The international movement to deter corruption: Should China join? *

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Abstract: Global concerns over the corruption of weak governments by firms engaged in transnational business are the source of an international movement that emerged in 1997. Special concern is presently directed at the weakness of enforcement of laws enacted in recent times to deter corrupt business practices in international trade that were enacted in response to that movement. One cause of weakness in law enforcement is the failure of China to share actively in those concerns and the efforts to address them. This essay will briefly record steps taken in other nations to address the concerns and the limited effectiveness of those steps. It will urge Chinese participation in the international movement and briefly suggest the need for private enforcement of the law if the movement is to succeed.

Key words: bribery; civil law convention; guan-xi; international arbitration; international commerce; International Convention on Combating Bribery; Organization for Economic Cooperation and Development; United Nations Convention against Corruption

1. The international movement

Concern for transnational corruption was expressed by the International Chamber of Commerce in 1977 when it first promulgated its Rules of Conduct to Combat Extortion and Bribery. 1 The Chamber perceived that international business firms competing on the basis of the size of the bribes they offered to foreign officials with whom they deal suffer diminished profits in their transactions with foreign firms and governments. They are therefore less inclined to engage in transnational transactions and compete in global markets, with the result that international markets function less efficiently, to the detriment of all nations.

The Chamber first expressed this concern in the form of proposed rules of business ethics, reflecting more general concerns about business practices in international trade. 2 But in the last decade of the 20th century, many


nations signed agreements obligating them to enact laws imposing criminal punishment on their citizens who violate the Chamber’s international standard of business ethics. The United States had enacted such a law in 1977 in response to Cold War concerns about the effectiveness of many governments in foreign states and their vulnerability to diverse forms of subversion. This federal Foreign Corrupt Practices Act’s prohibition of bribery of foreign officials was made applicable to foreign firms whose shares were listed on American exchanges and all listed firms were required to disclose their forbidden misdeeds to prospective investors. Those violating were subject to penalties imposed by the Securities Exchange Commission (SEC) and to criminal prosecution by the United States Department of Justice (DOJ). But for the next twenty years, the law was seldom actively enforced by either the SEC or the DOJ because enforcement was seen to put American firms at a disadvantage in securing international transactions if they were deterred from paying bribes to foreign public officials choosing firms with which to trade. Both American investors and American workers would suffer if business was lost because bribes were not paid. But that federal law did on rare occasion supply the standard of conduct on which a civil claim could be advanced by a competitor disadvantaged by the misconduct.

The economic crisis of the 1990s was centered in Southeast Asia and was seen to be in part a result of the misdeeds of irresponsible governments caused by the corrupt practices of foreign firms. The World Bank then came to share the concern of the Chamber of Commerce. In 1997, the Organization for Economic Cooperation and Development (OECD) responded to the concerns of the Chamber of Commerce and the World Bank by promulgating a new international Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. This OECD Convention obligates signatory nations to enact criminal laws “functionally equivalent” to those it prescribes, and to cooperate with the enforcement efforts of other signatory nations. To reinforce that obligation, it subjects signatory nations to periodic peer review by teams of specialists from at least two other states. While laws enacted pursuant to the Convention prohibit transnational corruption, they do not


5 Donald R. Cruver (1999). *Complying with the Foreign Corrupt Practices Act* (2d ed.). Chicago, IL: Section of Business Law, American Bar Association, vii-viii. (“There have been numerous instances where the ability and willingness of non-U.S. firms to bribe foreign public officials have placed U.S. firms at a tremendous competitive disadvantage.”)


7 Anyu, supra note 3. See also Deming, supra note 3.


9 See www.oecd.org. Its thirty one members include members of the European Union, the United States, Canada, Australia, New Zealand, Japan, Korea, Mexico, and Turkey.


require public disclosure of misdeeds nor do they forbid campaign contributions to foreign politicians, as the American law does. As of 2010, thirty-eight nations had ratified this OECD Convention including the governments of most of the major players in international commerce. China is the major exception. Hence Chinese firms are relatively free to bribe foreign officials to secure profitable transactions that might otherwise go to competing firms from OECD nations. This freedom seriously weakens the ability of OECD member states to secure compliance with their laws enacted pursuant to the Convention.

Other international organizations have now joined the OECD cause to enlist scores of other nations. In 1997, the Organization of American States promulgated the Inter-American Convention Against Corruption, it is even more explicit in requiring that its ratifiers enact specified criminal laws. In 2002, the Council of Europe’s Criminal Law Convention on Corruption entered into force, with forty-six signatories. In 2003, the African Union opened for signature its similar convention. In 2006, the European Union adopted a resolution calling for the return of assets of illicit origin to nations victimized by corrupt practices.

Also in 2003, the United Nations opened its Convention Against Corruption negotiated by the UN Office on Drugs and Crime in Vienna. It has been ratified by over one hundred nations and is also now in force. China signed this Convention in 2003, and ratified it in 2006. But the UN Convention falls short of making the rigorous demand that the OECD and other conventions have made in signatory states. Its restrained tone is reflected in Article 17:

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity. (emphasis added)

The UN Convention also proposes that each State Party take action to proscribe deliberate concealment of bribes or obstruction of justice, and provide for civil liability “if necessary”.

And despite these numerous international conventions and a few successful prosecutions, there is little evidence that the frequency of corrupt practices in international commerce has significantly diminished. The legislative enactments have been assessed as “hollow commitments”. While no thorough empirical study revealing an effect on the realities of weak governments has been conducted, the available data points to a
conclusion by advocates of the reform movement that “enforcement must be re-energized.”

2. The consequences of transnational corruption

The ineffectiveness of the measures deployed does not diminish the force of the arguments advanced by the Chamber of Commerce, the World Bank, and the United Nations. Transnational bribery is strongly tempting to those engaged in international trade but contrary to the larger interests of every state whose citizens or firms are engaged in substantial transnational transactions.

There is, of course, nothing new about corruption as a local matter everywhere. Public officials in all states are subject to temptations to abuse their offices for their personal benefit. And citizens or subjects of governments are everywhere tempted to gain an advantage by improperly favoring an official having public responsibility for business transactions or their consequences. Benjamin Franklin, the wise man of the American Revolution, observed that “there is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.” Except perhaps in smaller nations with homogenous populations, government is to many or even most citizens a distant nobody to whom little loyalty is owed. A government representing itself as accountable to the citizens it governs may tend to be less vulnerable to corruption. But even in democratic governments, the line of moral conduct for those in public service is not always clearly drawn. Family interests, longstanding friendships, cultural or sub-cultural connections, and political alliances supply corrupt motives in addition to simple self-interest. And if a foreign firm is offering bribes, it is not easy for competitors to refrain from making a matching offer.

China may face a special cultural impediment to the drawing of clear lines of moral conduct in relation to such public matters. That impediment is its ancient tradition of guanxi. That moral principle had origins in the teachings of Confucius that loyalty to one’s family and friends is a higher calling than loyalty to one’s Emperor or his commands. It imposes a strong moral obligation to bond with those who have favored one’s self or others to whom one is connected. Its acceptance among Chinese citizens may have been elevated by the shared experience of the Cultural Revolution of 1965 to 1974 when social chaos prevailed in many communities and thus enhanced the felt need for connectedness. Hence, guanxi is reported to have a strong bearing on business practices in China. It is said to be a cause of corruption and bribery, practices not uncommon in China, as elsewhere. And perhaps guanxi shapes the practices of Chinese firms engaged in international commerce who seek to bond with

29 Langenberg. Ibid. 7.
foreign firms.

I was informed of an extreme example of guanxi and its potential intersection with public or legal duties in a visit to China in 1984. Citizens generally employed by the government as arbitrators of transnational commercial disputes had been recently authorized to serve as attorneys to foreign clients. One such arbitrator was retained to represent a Danish client in a dispute with a Chinese firm. As it happened, he had previously been assigned to arbitrate that dispute. He simply rendered an award favorable to his Danish client without further ado, apparently in the perception that the duty to his personal client overrode any mere public duty to remain disinterested in hearing the Chinese adversary’s defense and assessing the legal merits of the Danes’ claim. An administrator of the arbitration program was deeply troubled by this event and sought my advice about how the law in the United States might deal with the issue presented. No doubt this extreme example reveals circumstances prevailing in the years when the arbitration administrator’s Republic was just emerging in the global economy after recovering from its Maoist Cultural Revolution of 1966-1974.30 The Maoist regime had condemned guanxi as unpatriotic, but that disapproval seems not to have prevailed among citizens outside the Maoist government. So the Cultural Revolution had apparently not diminished the moral force of guanxi, but had perhaps diminished the moral force of competing public law rights or duties.

Whatever the circumstances were in 1984, in the 21st century bribery of Chinese public officials is not permitted. Citizens are thus required to maintain a distinction between bribery and guanxi. A striking example of Chinese law enforcement was presented in May 2010 when a citizen identified as perhaps the wealthiest person in China was fined 800 million yuan ($103 million) and sentenced to fourteen years in prison for business practices that included paying bribes to five government officials.31

Even though the moral complexities of guanxi are not present in the United States, it has also long been familiar with corruption. Officers of the government waging the 18th century Revolution were detected betraying the cause for their personal profit.32 The problem was again starkly visible during the Civil War of the 1860s, resulting in enactment of a law rewarding citizens who asserted civil claims against those who were cheating their government.33 That federal false claims law was much used during the Civil War. It would evolve over the following century and a half to be a frequently used feature of American law that returns to the federal government about a billion dollars a year from citizens or their firms who cheated it.34

But corrupt practices in China or in the United States are not the primary sources of concern on the part of the Chamber of Commerce or OECD or the World Bank. The global problem is bribery across international boundaries. Moral constraints on such payments are largely absent in all nations because of the disconnection between the bribing firms and the people whose government they subvert. Adam Smith, the author of Wealth of

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The international movement to deter corruption: Should China join?

Nations and premier exponent of free markets, observed in his earlier work, The Theory of Moral Sentiments, that he and his fellow citizens of Glasgow would be very sorry on learning that China had fallen into the sea, but then they would retire to snore in peace, feeling no responsibility for the distant souls lost. So it is that Chinese firms are unlikely to feel moral constraints when tempted to bribe an official in Glasgow.

Recognition of transnational corruption as a matter for American national concern dates from the Cold War. Prior to 1977, American firms had long been accustomed to bribing officials of foreign governments to induce them to invest public funds in American goods and services or to tolerate their assault on natural resources or other misdeeds. It was then fair to assume that such payments were sometimes indispensable conditions of foreign trade because business opportunities were often going to the highest bidder, i.e. the firm offering the best bribe, and were thus a necessary cost of doing business. Among the scandals revealed in 1975 was the payment of a million dollars by The Lockheed Aircraft Corporation to Prince Bernhard of the Netherlands to secure a sale of military aircraft. The costs of such payments were partly borne by the federal government because they were treated as legitimate costs of doing business for the purpose of assessing firms’ income tax liabilities.

In many impoverished nations, a little corruption here and there is the “grease” that enables governments to recruit the public officers they need. But such complexities in the roles of minor officials in weak governments may be likened to guanxi in that they do not ease the problem of bribery of powerful public officers by the foreign firms or persons with whom they deal. It is now widely recognized that transnational corruption is a major cause of the enduring weakness of many national governments whose elite officials receive payments that will soon be deposited abroad for their benefit.

Indeed, the problem of corruption may be especially grave in nations endowed with natural resources highly valued by people in wealthier nations. Firms extracting minerals are often careless about the natural environmental consequences of their extractions, perhaps especially when mining or drilling in nations distant from their own, but the concern of ruling elites about those consequences is in many nations likely to be quite limited and reconciled by the personal rewards they receive as controllers of governments unable to deter either the corruption or environmental recklessness practiced by foreign firms. The World Bank calculated that bribes totaling a trillion dollars were paid in 2002. A large share of that amount was undoubtedly paid to officials of weak governments by firms that extract and export natural resources for sale in the developed world. And much of the foreign aid to such nations provided by the World Bank or the International Monetary Fund also seems quite likely to end up in some officials’ secret bank accounts.

Unless and until means can be devised to deter bribery of officials in weak governments, globalization can be

35 Adam Smith (1776). An inquiry into the nature and causes of the wealth of nations.
36 Published in 1761.
40 Earle A. Ripley et al. (1996). Environmental effects of mining. Delray Beach, FL: St. Lucie.
of scant benefit to “the bottom billion”\(^3\), who are destined to be governed weakly if at all. They will remain poor partners in international trade. Meanwhile, corrupt practices will be a common feature of international trade between more prosperous nations as well.\(^4\) Of course, as the Chamber of Commerce observed, bribes paid are a cost of doing business that benefits only the corrupt recipients, diminishes business profits, and impedes economic development. It is chiefly on the latter account that the World Bank initiated its effort to address the problem. Ungoverned states subverted by corruption will continue to export migrants and serve as havens for all sorts of gangsters, pirates, and terrorists. On that account, citizens of more prosperous nations have a personal stake in the movement.

3. Enforcement of criminal laws on transnational corruption

Public enforcement of the American Foreign Corrupt Practices Act has been more vigorous in the 21\(^{st}\) century. The role of the SEC was enlarged by the Private Securities Litigation Act of 1995.\(^5\) That law protects whistleblowers who reveal corrupt acts to enforcement officials, expands the criminal sanctions, limits the confidentiality of communications to attorneys, and imposed a duty on auditors to detect and disclose corrupt practices.\(^6\) The auditor is no longer permitted to rely on personal confidence in the integrity of the audited firm, but must investigate the integrity of the firm’s reporting of payments made.\(^7\) In addition, the SEC has commenced the practice of requiring firms listed on American exchanges to disgorge profits proven to be derived from corrupt deals.\(^8\)

The United States DOJ has also substantially enlarged its staff of prosecutors responsible for enforcement of corrupt practices law,\(^9\) but their efforts seem to have more than reimbursed the national treasury for the cost of their services. It is reported that American businesses creating joint ventures with Chinese companies or acquiring Chinese outfits are especially exposed to the risk of prosecution because of the probability that their ventures are corrupt.\(^10\)

And now the DOJ has begun to prosecute individual officers of firms who participate in the transnational briberies and, along with the SEC, to require their employers to disgorge profits from deals acquired by their crimes. Among those successfully prosecuted is a member of Congress who was convicted of bribing Nigerian

\(^3\) The phrase belongs to Paul Collier (2007). *The bottom billion: Why the poorest countries are failing and what can be done about it.* New York: Oxford University Press.


\(^6\) Ibid.

\(^7\) Deming, supra note 3, 371-380.


The international movement to deter corruption: Should China join?

officials on behalf of an American firm.51

Two of the recent cases advanced by the SEC and the DOJ warrant special notes. One is the case against the Halliburton Company that disgorged $550 million in 2008 as punishment for its corrupt practices in Nigeria.52 Albert Jack Stanley, who managed the Halliburton subsidiary under the supervision of Richard Cheney, then the Halliburton CEO and Vice President of the United States from 2001 to 2009,53 reduced his own sentence to three years in prison when he became a primary witness in federal prosecutions for his firm’s bribery of public officials in Nigeria.54 Halliburton, long centered in Houston, in 2008 moved its corporate headquarters to Dubai, apparently in hope of reducing its exposure to federal law enforcement.55 Its continuing relationships in Iraq are not presently the subject of criminal proceedings, but they are an appropriate subject of continuing investigations.56

Also to be noted is the prosecution of the German firm, Siemens, whose registration with the SEC exposed it to federal prosecutions for bribes paid to the Nigerian government. That prosecution came on the heels of a German prosecution.57 It resulted in a $1.6 billion fine paid by Siemens to the United States for corrupt practices in numerous nations.58 That fine was in addition to one paid to Germany.59

And the DOJ in January, 2009, for the first time initiated a proceeding to recover funds received as a bribe paid by Siemens to the son of the Prime Minister of Bangladesh and held in a bank account in Singapore. This appears to be its first effort to retrieve a bribe paid to a foreign official.60 The event seems perhaps to have alerted the Liberian government to the possible use of American aid in tracking its officials who have benefited from corruption in that nation.61

But still there are constraints on enforcement of such laws by public officials. Because of their adverse domestic economic consequences, such federal prosecutions can be politically very difficult for the prosecutors in the DOJ. For example, James Giffen, an American citizen, was arrested in 2003 and indicted in 2005 for bribing President Nursultan Nazarbaev of Kazakhstan on behalf of Mobil, Texaco, Phillips/Conoco and BP. His alleged offense had gained public attention in 2000.62 After four years of investigation, Giffen was charged with thirteen

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57 Siri Schubert & T. Christian Miller (December 20, 2008). At Siemens, bribery was just a line item. N.Y. Times.
59 Supra note 48.
counts of violating the FCPA and thirty three counts of criminal money laundering. President Nazarbaev, who has been a friend of American foreign policy in the Middle East, was critical of the prosecution, perhaps sensing that he could even lose his office as a result of it; prospective government witnesses were said to have received death threats. In his defense, Giffen alleged that he had been regularly debriefed by United States government officials, and claimed that “by the time of the transactions at the heart of the indictment, he understood himself to be working not only for the government of Kazakhstan, but also for United States government agencies”. DOJ moved to preclude the defendant from advancing the defense that he was acting on public authority, or to use information classified as secret by the government agencies said to be involved. The trial court denied the motion to preclude the defense, but did not rule on the motion regarding government secrets. On appeal by DOJ, the court of appeals, after a year of deliberation, dismissed the appeal on the ground that the trial court order to be reviewed lacked the finality essential to appellate jurisdiction.

The Giffen case, although extraordinary, illustrates the fundamental difficulty with public enforcement of any law forbidding bribery of foreign officials. The responsible public officers so engaged are required to punish their fellow citizens, with whom they may have diverse connections and shared interests, and to whom they owe their official status, in order to protect a distant government with whom they have no connection. Co-nationality is a weaker connection than guanxi, but reflects the unconcern for the circumstances of distant others to which Adam Smith adverted.

One example of weak enforcement of laws enacted in other states pursuant to the OECD Convention is provided by a case arising in Lesotho. Lesotho prosecutors, at the urging of the World Bank, sought in 2000 to punish Canadian, French, and Italian nationals and their firms for corrupt practices related to the Lesotho Highlands Water Project. As a result of the prosecutors’ efforts, the World Bank barred one firm from further

65 Ibid.
68 James Giffen and America’s Secrets, ibid.
participation in projects funded by it. And convictions in Lesotho resulted in penalties imposed on some subsidiary corporations, but the convicted foreigners apparently remain at large. OLAF, the anti-fraud office of the European Union did supply some data on the parent corporate defendants, but other help to Lesotho was not forthcoming. Such events are obviously discouraging to prosecutors in developing nations who need to consider competing needs for their scarce professional resources.

Another example of the difficulties arose in 2004 in the United Kingdom. Having recently enacted its criminal law as required by the OECD Convention, its Serious Fraud Office initiated an inquiry into bribes allegedly paid by BAE Systems, the British weapons firm, to secure contracts with the government of Saudi Arabia. In November 2006, it was reported that Saudi Arabia, perhaps inspired by the Kazakhstan experience in the United States, threatened to break diplomatic relations with the United Kingdom if the investigation were not dropped. The next month, the investigation was dropped “after balancing the need to uphold the rule of law with the wider public interest.” Prime Minister Tony Blair justified the action by calling attention to the needs to secure the help of Saudi Arabia in dealing with Palestinian affairs and to secure thousands of jobs of workers hired to perform the corrupt contract, considerations said to overbalance the rule of law. Mr. Blair’s successors were told by the High Court of Justice in 2008 to reconsider his decision to discontinue the investigation, but on appeal the House of Lords affirmed the Prime Minister’s action in calling off the prosecution. A “summit” conference was held in London in 2009 to explore the options and train business leaders to confront the issues. That conference was apparently a part of a trend presenting other such “summit” conferences.

In October 2009, the BAE case was reopened by the Serious Fraud Office and in February 2010 the Office was able to secure an admission from BAE that it had concealed payments made to middlemen and it paid a fine of roughly $50 million. But what made this possible was BAE’s confession of guilt under the United States Foreign Corrupt Practices Act and payment of a $400 million fine to the United States. The Serious Fraud Office has yet to demonstrate the will to punish the corruption of foreign officials by important British firms seeking to gain an advantage for the Office’s fellow countrymen.

77 The case against the action was brought by an NGO, The Campaign against Arms Trade. The organization was thanked by the court for bringing the action. High Court Re-opens Saudi Arms Corruption Investigation, Ekklesia (April 24, 2008). Retrieved July 13, 2009, from http://ekklesia.co.uk/node/7051.
The international movement to deter corruption: Should China join?

Anti-corruption laws do have a better chance of being locally enforced when a new regime takes over the corrupted government and might reveal the dealings of its predecessors. This happened in Nigeria in 2007 and led to the investigation of Siemens by the German government enforcing its new foreign corrupt practices law enacted pursuant to the international initiatives. It appeared that in 2006, Siemens’ Nigerian subsidiary had acquired a contract to build a power sector, paying about $18 million to Nigerian officials to close the deal. When this deal was exposed in 2007, the firm not only lost a contract but its parent firm also became the object of criminal investigations in Germany and the United States, where its stock is traded and it is subject to the corresponding laws governing accounting in publicly traded firms. The German parent firm cooperated in the investigation and won a measure of restraint on the part of the prosecutors. It appears that it had budgeted $40 to $50 million a year from 2002 to 2006 to pay bribes to Nigerian officials.

As noted, the parent Siemens firm has now paid fines of $1.6 billion to the governments of Germany and the United States for its corrupt practices in many nations. Siemens has declared its intent never to do it again. But will future officers of Siemens keep that promise in mind? If so, can it compete successfully with firms less constrained by their governments? Is it reasonable to expect that Siemens’ experience will suffice to deter other firms from other nations with less vigorous and less well-endowed prosecutors? A blacklisting of Siemens has been lifted and in 2008 it acquired new contracts with Nigeria to construct its power sector.

It is reported that France, like Germany, has become actively engaged in anti-corruption law enforcement. That may be the reality throughout the European Union. Nevertheless, a skeptic may well doubt that the criminal laws pose a very serious threat to most of those many firms around the world whose profits, indeed perhaps their economic viability, seem to depend on their willingness, or at least the willingness of their subsidiaries and their local officers, to participate in the weakening corruption of foreign officials to secure markets for their goods or services. Of course, such criminal laws express a moral judgment, and businessmen are not immune to moral suasion. But, as noted, the moral force of such international law is chronically weak. And corrupt practices are by definition secret crimes that can be prevented or deterred only by vigorous investigation and forceful legal sanctions that may not be forthcoming.

Transparency International, an organization devoted to the cause, reports that progress in deterring corrupt practices has been at best modest. In response to this situation, the OECD Council in 2009 posted a new recommendation that member states raise taxes on their firms detected to be engaged in international corrupt practices. They are also directed to increase public awareness of the criminal law, improve auditing practices,
The international movement to deter corruption: Should China join?

limit public subsidies and licenses to those firms more closely observed in their compliance, and who cooperate fully with the OECD’s peer review system of investigation and accountability.89

If China were now to ratify the OECD Convention and join the other “developed” nations concerned with the integrity of the global marketplace, it would subject itself to an obligation not only to enact laws punishing transnational corruption by Chinese firms employing Chinese workers, but it would be expected to join in the additional conditions imposed by the 2009 OECD Recommendations.

4. Civil law deterring corruption

These OECD Recommendations also urged member states “to further examine” the possible use of “civil, commercial, and administrative laws and regulations, to combat foreign bribery.”90 This follows the leadership of the Council of Europe that in 1999 adopted the Civil Law Convention on Corruption. Its aim, as stated by the Council of Europe was to take “into account the need to fight corruption and in particular provide for effective remedies for those whose rights and interests are affected by corruption.”91 Signatories are obliged to authorize civil actions for compensation of firms damaged by corrupt practices.92 This Convention entered into force in 2003. It provides for actions for compensation to the defrauded government, such as that of Iraq in the oil-for-food scandal, 93 for all damages suffered as a result of corruption.94 It also provides for the protection of whistle blowers,95 the acquisition of evidence96, and provisional remedies.97 In addition, it requires transparency in company accounts98 and strives to promote international co-operation and monitoring.

With this Convention, the Council of Europe acknowledged the need for a civil enforcement mechanism imposing real adverse economic consequences on firms that bribe foreign governments. Civil liability for the harm to the corrupted business partner is surely important to deter firms from bribing one another’s corporate officers in the private sector. The integrity of many other governments calls for a similar and plausible threat of civil liability to the government suffering harm as a result of a corrupt action. But while the Civil Law Convention is a significant step forward, reports of civil actions against offenders are few. The incentives constraining criminal prosecutions of fellow citizens who bribe foreigners also arise when civil actions are being considered by public officers.99

To date, no effort appears to have been made to bring the Council of Europe into line with the law of the United States recognizing bribery of foreign officials by American firms as a tort100 subject to punitive

89 See supra note 11.
90 Supra note 87. Recommendation viii.
94 Supra note 91. Article 3.
95 Ibid. Article 9.
96 Ibid. Article 11.
97 Ibid. Article 12.
98 Ibid. Article 10.
100 See generally Olaf Meyer (Ed.).(2009). Civil consequences of corruption.
The international movement to deter corruption: Should China join?

damages in proceedings brought by competitors who lost government contracts as a result of a defendant’s payment of a bribe, or by victimized governments such as Iraq. Thus, while the Civil Law Convention takes steps in the direction of civil enforcement, those steps may be insufficient to deter European firms motivated by the marketplace to engage in corrupt practices, except possibly for the most blatant misdeeds. And of course, that Convention is enforceable only against firms subject to the jurisdiction of states that are members of the European Union.

The 2009 Resolution of the OECD Council urges consideration of other forms of civil enforcement of foreign corrupt practices law. This evokes recollection of the false claims laws enacted in the United States in the 19th century, and further enhanced in the 20th and 21st century. The citizen who enforces that law does so by filing a civil action in the name of the United States, much as some ancient English civil actions were brought in the name of the King by his loyal subjects. The government is afforded an opportunity to take over the case, but the citizen-plaintiff remains an interested party. If fraud is proven, the defendant is required to pay treble damages, and the citizen-plaintiff is generously rewarded for his or her public service.

The proven effectiveness of that law is derived from numerous other features in addition to the prize offered to the successful citizen plaintiff. American civil procedure law contributes to the effectiveness of the private enforcement of many public laws. One important feature is the American Rule that liberates the citizen plaintiff from liability for the costs of a successful defense against his claim. Another is the contingent fee that enables the plaintiff to retain counsel who will be compensated only if the claim succeeds. A third is the law of discovery that empowers the citizen plaintiff’s lawyer to conduct an investigation of witnesses and documents not unlike that conducted by a criminal prosecutor. A fourth is the right of plaintiffs to aggregate their identical claims in one class action.

These features of American civil procedure are, of course, available to foreign plaintiffs asserting claims in American courts against defendants who are subject to their jurisdiction. It is possible to imagine many forms of private civil enforcement in American courts of foreign or international laws as well as American laws prohibiting foreign corrupt practices.

But if OECD or those pursuing the 2009 recommendations are very serious about securing effective civil law enforcement of its Convention, perhaps it should begin to consider the possible roles of citizen plaintiffs and the need for procedural accommodations needed to enable and encourage citizens to come forward to protect governments from corrupt practices. Given the World Bank’s interest in the cause, it is imaginable that it could

103 See Supra note 91. Article 3.
109 See F. R. Civ. P. 23(b)(3).
establish an arbitral forum suitably equipped with rules of procedure and rewards that would suitably encourage citizens in even the weakest and most impoverished states to become enlisted in the cause of deterring the corruption of their governments. The World Bank has established the International Center for the Settlement of Investment Disputes. While that Center in its present form is not suited to the task of enforcing corruption law, such a transnational institution could be devised.\textsuperscript{110} It might possibly gain a measure of trust from the humanity in whose behalf the Bank governs\textsuperscript{111} and thus alert transnational firms to the risk of the adverse consequences of corrupt practices to themselves.

5. Conclusion

It is crucial to even modest success for this international movement against transnational corruption that China participate by enacting laws to deter bribery of foreign officials by Chinese firms. While a criminal law is the obvious response required, a civil law would be more timely and effective. If, as appears to be the case, \textit{guanxi} weakens the force of moral principles such as those the international movement seeks to embed in international business practices, the international movement would have even greater need for methods of private enforcement of the international conventions that would serve to deter corrupt practices. But participation by China in the international movement might also be a special benefit to it. If such a system of motivating effective private law enforcement were established, it might serve the interests of China by reinforcing the current domestic movement to distinguish the bribery of public officials from the benign connections formed pursuant to the social morality of \textit{guanxi}.

(Edited by Jane T.)
