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ICC Views on the UN Convention Against Corruption

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Policy statement

ICC views on the UN Convention against Corruption

Prepared by the Commission on Anti-Corruption

Introduction

The United Nations Convention against Corruption, adopted on 9 December 2003 in Merida, Mexico, marks an important breakthrough in the global fight against corruption, making the prohibition of corruption an integral part of the international public order. The International Chamber of Commerce (ICC), through its Commission on Anti-Corruption, played an active role in the consultation process leading up to the signing of the Convention, providing business input into the negotiations and highlighting key areas of priority for international business.

ICC, the world business organization, presents in this statement its views on the UN Convention against Corruption and calls all signatory countries to work towards its rapid ratification and implementation into national law. In this context, ICC firmly believes that the establishment of an appropriate UN-led monitoring process will be fundamental to ensure the effective implementation and enforcement of the Convention by all signatories. ICC also attaches prime importance to the availability of procedural safeguards to ensure against arbitrary and unwarranted actions that may result from the implementation of the Convention.

ICC has been concerned about corruption, bribery and extortion and their effect on international business for more than 25 years. When business transactions are affected by the payment of bribes, resources are diverted from more productive uses. Corruption undermines public and business confidence in the fair and efficient operation of markets, distorts competition and discourages productive economic activity. Business therefore has good reasons to support international efforts to fight against corruption and has a strong interest in the success of the UN Convention against Corruption.

The UN Convention: a major step forward

The adoption of the UN Convention against Corruption represents a major step forward in the global recognition of the harmful nature of extortion and bribery. It brings to the forefront the notion that corruption is wrong, whatever the transaction, in every country and in all circumstances.

International Chamber of Commerce
38, Cours Albert 1er, 75008 Paris, France
Telephone +33 1 49 53 28 28 Fax +33 1 49 53 28 59
Web site www.iccwbo.org E-mail icc@iccwbo.org

The UN Convention follows a number of international conventions which have been adopted under the auspices of various intergovernmental organizations, including the Organization for Economic Cooperation and Development (OECD), the Council for Europe, the Organization of American States and the European Union. While these initiatives should be pursued, it must be noted that the UN Convention is the first truly global instrument against corruption. This is particularly important for countries not covered by regional conventions. Its provisions cover a very broad scope of issues, likely to bring fundamental changes to the environment in which governments and business operate:

- The UN Convention prohibits both active and passive corruption. ICC has long argued that fighting corruption requires action against extortion as much as against bribery. ICC therefore welcomes the strong recognition of the important issue of solicitation in the Convention. Without effective action to address the "demand side" of corruption, the fight against corruption cannot be won.

- The UN Convention condemns both public and private corruption. In view of the large role played by the private sector in the global economy and the continuing privatization of governmental enterprises and activities, the time has come to make sure that effective measures are taken to control corruption within the private sector. ICC is happy to note that the critical matter of private-to-private bribery has been addressed in the Convention, but regrets that the article prohibiting bribery in the private sector has not been made mandatory. Such prohibition is laid down in the Rules of Conduct to Combat Extortion and Bribery which ICC has recommended world business to follow as a method of self-regulation.

- The UN Convention addresses serious shortcomings in mutual legal assistance, a key tool for combating international corruption that can only be strengthened through comprehensive worldwide efforts. The Convention's worldwide participation raises hopes for major progress in this respect, particularly on issues that require North/South cooperation.

From ICC's perspective, a major objective of the Convention should be the establishment of a level playing field between countries in order to improve legal certainty for companies doing business in multiple jurisdictions and to facilitate their compliance efforts. For this reason, ICC is of the view that the ratification and implementation of the Convention should take place simultaneously in as many countries as possible.

ICC concerns

ICC has noted however a number of serious deficiencies in the Convention that will require special attention from governments and legislatures as they implement its provisions into national legislation:

- ICC is concerned by the large number of provisions which are discretionary in nature. The mix of binding and non-binding provisions undercuts the objective of developing consistent

international rules. Particularly disturbing is the unevenness of the mandatory obligation to adopt laws regarding the offering of a bribe, and the obligation to only *consider* legislation to deal with solicitation by foreign public officials. This creates a risk that world business will have to deal with a patchwork of different laws and regulations.

- There is considerable concern that a number of the Convention's provisions could be interpreted in unfair and unpredictable ways. In particular, the private right of action provided under Article 35 could lead to a flow of unwarranted litigation, with potentially damaging impact on companies. The article also raises problems of extraterritoriality, which has long been an ICC concern. Other problematic provisions include Article 18 "Trading in Influence" and Article 20 "Illicit enrichment", which may be interpreted unfairly and unpredictably. With these as well as other articles, it is imperative that governments make clear in their implementing and other processes, that they will take action to insure that procedural safeguards will apply to mitigate concerns about arbitrary actions.

The vital need for follow-up monitoring

The adoption of a Convention is only a beginning. Whether the Convention will make a practical impact will depend on whether there will be an effective follow-up monitoring process. Without such a process, the Convention could be interpreted differently from one country to the next, making the conduct of international business unnecessarily complex and uncertain. An unequal implementation of the Convention's provisions would result in substantial divergences between national laws, thereby defeating the very purpose of the Convention.

To be carried out efficiently, such a monitoring process should take into account results from monitoring existing instruments. This approach would save resources and reduce the burden on all participating institutions. Joint efforts in monitoring implementation of various instruments against corruption are the only way to get an overall coverage on a broad scale and within reasonable time limits.

An effective monitoring process should not only ensure the consistent application of the Convention but also monitor the steps that are being taken to ensure that the provisions of the Convention are not being abused or misinterpreted. In this respect, one of the objectives of follow-up monitoring should be to assure the availability of procedural safeguards. Another function of the monitoring process could be to help identify specific provisions of the Convention which may be too broadly worded and on which the UN could issue further recommendations.

Follow-up monitoring brings three influences into play. First, it imposes external discipline on signatory governments through reporting schedules and review team visits. Second, it provides a forum for peer-group pressure from other governments. And third, it enables business and civil society groups to press for action when governments are lagging. The track record of the anti-corruption conventions launched by the OECD, the Council of Europe and the Organization of American States shows that effective monitoring is the key to effective action against corruption.

It is crucial that participation in the monitoring process is not limited to governments and governmental institutions. The involvement of business organizations is a proven mechanism to inject practical knowledge into the process and to obtain a complete picture. In selecting participants from civil society, sufficient consideration has to be given to the representations of invited organizations, particularly those representing stakeholders such as the business community who are directly affected by official corruption. Given its long standing experience and involvement in the fight against extortion and bribery, ICC urges the UN to include it – as the world business organization – in any body set up to ensure the monitoring of the Convention.

Conclusion

Business places high hopes in the UN Convention against Corruption but remains convinced that no tangible progress will be achieved without a proper monitorting mechanism to ensure its effective implementation and enforcement by all signatory countries. ICC is thus seriously concerned at the lack of a confirmed monitoring system for this Convention.

By establishing a global standard that all signatories can meet satisfactorily, the successful implementation of the Convention would help bring more clarity and greater certainty to the regulatory environment in which companies operate, in turn boosting their efforts to develop and implement corporate compliance programmes. With the current proliferation of anti-corruption initiatives and instruments raising concerns about the possibility of inconsistent rules and the lack of common definitions, the ICC Rules of Conduct to Combact Extortion and Bribery have gained further relevance as a method of self-regulation by business to facilitate compliance with their legal obligations.

Consistent with our long standing view that the fight against corruption can only be won through complementary and mutually supportive action by governments, intergovernmental bodies and the business world, ICC is commited to working with the United Nations towards ratification of the Convention and to make sure that the Convention accomplishes its objective.

About ICC

ICC is the world business organization, the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC promotes an open international trade and investment system and the market economy. Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. ICC was founded in 1919 and today it groups thousands of member companies and associations from over 130 countries.

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