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The Russian Federation Joins the OECD Convention Against Bribery

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Introduction

On April 17, 2012, the Russian Federation joined the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions ("the Convention").^[1] This is but the latest example of a recent trend among the

major emerging markets toward criminalizing the bribing of foreign officials. This *Insight* will place Russia's accession in context of the broader effort to establish a global anti-bribery regime.

Origin of the OECD Convention

Historically, states assumed that the bribing of government officials was properly punished under the laws of the country in which the bribe occurred. And indeed, virtually every country in the world had, and still has, a domestic bribery prohibition on the books. But revelations in the mid-1970s of widespread overseas bribery by U.S. corporations exposed the shortcomings of this assumption. Concluding that countries should take responsibility for punishing their own corporations' bribery regardless of where it occurs, the United States enacted the Foreign Corrupt Practices Act of 1977 ("FCPA").^[2] This statute criminalized paying "anything of value" to a "foreign official" for "obtaining or retaining business," and established liability for both natural and legal persons. Because it was at the time the only such statute in the world, U.S. companies soon objected that the FCPA put them at a competitive disadvantage. Corporations from other countries could not only bribe without fear of penalty, but often could actually deduct the payments from their taxable income.

A decade of intensive international lobbying would, in 1997, ultimately produce the Convention. Finding that "all countries share a responsibility to combat bribery in international business transactions," the Convention calls on member states to criminalize

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the giving of “any undue pecuniary or other advantage” to a foreign public official to “obtain or retain business or other improper advantage in the conduct of international business.” Like the FCPA, the Convention includes an exception for so-called “facilitating payments”—payments made to speed up the performance of routine governmental actions. Because not all member states recognize the doctrine of corporate criminal liability, the Convention requires only that each party “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”^[3]

OECD membership included what were, at that time, the world’s principal exporters of capital: the major economies of North America and Western Europe, as well as Japan and Australia. The Convention was thus assumed to bring the overwhelming majority of corporations engaged in international business within the jurisdiction of bribery prohibitions. To borrow an often-used metaphor, the international business community generally believed that the Convention would “level the playing field.”

New Capital Exporters

However, tectonic geopolitical shifts of the next ten years would radically alter the anti-bribery landscape. Specifically, the late 1990s and early 2000s would see the rise of new economic powers which produced their own multinational corporations and thus became significant exporters of capital. Chief among these were, and are, the so-called BRICs (an acronym coined in 2001): Brazil, Russia, India, and China. Importantly, none of these countries belonged then, or now belongs, to the OECD.

In this new global business environment, anti-bribery enforcement became subject to at least two major lines of criticism, one from the business community and the other from the academy. Companies subject to meaningful anti-bribery laws complained that the shifting global economic landscape had again upset the playing field. To wit, a new group of competitors—corporations from the BRIC countries—now had the competitive advantage of doing business outside the jurisdiction of anti-bribery laws. Indeed, in the United States this objection gave rise to a still-active effort, led by the U.S. Chamber of Commerce, to amend the FCPA with various provisions designed to mitigate the statute’s tendency to deter foreign investment.^[4] But regardless of any prospective amendments, clearly among the most effective remedies to the unlevel playing field was the BRICs’ adoption of anti-bribery laws.

The second line of criticism focused not on the impact on corporations, but on the developing countries in which they sought to do business. Scholars questioned whether aggressive anti-bribery enforcement by select capital-exporting nations would actually reduce corruption in developing countries when many other capital-exporting nations enforced no such laws. These scholars cited empirical evidence showing that as the OECD nations increasingly honored their obligations under the Convention, companies from these nations conducted less business in developing countries. The resulting capital void was frequently filled by companies from countries that do not enforce anti-bribery laws. These scholars thus argue that anti-bribery enforcement will not significantly reduce bribery in developing countries until all major capital-exporting countries adopt the Convention or its equivalent.^[5]

These two lines of criticism thus prescribe the same remedy: adoption of effective anti-bribery law among all capital exporters, particularly the BRICs. Russia’s recent ascent to full

party status in the Convention thus represents a significant step in establishing a more effective international anti-bribery regime.

The BRICs Begin Adopting Anti-Bribery Laws

Russia is the first and only BRIC to enact legislation pursuant to the Convention that establishes liability for both natural and legal persons. The process began in May 2007, when the OECD Council opened discussions with Russia for accession to the Organization. One of the terms for eventual accession to the OECD was full implementation of the Convention. In February of 2009, Russia then applied to formally accede to the Convention (though not yet to the organization). Finally, in May of 2011, Russia enacted Federal law No 97-FL, which established the offence of bribing foreign officials.^[6] Russia deposited its instrument of accession to the Convention with the OECD on February 17, 2012, and sixty days later, became the 39th party to the Convention.^[7]

The statute establishes criminal liability for natural persons and, in accordance with its legal principles, administrative liability for legal persons. Unlike the Convention or the FCPA, it contains no exception for facilitating payments. Russia's definition of bribery is substantially broader than the Convention in that it does not require proving a business purpose. However, the Russian statute is narrower than the Convention in two key respects. First, the Russian statute neither adopts the Convention's "pecuniary or undue advantage" definition of bribery nor supplies an alternative clause. Instead, the statute incorporates Russia's existing definition of a bribe, which does not expressly include non-pecuniary benefits. Second, the statute provides an "effective remorse" defense whereby a natural person who voluntarily reported his crime to the authorities may be exonerated of criminal liability; the Convention contemplates no such defense.^[8] Nonetheless, in enacting this statute, Russia fully acceded to the Convention. Discussions with the OECD concerning full membership in the organization remain ongoing.

Russia is actually not the first BRIC to take significant steps toward implementing the Convention. Brazil originally signed the Convention in 1997, becoming a non-member party. It ratified the Convention in 2000 and its adopting legislation took effect in June 2002. However, the legislation established liability only for natural persons and not for legal persons.^[9] The Brazilian Câmara dos Deputados is now considering a bill that would specifically impose liability on legal persons for the business-related bribing of foreign officials, bringing it on a par with the Convention and Russia's new law.^[10] Because Brazilian law does not recognize corporate criminal liability, the Brazilian bill contemplates only administrative and civil liability.

While Russia's ascent to full party status has received much coverage in the western press, it comes in the wake of a less-noticed but perhaps equally important development. In February 2011, China amended its criminal code to prohibit the bribing of foreign officials for business purposes.^[11] China did not adopt the Convention, choosing instead to amend its code outside the OECD rubric entirely. However, the statute conforms to the Convention in some, if not all, respects. Like Russia, it prohibits only the giving of "property" (rather than the Convention's "any pecuniary or other advantage" definition), and corporate liability is limited to companies organized under Chinese law. Still, these differences do not diminish the importance of the world's second largest economy adopting an extraterritorial bribery prohibition.

The sole BRIC to have not yet enacted a statute specifically criminalizing the bribing of

foreign officials for business purposes is India. But given its spate of recent anti-corruption protests, including the much publicized hunger strike of Anna Hazare, public attention may now be focused on the problem in ways that could increase support for a prohibition on foreign bribery.

Conclusion

Of course, no matter how widely anti-bribery laws may be enacted, they will not prove effective until meaningfully enforced. Indeed, the time when developing countries are able to allocate the needed resources for enforcement of foreign bribery prohibitions may not yet be imminent. But a lag between adoption and enforcement of anti-bribery laws is certainly not unprecedented. The United States did not begin to meaningfully enforce the FCPA until the early 2000s, a full twenty-five years after enactment, and most of the OECD nations who now enforce their anti-bribery laws began much more recently. Many have yet to begin. But because enactment remains necessary (if not sufficient) to curbing global commercial bribery, Russia's recent step forward is a most noteworthy event.

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Endnotes:

[1] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 (1998).

[2] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-1 to -3, 78ff (2006)), *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415-25 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).

[3] OECD Convention on Combating Bribery, *supra* note 1, art. 2.

[4] See, e.g., U.S. Chamber of Commerce Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, available at <http://www.instituteforlegalreform.com/doc/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act>.

[5] See, e.g., Alvaro Cuervo-Cazurra, *The Effectiveness of Laws against Bribery Abroad*, 39 J. Int'l Bus. Stud. 634, 635 (2008); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 Fla. L. Rev. 351 (2010).

[6] See OECD, *Phase 1 Report on Implementing the OECD Anti-Bribery Convention in the Russian Federation*, available at <http://www.oecd.org/dataoecd/10/40/49937838.pdf> [hereinafter Phase 1 Report].

[7] See OECD, *Russia Joins Anti-Bribery Convention*, available at http://www.oecd.org/document/37/0,3746,en_21571361_44315115_49695141_1_1_1_1,00.html.

[8] Russian Fed. Crim. Code art. 291; see also Phase 1 Report, *supra* note 6.

[9] See OECD, *Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery in International Business Transactions: Brazil*, available at <http://www.oecd.org/dataoecd/15/25/42097321.pdf>.

[10] Projeto de Lei (Bill) No. 6826/2010, available at

<http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=466400> (webpage setting out the legislative steps taken, with links to bill text and reports).

[11] P.R.C. Criminal Law art. 164; pre-amendment text *available at* <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>. As translated by Covington & Burling, the amendment adds a second provision to Article 164, as follows: "Whoever, for the purpose of seeking illegitimate commercial benefit, gives property to any foreign public official or official of an international public organization, shall be punished in accordance with the provisions of the preceding paragraph [i.e., the pre-existing Article 164]." Covington & Burling E-Alert, *China Amends Criminal Law to Cover Foreign Bribery*, March 1, 2011, available at <http://www.cov.com/files/Publication/42670cdc-69c5-449f-8cca-de977578b090/Presentation/PublicationAttachment/ccc56508-172d-445a-9a57-e5552dedb517/China%20Amends%20Criminal%20Law%20to%20Cover%20Foreign%20Bribery.pdf>.