectly, demand or accept a bribe." The Vincke Committee did not find any justification for an official soliciting or accepting payment in cash or kind, or a favour, or a personal advantage, with the intention of acting in favour of the person making the payment in the performance of his duties as an official: hence, this rule has no exceptions (not even in the case of the facilitating payments). (24)

Article 2. Bribery and "Kickbacks". This article states that *"no enterprise may, directly or indirectly, offer or give a bribe, and any demands for such a bribe must be rejected.*" This paragraph is also written in a very categorical manner and goes further than the 1977 text, which specified that such payments were made "in order to obtain or retain business". Obviously, facilitating payments are also prohibited.

Paragraph b) of this article also clearly stipulates *the prohibition to "kick back* any portion of a contract payment to employees of the other contracting party", and the use of indirect means (e.g., subcontracts, purchase orders or consulting agreements) "to channel payments to government officials, to employees of the other contracting party, their relatives or business associates". The ethical and legal principle is very clear; these definitions simply seek to avoid broad interpretations that can be used as excuses for such behaviour. It is interesting to note that, unlike the 1977 text, bribery and "kickbacks" have been fused in a single article, underscoring that they are two variants of the same censurable conduct.

Article 3. Agents. This article considers the company's relationships with its agents. According to this article, it is the company's duty to take "measures reasonably within its power to ensure: a) that *any payment made to any agent represents no more than an appropriate remuneration for legitimate services* rendered by such agent", and "b) that no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct". Obviously, the company cannot completely control its agents' behaviour (nor would this be desirable from the ethical and legal standpoint), but it should

take appropriate steps to prevent unsuitable behaviour, particularly if it is suspected that such behaviour is liable to occur.

In order to facilitate this duty of surveillance, paragraph c), faithful to the principles of disclosure and transparency, suggests that companies should “maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises”, so that they may be examined, first, by the company’s auditors and, also, “upon specific request, by appropriate, duly authorised governmental authorities under conditions of confidentiality”. Once again, the purpose is not to increase the company’s paperwork or multiply the activity of inspectorates but, primarily, to be able to account for the people who have taken part in operations that may involve irregular conduct. The mere existence of this record and the fact that it may be inspected by auditors and authorities, will often be sufficient deterrent for such behaviour. Its ultimate efficacy may be questioned but there is no doubting that it will unequivocally show the company’s legal and ethical stance.

Article 4. Financial Recording and Auditing. Continuing with the above-mentioned principles of disclosure and transparency, this article states, first, *the duty to record in the books all financial transactions,* for examination by the board of directors (or a corresponding body), as well as auditors; (25) second, *the prohibition to carry “‘off the books’ or secret accounts”,* and, third, the obligation for all documents issued to state “properly and fairly (...) the transactions to which they relate”.

Finally, companies are invited to create *“independent systems of auditing* in order to bring to light any transactions which contravene the present Rules of Conduct”. This implies delegating to the (internal or external) auditors a significant degree of responsibility in detecting possible cases of bribery and extortion, adding that “appropriate corrective action must then be taken”. (26)

Article 5. Responsibilites of Enterprises. The existence of the Rules of Conduct would serve no purpose if the person ultimately responsible for observing them in the company was not clearly identified. Therefore, this article confers on the “board of directors or other body the ultimate responsibility for the enterprise”. In other words, *the supreme authority in the company* is given the duty of establishing the necessary mechanisms of control for those payments that may be subject to extortion and bribery, periodically reviewing the observance of these rules, requesting the necessary reports and taking “appropriate action against any director or employee” who contravenes them. As it is intended that these Rules of Conduct should serve as a basis for companies to create their own codes, this statement is particularly useful if such codes are to be applicable.

Article 6. Political Contributions. As has already been stated, political contributions (“to political parties or committees or to individual politicians”) are often a source of immoral or illegal conduct. Therefore, this article establishes three basic rules: a) that any such contributions be made *“in accordance with the applicable law”,* b) that “all requirements for *public disclosure* of such contributions shall be fully complied with” (27), and c) that “all such contributions must be *reported to senior corporate management*”.

Article 7. Company Codes. Companies are invited to *create codes of their own* that are consistent with these Rules of Conduct and which enable the company’s specific circumstances to be taken into account. The requirement that company codes be consistent with the Rules of Conduct should not be interpreted as a desire to establish a monopoly, but rather as a recognition that it is desirable that all companies operating in a particular country,

and even in the entire world, adopt homogenous criteria. On the other hand, considering that the Rules of Conduct are based on objective and broadly acceptable ethical criteria, this desire for universal applicability seems to be reasonable.

Very wisely, this Article recommends including useful examples in these codes (or in documents enclosed with them). It is also recommended that employees be involved in writing the codes and that they be encouraged to report immediately to the senior corporate managers any extortion and bribery attempt they encounter. It concludes by advising companies to "develop clear policies and guidelines, and training programmes for implementing and enforcing the provisions of their codes".

All in all, these Rules of Conduct provide *an excellent body of doctrine* on the treatment that companies should give to any business operations that may give rise to extortion and bribery problems. One cannot close this section without stressing the clarity and concreteness of their precepts and the practical nature of their recommendations, aimed at providing effective weapons for the fight against extortion and bribery.

Part III. ICC Follow-up and Promotion of the Rules

As we have already mentioned, the Vincke Committee was created because of the impracticality of the Panel provided for in Article 11 of the 1977 Rules of Conduct, although its main task was to revise the Report. Having completed this first task, the Committee proposed this Part III as a replacement for Article 11 and the old Part IV (*By-laws of the International Panel on Extortion and Bribery in Business Transactions*). This part provides for a Standing Committee whose general function is "to promote the widest possible use of the Rules set forth in Part II and to stimulate cooperation between governments and world business". (28) The specific tasks indicated include:

1. Encourage the ICC National Committees to promote among companies in their country a "strong support to these Rules of Conduct", with particular emphasis on the international business groups "to ensure that their subsidiaries endorse the Rules or other corporate rules having similar effect". (29)

2. Act as an "information clearing house for businesses seeking to develop their own codes and requiring advice on the problems involved", receiving, through the National Committees, "a wide range of company codes of conduct". This implies a certain widening of the field of action of the Vincke Committee, which was expanded from issues concerning extortion and bribery to cover the ethical aspect of all of the company's activities. However, at the same time, it is consistent with the mission entrusted to the Committee to provide a basis for drawing up codes that have a much broader scope.

3. Promote "seminars designed to stimulate interest in, and discussion of, the Rules among the business community".

4. "Encourage National Committees to impress upon their governments the need to include, from the initial stages, the business community (...) in discussions aimed at enacting or strengthening legislation against extortion and bribery." This initiative is very laudable, in that it commits the business community to studying and proposing solutions for the problems created by extortion and bribery, which they cannot consider as having no bearing on their interests.

5. “Ensure the liaison with the OECD, the WTO and other international organisations”, so that the ICC’s voice is heard in such issues.

6. “Conduct a study (...) on the most appropriate policies and procedures practiced by top management of companies to minimise risks of exposure to extortion of, and bribery by, personnel dealing with sensitive issues”, which may also be of considerable practical help to companies.

7. Produce regular reports for the ICC’s Executive Board and Council “on results achieved concerning worldwide recognition of the Rules of Conduct and of progress otherwise made by business in combating extortion and bribery.”

8. “Review these Rules in the light of experience and recommend amendments, as necessary, to the Executive Board and the Council.”

Conclusions

The *ICC 1996 Report on Extortion and Bribery in Business Transactions* is an important document. It reflects the international business community’s concern about extortion and bribery and its commitment to take concrete and useful measures to eradicate it. It may serve as a model for many governments, international organizations, non-governmental organizations and companies. Above all, it seeks to provide a model for corporate activities both at home and abroad, not only by helping companies draw up their own codes of ethics but also by guiding them in their business transactions.

From the ethical viewpoint, our judgement is also positive. The *Report* is not an instrument with a directly ethical content, that is, aimed at changing personal and social attitudes and values, but a practical document, with a primarily educational function, and written with the aim of offering practical suggestions to the business community and governments to enable them to effectively combat the problems caused by corruption, particularly at the international level. From this viewpoint, it is a sufficiently complete, practical and relevant document, which may serve to defend and protect those agents who try to behave ethically, and to help those who need external and internal instruments to combat the pressures trying to push them towards extortion and bribery. When a *Report* such as this has been written with ethical criteria, it ends up being a good ethical instrument, even though it rarely uses explicit ethical arguments and categories.

In short, what the *Report* provides is a private law - a code of ethics - which governs the internal and external conduct of companies that wish to be ethical and protect themselves against those who are not. Like any law, the *Rules of conduct* play an educational role and provide normal barriers for minor deviations. Since it lacks the enforcement powers of laws as such, the *Rules of conduct* will be worthless if the companies that adopt them decide to ignore them. However, given a willingness to behave in a generally ethical manner, the companies that adopt the *Rules* will find them very helpful. And, ultimately, the recommendations made by the *Report* to governments may provide that element of coercion which companies may not need for themselves but which may protect them from other immoral agents (other companies, parties, politicians, government officials, etc.). □

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(1) I would like to thank those who took part in the Workshop at the 1996 EBEN Conference for their comments, and Ronald Katz of the ICC for information about the background and history of the Report.

(2) ICC services include the International Court of Arbitration (Paris), the International Maritime Bureau (London), the Centre for Maritime Cooperation (London), the Counterfeiting Intelligence Bureau (London), the International Bureau of Chambers of Commerce (Paris), the Institute of International Business Law and Practice (Paris) and the International Environmental Bureau (Oslo). The ICC headquarters are located in Paris.

(3) This does not mean that extortion or bribery cannot have positive economic effects on some occasions: for example, when they make it possible to end a monopoly or facilitate the economic use of resources which would not otherwise have been used. However, these effects will be less satisfactory than those that could be obtained without resorting to illicit means.

(4) According to many authors, yielding to extortion may be ethically acceptable if certain conditions are met: the benefit is something that the extorted party is entitled to, there are no other licit means of obtaining it, there are objective and commensurate reasons, third parties are not unfairly harmed, the party acts with rectitude, etc. Cfr. D. Melé, "Actuaciones ante entornos corruptos", Barcelona: IESE, TDN-98, 1993.

(5) As examples of this discussion, see the articles of M. Pastin and M. Hooker, "Ethics and the Foreign Corrupt Practices Act" (*Business Horizons,* December 1980) and R. E. Frederick, "Bribery and Ethics: A Reply to Pastin and Hooker", both reproduced in W. Michael Hoffman and Robert E. Frederick, *Business Ethics. Readings and Cases in Corporate Morality.* New York, McGraw-Hill, Inc., 1995.

(6) A public good is considered to be such because its consumption by one agent does not reduce the opportunities of use or consumption by others (for example, all of a country's citizens benefit from the existence of an army that protects them from foreign invaders and no citizen or group can be excluded from this protection). This implies that everyone has an interest in this public good being provided, but no one wishes to pay for it (except for ethical reasons) as this payment will benefit everyone and not just the person who pays. This justifies financing by taxation, but it also leads to opportunistic, free-rider conducts as those who do not pay the tax benefit from the protection just as much as the person who does pay.

(7) The Report of the *OECD Ad Hoc Group on Illicit Payments* (April 1994) cited Belgium, Canada, Denmark, Germany, Greece, Luxembourg and Norway as countries that permit tax deductions for overseas payments, even if the recipients are not identified. However, under certain conditions or within certain limits, almost all of the countries included in the study allow some sort of deduction. For example, Australia, Austria, France, Ireland, the Netherlands and Switzerland permit tax deductions for overseas payments such as bribes as long as the identity of the recipients is disclosed to the tax authorities. See "U.S. Get Backing to Combat Bribery In Global Market; Tax 'Subsidy' Targeted", *The Wall Street Journal,* European Edition, Jan. 22, 1996, p. 2.

(8) As far as we know, only Sweden and the United Kingdom have developed legislation along these lines.

(9) Other OECD initiatives include a set of *Orientations on Participatory Development and Good Governance,* endorsed in December 1993 by the Development Assistance Committee (DAC), and the activities of the Public Management Committee (PUMA), which are focused on ways to improve the efficiency and effectiveness of public sector management.

(10) The Recommendation "appeals to non-Member countries to join OECD Members in their efforts to eliminate bribery in international business transactions".

(11) Recent international events include the declaration of the Transatlantic Summit (3 December 1995), the European Parliament *Report on Combating Corruption in Europe* (15 December 1995), the *Inter-American Convention against Corruption* of the Organization of American States (29 March 1996), the communiqué of the *G7 Lyon Summit* (28 June 1996), the *Recommendations to Industry and Trade Concerning Measures to Fight Corruption in Germany* of the Bundesverband der Deutschen Industrie (11 September 1996), etc.

(12) The ICC has developed other self-regulatory codes of conduct, guidelines and other mechanisms to ensure that businesses adhere to high standards in their daily activities. For example: *International Code of Advertising Practice* (1937, last revised in 1986), *Guidelines on International Investment* (1972), *International Code of Sales Promotion* (1973), *Business Charter for Sustainable Development* (1990), *Code on Environmental Advertising* (1991), *International Code of Practice on Direct Marketing* (1992), *Code on Sponsorship* (1992), etc. *The 1977 Report* was reprinted in 1993.

(13) The proposal was made by the Commission on Multinational Enterprises and International Investment at its meeting in December 1993.

(14) The OECD had an observer in the Committee (and the Council of Europe had another). For its part, the ICC took part in the March 1995 OECD *Symposium on Corruption and Good Governance.* The Vincke Committee also included representatives from the National Committees and ICC member companies from Austria, Belgium, Canada, France, Israel, Mexico, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States.

(15) It includes: Recommendations for international cooperation, National measures (grouped into Preventive measures, namely Disclosure procedures, Economic regulations, Transactions with governments and international organisations, and Political contributions; Enforcement measures; and Auditing), and international cooperation and judicial assistance (implementation of the OECD Recommendation, Cooperation in law enforcement and the Role of international financial institutions).

(16) With an Introduction, a Basic Principle, and the Basic Rules, grouped in seven articles.

(17) "For the purpose of these Rules of Conduct, the term 'enterprise' refers to any person or entity engaged in business, whether or not organised for profit, including any entity controlled by a State or a territorial subdivision thereof; it includes, where the context so indicates, a parent or a subsidiary" (Part II, Basic Principle).

(18) The *1977 Report* expressed the same ideas, although the wording has been improved. It also referred to the need for "an international treaty (...) under the aegis of the United Nations", which, wisely, has not been included in the 1995 text.

(19) This reference to "its jurisdictional and other basic legal principles", which also appears in other parts of the text, is a clear allusion to the problem of the extraterritorial application of laws, which we have already mentioned when discussing the United States *Foreign Corrupt Practices Act* (FCPA). Very wisely, the Vincke Committee did not consider that it was qualified to make recommendations on this issue.

(20) In all of the quotes taken from the *Report,* the italics are ours.

(21) All of them were already included in the *1977 Report*, except, obviously, the suggestion about the *May 1994 OECD Recommendation on Extortion and Bribery in International Business Transactions* mentioned further on. The points discussed below are matched by the Rules of Conduct applicable to companies, which are set forth in Part II.

(22) And the WTO is urged "to involve itself with these issues to support the OECD in the implementation of its Recommendations" (Part I, "Recommendations for international cooperation").

(23) It is also pointed out that "they must be read *mutatis mutandis* subject to such [national legal] systems".

(24) The *1977 Report* mentioned, in the introduction to the Rules of Conduct, the excuse that these facilitating payments are justifiable in countries "where minor officials (...) demand payments to supplement often inadequate salaries". Very wisely, the *1996 Report* omits this argument as it considers that this cannot justify a bribe. On the other hand, the wording of Article 1 of the *1977 Report* was the same as that quoted in the text, although it omitted the words "directly or indirectly", which modifies significantly the purport of the paragraph.

(25) Article 8 of the *1977 Report* limited this control to "all agents whose remuneration exceeds US$ 50,000 a year". The wording of the *1996 Report* seems much more appropriate.

(26) These requirements were stated in a separate article (Article 7) of the *1977 Report.*

(27) The *1977 Report* indicated that they should be disclosed as required by law. Once again, the new wording seems to be preferable.

(28) The Vincke Committee did not write the Standing Committee's by-laws but confined itself to stating that its Chairman "shall be nominated by the President of the ICC", that its members shall be "representatives of both developed and developing countries", and that "businessmen [shall be] adequately represented in the membership".

(29) It should be pointed out that the ICC does not intend its Rules to be a kind of universal law; hence, the encouragement given to company codes and other regulations that have the same purpose.

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