

Anti-corruption at the ICC: a policy revisited

ICC Portugal

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1.- Plan of my Presentation.-

- Why anti-corruption at the ICC?

Why should business bother about criminal law?

- I.- Looking in the rear window
 - The founders
 - Self-regulation
 - Anti-corruption part of ICC's DNA
- II.- Anti-corruption in a globalized world
- III.- What has been achieved so far
 - The turning point : FCPA
 - The kick-off: OECD
 - The world scale: UNCAC
 - A series of practical ICC tools for companies
- IV.- The business case
- V.- What is still to be done
 - The essential role of the National Committees

Part I:
Looking in the rear
window

2.- Merchants of Peace.-

- The founders wanted in 1919 to ‘ further the development of an open world economy with the firm conviction that international commercial exchanges are conducive to both greater global prosperity and peace among nations’
- But the market had to be compliant with laws and regulations
- Etienne Clémentel and his young assistant Jean Monnet had experienced during WWI the concept of ‘organized liberalism’
- ICC was created because the allied nations did not follow Clémentel’s plea to continue the war time inter-allied organized liberal system (such as in the Wheat Executive (1916) the Meats and Fats Executive (1917), the Oil Seeds Executive, Spring (1918) and the Allied Maritime Transport Committee)

3.- Corporate Self-regulation, Wherever Possible.

- The ICC founders, in this spirit, promoted corporate self-regulation as a means of codification of good practice:
 - Uniform Customs and Practice for Documentary Credits [UCP] (1933)
 - INCOTERMS ® (1936)
 - Ethics Code for the Advertising Industry (1937)
 - International Code on Fair Treatment for Foreign Investments (1949)
 - Business Charter for Sustainable Development : the Management Principles (1991)
 - Business in Society : Making a positive and responsible contribution, a voluntary commitment by business to manage responsibly (2002)
 - Antitrust Compliance Toolkit (2013)
 - Model contracts and model clauses
 - Anti-corruption instruments (*i.a.* ICC Anti-corruption Clause)

4.- A Heartening Soft Law.-

- ICC soft law is applied worldwide. Many courts in numerous jurisdictions refer to it explicitly.
- Certain ICC self regulatory texts are recognized by UNCITRAL.
- Soft law often has a stronger impact than hard law, as it is fully endorsed by the professionals, as a kind of present day '*lex mercatoria*'.
- Self-regulation should not be arrogant and should not substitute for international conventions or state statutes but should complement them.
- As a result, ICC self regulation never was criticized as other kinds of self regulation (*e.g.* in the banking sphere).

5.- Anti-corruption as part of the ICC DNA.-

- Anti-corruption is a constitutive element of the ICC economic vision, not just something ‘nice to have’.
- Anti-corruption is a natural consequence of ICC’s plea for ‘organized liberalism’.
- There cannot be a free market without a free and transparent offer meeting a free and transparent demand, expressed by persons not bound to each other.
- If demand and/or offer are truncated by corruptive elements or if offeror and offeree are bound by secret agreements, the commercial transaction is not free and will rather be a masquerade of free transaction.

6.- Fighting Corruption is Giving the Free Market a Real Chance.-

- The ‘iron law’ of the free market cannot be applied with undue, hidden, non-transparent advantages
- Only a market free of bribes gives all economic actors equal and fair chances to participate on equal terms
- This is particularly true for newcomers in the market, such as minority groups (such as young innovators, women, persons from cultural minorities, persons without political or financial connections...)
- Social justice requires transparency

Part II: On the way of Globalization

7.- From the City to the Nation: a Limited Franchise-

- In history, a limited number of merchants and craftsmen were admitted to a guild in their municipality and only few corporations received by 'royal privilege' their legal incorporation and in certain cases, a monopoly
- Gradually - with the 'Enlightenment' and the industrial revolution - an increasing number of firms was admitted as economic actors in the nation-state
- There was, however, a *quid pro quo* in the unwritten 'social contract': companies could operate as legal entities and with 'limited liability' but had to act in accordance with the expectations of the national community

8.- From the Nation to the World: a Global Franchise.-

- With globalization and liberalization, the companies' franchise grows from the nation-state to a whole world: their duties towards the communities, in which they are active, grow in parallel
- Gradually, the concept of Corporate Social Responsibility (CSR) comes into play: companies are expected not only to make profit but also to meet the populations' expectations
- OECD Guidelines for Multinational Enterprises (1976 and 2011):

[Companies should] develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate

9. There is no *Terra Incognita* any more.-

- In this context, no country is off limits anymore (*'ubi sunt leones'*)
- A company venturing into a new market, has to adapt to every new set of legislation or regulation (e.g. national legislation on mergers and acquisitions) and has to be compliant with each such country's expectations
- The interests of the local (often less developed) populations have to be taken into account
- There is no space (anymore) for what is called 'non-law' (in French: *le 'non droit'*)

10.- Corporate Law in New Clothes: the Invention of Compliance.-

- Corporate legal policies go from curative (the typical work accomplished by a ‘legal department’ or by solicitors) to preventative action (the new form of ethics and compliance approach, conducted by ethics and compliance officers)
- A corporate lawyer used to be dividing his/her time between :
 - corporate & governance matters,
 - litigation, and
 - legal advice
- Ethics and compliance was hardly a concern: the law was in the codes (‘my ethics code is the criminal code’)
- Corporate governance has to provide adequate space for the ethics and compliance function

Part III:

**What has been achieved
so far**

11.- In the Aftermath of Watergate.-

- After the Watergate scandal in the early 70ies, the US Congress learns about bribes paid by US companies (Lockheed, Northrop, Exxon, Mobil, Phillips, Gulf, ITT) from offshore funds to foreign public officials in return for obtaining government business and of kickbacks to the country of origin
- Shocked by these revelations, the US administration proposed legislation banning foreign bribery
- This would be completely new, as it was commonly understood that each jurisdiction had exclusive competence over corruption of its own public officials

12.- The Turning Point: FCPA.-

- US Congress votes on December 9, 1977 the Foreign Corrupt Practices Act (FCPA)
- Two pillars: (i) criminalization of illicit payments made to foreign public officials and (ii) requirement to (a) ‘make and keep books and records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets’ and (b) to devise and maintain accounting controls sufficient to provide reasonable assurances about the reality of the accounting
- Extra-territorial reach: Department of Justice hits hard at European companies

13.- ICC has to take position.-

- The US the only country in the world (with the exception of Sweden), which criminalizes foreign active bribery
- US business feels handicapped and tries (unsuccessfully) to soften FCPA and to internationalize its provisions
- Efforts in this sense fail (mainly in the United Nations)
- ICC sets up in 1975 an *Ad hoc* Committee on Extortion and Bribery in International Business Transactions, chaired by Lord Shawcross (before Sir Hartley William Shawcross), former chief British Prosecutor at the Nuremberg War Crime Trials

14.- ICC Rules on Bribery and Extortion.-

- The blue ribbon Committee issued in 1977 the first Rules of Conduct on Bribery and Extortion ever written by a non-governmental organization
- The Rules cover all types of corruption: active as well as passive, public as well as private, national as well as international
- The ICC document encourages companies to draw up their codes of conduct and corporate compliance programmes as a shield against extortion and bribery
- The UK Bribery Act now imposes compliance programmes

15.- An original but unpractical idea.-

- In addition, in order to monitor the implementation of the ICC Rules, a Panel was established which would consider infringements of the Rules of Conduct and possibly impose disciplinary sanctions
- The intent was excellent but the result was close to nil: the business community brought almost no cases to the Panel, which had to be mothballed in the 80ies and suppressed in the 90ies
- There is plenty of space for self-regulation but none for self-adjudication

16.- OECD enters the Scene.-

- After the entry into force of FCPA, the other developed economies (Europe and Japan) continued to lie doggo
- Certain countries continued to accept bribes as deductible business expenses
- The Americans, however, did not remain inactive and succeeded, as from 1989, in convincing OECD to start addressing the matter of corruption
- Recommendations (the implementation whereof was mainly based on ‘peer pressure’) were adopted and slowly the idea of a fully fledged convention began to materialize

17.- ICC comes back-.

- ICC could not remain silent on corruption in the 90ies, while having been a pioneer in the 70ies
- Many scandals had erupted in Europe (Tangentopoli in Italy, Elf Aquitaine and false invoices in France, Banesto in Spain, Agusta Dassault in Belgium...)
- A new Group came together in 1994 at the ICC, under my chairmanship
- Our goal was clear: invigorate ICC's position on corruption, abandon the idea of a Panel and give effective and concrete help to companies, large, medium and small in all parts of the world in order to build up real prevention systems

18.- The United Nations.-

- Corruption is everywhere, anti-corruption should be everywhere too
- After the developed nations, gathered in OECD, all the nations had to take a position
- That was realized through the United Nations Convention against Corruption (2003)
- ICC actively participated in the debate leading to UNCAC and applauded it when it was adopted
- This Convention is truly comprehensive: (i) the number of signatories, (ii) all corruptive practices covered and with (iii) a review mechanism (which hopefully will improve over time)

19.- ICC Practical Guidelines (I).-

- The Rules of Conduct for Companies (1996)

<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-Centre/Rules-on-Combating-Corruption>

- Fighting Bribery, A Corporate Practices Manual (1999)

- Revision 2003

- RESIST (ICC, TI, Global Compact, WEF)

[*http://www.iccwbo.org/products-and-services/fighting-commercial-crime/resist/*](http://www.iccwbo.org/products-and-services/fighting-commercial-crime/resist/)

- Fighting Corruption, International Corporate Integrity Handbook (2008)

20.- ICC Practical Guidelines (II).-

- ICC Guidelines on Whistleblowing

<http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2008/icc-guidelines-on-whistleblowing/>

- ICC Guidelines on Agents, Intermediaries and Other Third Parties

<http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2010/icc-guidelines-on-agents,-intermediaries-and-other-third-parties/>

21.- ICC Practical Guidelines (III).-

- ICC Anti-corruption Clause

[http://iccwbo.org/Advocacy-Codes-and-Rules/Document-Centre/ICC Anti-corruption Clause](http://iccwbo.org/Advocacy-Codes-and-Rules/Document-Centre/ICC-Anti-corruption-Clause)

- ICC Ethics and Compliance Training Handbook (2013)

www.iccbooks.com

[http://www.youtube.com/watch?v=MleA-y\]W6k8](http://www.youtube.com/watch?v=MleA-y]W6k8)

- ICC Guidelines on Gifts and Hospitality

<http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2014/ICC-Guidelines-on-Gifts-and-Hospitality/>

- Anti-corruption Third Party Due Diligence (2015)

<http://www.iccwbo.org/News/Articles/2015/ICC-releases-new-anti-corruption-guide-for-SMEs/>

- The Compendium
In the making

Part IV

The Business Case

22.- Business needs integrity.-

- The plea for more integrity is still quite recent
- Not too long time ago, one could still say: ‘The ethics code is the criminal code’
- Now nobody feels this is anymore meeting the citizens’ expectations
- Our kids, neighborhoods, parishes, local communities and nations expect more from the companies, large and small
- Not meeting these new social norms is missing the boat
- Integrity is good for business

Part V

What is still to be done

23.- The essential role of NC's.-

- ICC is not restricted to only the Paris headquarters
- It is beneficial to have as many as possible opinions expressed in the ICC Commission on Corporate Responsibility and Anti-corruption
- What is essential though is that the ICC integrity message percolates really through all the National Committees to the national and regional communities
- Importance to have national Anti-corruption commissions
- ICC should not be an organization for large multinationals. It should reach all corporations, large, medium and small
