



Making The Invisible More Visible: Tackling Bribery & Corruption

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Definition of Corruption

There is no accepted global definition of corruption.

Transparency International: *"Corruption is the abuse of entrusted power for private gain."*

World Bank (2005): *"Abuse of public or corporate office for private gain"*

European Civil Law Convention of Corruption (1999): *"requesting, offering, giving, accepting directly or indirectly a bribe or any other undue advantage or the prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof"*



Forms of Corruption

Bribery, Embezzlement, Fraud, Extortion, Abuse of Power, Conflict of Interest, Insider Dealing, Favouritism, Nepotism, Illegal contribution (Mauritius: Select Committee, Fraud & Corruption)

Transparency International considers the following to be forms of corruption:

- **Transfer Pricing (Mispricing)**- Transfer mispricing is the abusive manipulation of price of goods or services, between companies of the same group, for the purpose of avoiding or reducing taxes across all entities. This takes place when related firms agree to manipulate the price of their internal transactions in order to declare less profit in higher-tax jurisdictions and therefore reduce their total tax payments. It deliberately generates profit and hides or accumulates money in the jurisdiction where the tax bill is low.
- **Offshore Financial Centres**- Financial services to non-residents on a disproportionate scale to the domestic economy as a result of financial incentives, such as minimum government interference and very low or zero tax rates.
- **Tax evasion** - The illegal non-payment or under-payment of taxes, usually by deliberately making a false declaration or no declaration to tax authorities - such as by declaring less income, profits or gains than the amounts actually earned, or by overstating deductions.

Bribery - Same old wine (I)



In *Samynaden vs The Queen (1865)* MR 1, a constable of police was sentenced by the District Magistrate of Savanne to three months of imprisonment and thirteen shillings as cost, for having committed an offence under Article 126 of the then Penal Code. (Section 4 of the Prevention of Corruption Act 2002).

He was charged for receiving £1 as an inducement to neglect his duty. Having found dangerous drugs in possession of certain parties, the accused had agreed not to give information against these parties in return of a bribe. On appeal to the Supreme Court, it was argued on behalf of the Appellant that the magistrate had no jurisdiction because prosecution ought to have been brought under Section 52 of the Police Ordinance No 11 of 1860. His appeal failed and conviction was maintained.

Bribery - Same old wine (II)



Section 52 of the Police Ordinance No 11 of 1860

"No officer, or constable, shall take or receive for his own use, any gratuity, fee, remuneration, or reward, pecuniary or otherwise, for the performance of any act done, or to be done by him, in the execution of his duty, except only his salary from the Government, as such officer or Constable, and any gratuity which he may, by the rules of the Police Service, at the time, be allowed to receive by the written orders of the Inspector-General, or Superintendent."

Corruption: No more a taboo subject (I)



A.Lopez Claros: - *" Removing impediment to sustainable economic development"*-The case of Corruption. Policy Research Paper (6704), World Bank November 2013.

Quarter a century ago, there was a reluctance to speak about corruption, because this could take huge political dimension. There has been a shift in attitude, triggered by numerous factors. Late 1980s-1990s were a turning point.

- (a) Fall of the Berlin Wall: "Central Planning" as opposed to "Free Market", demonstrated wide spread institutional failings (not inappropriate monetary policies) due to authoritarianism and corruption;
- (b) The End of the Cold war: For example, Mobuto who used to be quietly rewarded by the West was cut-off from the donor community, revealing glaring inequalities and corruptive practices;

Corruption: No more a taboo subject(II)



- (c) Global fight against poverty: IMF had to look beyond macro-economic stabilization to issues of structural and institution reforms. Corruption could no longer be ignored;
- (d) The contribution of the academic community: More research was being done on property rights, education, training and institutions. Corruption began to be seen as an "economic issue";
- (e) Globalization and supporting technologies: Led to an increase in people's demand for openness & greater scrutiny. The worst autocrats in the world, could not stash away their ill-gotten billions of dollars in secret bank accounts;

Corruption: No more a taboo subject(III)



- (f) International awareness on corruption as a result of a number of political scandals:
 - (i) Former President of South Korea: Mr Roh Tae-Woo, former president was sentenced to 22 ½ years in prison (pardoned in 1997), for offences of bribery and mutiny.
 - (ii) Political class in Pakistan: Marred with allegations of corruption, Mr Atif Ali Zadari- Mr 10%, Benazir Bhutto, convicted in absentia, for corruption charges.
 - (iii) Carlos Andrés Pérez (1989-93), President of Venezuela impeached for corruption.
 - (iv) Fernando Affonso Collor de Mello- 32nd President of Brazil impeached for corruption.

Corruption: No more a taboo subject (IV)



Globalization = Efficiency: There was a need to cut down on costs associated with doing businesses in corrupt environments. (US Foreign Corrupt Practices Act 1977 and OECD Anti-Bribery Convention 1997- officially Convention on Combating Bribery of Foreign Public Officials in International Business Transactions- In force on 15th February 1999)

Transparency International Index: (1993): Focus public attention on corruption issues and legitimize public discourse on corruption.

The impact of Corruption



- (a) Negative impact on economy, contract allocation, foreign direct investment and service delivery.
- (b) Businesses and individuals pay an estimated \$1.5 trillion in bribes each year: 2% Global GDP.
- (c) The poor pay the highest proportion of their income in bribe: Paraguay: The poor households pay 12.6% of their income in bribes, whilst the high income households pay 6.4% of their income in bribes.

Tackling corruption: Everyone has a role to play



Tackling corruption: "*Coalition of the concerned*" - politicians and senior government officials, the private sector, citizens, communities and civil society organizations.

United-Nations: Countries should consider having a National Anti-Corruption Strategy: A practical guide for development and implementation (2015).

- Must have a high level entity in charge of co-ordination and implementation;
- Periodic assessment of the impact of the measures taken; and
- Monitoring and Evaluation: Involve civil society organizations, citizens, scholars and research organisations;

NB: What should NOT be done, is to track TI corruption index on a yearly basis.

Groups and leadership initiatives (Non-Exhaustive List)



G20 Anti-Corruption Working Group- Comprehensive recommendations for consideration by leaders on how the G20 could continue to make practical and valuable contributions to international efforts to combat corruption.

The Stolen Asset Recovery (STAR) Initiative- is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. STAR works with developing countries and financial centres to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.

SACC- SADC anti-corruption sub-committee. Met in Sep 2017: Draft a 5 years SADC Anti-Corruption and Strategic Plan, with a view to implement the SADC Protocol Against Corruption.

African Union Convention on Preventing and Combating Corruption (I)



[signed 06th July 2004/ Not Ratified]

Article 9- Access to information

Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.

African Union Convention on Preventing and Combating Corruption (II)



Article 10- Funding of Political Parties

Each State Party shall adopt legislative and other measures to:

- (a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
- (b) Incorporate the principle of transparency into funding of political parties.

Article 11- Private Sector

Article 11(1) -Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed by agents of the private sector.

Article 11(3)-Adopt such measures as may be necessary to prevent companies from paying bribes to win tenders.

The United Nations Convention Against Corruption (I)



Signed by 186 State Parties

Mauritius – Signatory: 09th December 2003, Ratification: 15th December 2004

The Convention covers five main areas: (1) preventive measures (2) criminalization and law enforcement (3) international cooperation, (4) asset recovery and (5) technical assistance and information exchange.

The United Nations Convention Against Corruption (II)



Offences fall in two categories: (a) One whereby State Parties are called upon to adopt such legislative or other measures and (b) another whereby State Parties are called upon to consider adopting legislative measures and other measures.

Examples in Category (a): (i) Bribery of national public officials, (ii) Bribery of foreign public officials and officials of public international organizations, (iii) Embezzlement, misappropriation or other diversion of property by public officials, and (iv) laundering of proceeds of offences under the convention;

Examples in Category (b): (i) Trading in Influence, (ii) Abuse of functions (iii) Bribery in the private sector, and (iv) Embezzlement of property in the Private Sector.

Reporting of Corruption Offences Protection of witnesses (I)



S49 (1) Prevention of Corruption Act (POCA) 2002

Subject to subsection (6), where a person-

(a) discloses to a member of the Board (ICAC) or an officer that a person, public official, body corporate or public body is or has been involved in an act of corruption; and

(b) at the time he makes the disclosure, believes on reasonable grounds that the information he discloses may be true and is of such a nature as to warrant an investigation under this Act, he shall incur no civil or criminal liability as a result of such disclosure.

Reporting of Corruption Offences Protection of witnesses (II)



S49(2) Prevention of Corruption Act (POCA) 2002

Subject to subsection (6), where a public official-

(a) discloses to his responsible officer or to the Director-General that an act of corruption may have occurred within the public body in which he is employed; and

(b) believes on reasonable grounds that the information is true, he shall incur no civil or criminal liability as a result of such disclosure and no disciplinary action shall be started against him by reason only of such disclosure.

Reporting of Corruption Offences Protection of witnesses (III)



S49 (5) Prevention of Corruption Act (POCA) 2002

A person who commits an act of victimisation against a person who has made a disclosure under subsection (1) or (2) shall be guilty of an offence and shall, on conviction, be liable to pay a fine not exceeding 50,000 rupees and to imprisonment not exceeding one year.

S49 (7) Prevention of Corruption Act (POCA) 2002

“victimisation” means an act,

- (a) which causes injury, damage or loss;
- (b) of intimidation or harassment;
- (c) of discrimination, disadvantage or adverse treatment in relation to a person’s employment; or
- (d) amounting to threats of reprisals.

Standard Bidding Documents (Procurement Policy Office), Instructions to Bidders (I)



It is the policy of the Government of the Republic of Mauritius to require Public Bodies, as well as bidders, suppliers and contractors and their agents (whether declared or not), personnel, subcontractors, service providers and suppliers, to observe the highest standard of ethics during the procurement and execution of contracts.

Standard Bidding Documents (Procurement Policy Office), Instructions to Bidders (II)



The following terms are defined:

- (i)“Corrupt Practice” is the offering, giving, receiving or soliciting, directly or indirectly anything of value to influence improperly the actions of another;
- (ii)“Fraudulent Practice” is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;
- (iii)“Collusive Practice” is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party;
- (iv)“Coercive Practice” is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

Standard Bidding Documents (Procurement Policy Office), Instructions to Bidders (III)



(v) "Obstructive Practice" is (aa) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede the Client's investigation into allegations of corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation, or (bb) acts intended to materially impede the exercise of the Client's inspection and audit rights...

Standard Bidding Documents (Procurement Policy Office), Instructions to Bidders (IV)



In pursuance of the abovementioned policy, the Government of Mauritius,

- will reject a proposal for award if it determines that the Bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for the contract in question; and
- will sanction a firm or an individual, at any time, in accordance with prevailing legislations, including by publicly declaring such firm or individual ineligible, for a stated period of time: (i) to be awarded a public contract; and (ii) to be a nominated sub-contractor, consultant, manufacturer or supplier, or service provider of an otherwise eligible firm being awarded a public contract.

Standard Bidding Declaration Form (I)



We have taken steps to ensure that no person acting for us or on our behalf will engage in any type of fraud and corruption as per the principles described hereunder, during the bidding process and contract execution:

- (i) We shall not, directly or through any other person or firm, offer, promise or give to any of the Purchaser's employees involved in the bidding process or the execution of the contract or to any third person any material or immaterial benefit which he/she is not legally entitled to, in order to obtain in exchange any advantage of any kind whatsoever during the tender process or during the execution of the contract.

Standard Bidding Declaration Form (II)



(ii) We shall not enter with other Bidders into any undisclosed agreement or understanding, whether formal or informal. This applies in particular to prices, specifications, certifications, subsidiary contracts, submission or non-submission of bids or any other actions to restrict competitiveness or to introduce cartelisation in the bidding process.

(iii) We shall not use falsified documents, erroneous data or deliberately not disclose requested facts to obtain a benefit in a procurement proceeding.

We understand that transgression of the above is a serious offence and appropriate actions will be taken against such bidders.

GOOD GOVERNANCE & INTEGRITY REPORTING ACT 2015 (I)



Section 9: Provides for reporting of unexplained wealth acquired to the Integrity Reporting Services Agency

Section 14(1): When the [Integrity Reporting Board] has reasonable grounds to believe that a person has unexplained wealth, it shall direct the agency to apply to a Judge in Chambers for an unexplained wealth order.

GOOD GOVERNANCE & INTEGRITY REPORTING ACT 2015 (II)



Section 20: Whistle-blower is offered protection for he/she shall not incur any civil or criminal liability if the report to the Agency was genuine or if he/she has reasonable grounds to believe that the information disclosed was true and was of such nature as to warrant an enquiry.

Corruption in International Arbitration Practice



1963 ICC Case No 1110, 47: The sole arbitrator declined jurisdiction, holding that disputes concerning allegedly illegal contracts were not arbitrable, as a matter of public policy.

"Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for the assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes"

First Interim Award, of 1983, in ICC Case No 4185(1987): Arbitral Tribunal did not rule out jurisdiction. It was held, *"the question of validity or nullity of the main contract for reasons of public policy, illegality or otherwise is one of merits and not of jurisdiction, the validity of the arbitration clause having to be considered separately from the validity of the main contract."*

UNIDROIT PRINCIPLES (2016) of international commercial contracts



Article 3.3.1 -Contracts infringing mandatory rules

(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin,.... the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether one or both parties knew or ought to have known of the infringement; (f) whether the performance of the contract necessitates the infringement; and (g) the parties' reasonable expectations.

Examples provided Under Articles 3.1 & 3.2 of UNIDRIOT PRINCIPLES (I)



(1) Contractor A of country X enters into an agreement with agent B ("the Commission Agreement") under which B, for a fee of USD 1,000,000, would pay USD 10,000,000 to C, a high-ranking procurement advisor of D, the Minister of Economics and Development of country Y, in order to induce D to award A the contract for the construction of a new power plant in country Y ("the Contract"). In both countries X and Y bribery of public officials is prohibited by statute. The Commission Agreement infringes the statutory prohibitions in question, by its terms.

Examples provided Under Articles 3.1 & 3.2 of UNIDRIOT PRINCIPLES (II)



(2) A, an aircraft manufacturer in country X, knowing that C, the Ministry of Defence of country Y, intends to purchase a number of military aircraft, enters into an agreement with B, a consultancy firm located in country Y, by which B is to negotiate the possible purchase by C of the aircraft manufactured by A ("the Agency Agreement"). A statutory regulation of country Y prohibits the employment of intermediaries in the negotiation and conclusion of contracts with governmental agencies. Since the purpose of the statutory prohibition of the employment of intermediaries is to fight corruption, neither A nor B should be granted any remedy under the Agency Agreement.

Examples provided Under Articles 3.1 & 3.2 of UNIDRIOT PRINCIPLES (III)



Article 3.3.2 (1) (Restitution): Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.

Further to the scenario in Example 1, A, having been awarded the Contract, might have almost completed the construction of the power plant when in country Y a new Government comes to power which claims that the Contract is invalid because of corruption and refuses to pay the outstanding 50% of the price. Under the circumstances it would not be fair to let D have the almost completed power plant for half the agreed price. A may be granted an allowance in money for the work done corresponding to the value that the almost completed power plant and D may be granted restitution of any payment has made exceeding this amount.

The Pecuniary Liability



The UK Bribery Act 2010, amongst other forms of Bribery, address the failure of commercial organizations to prevent bribery.

Deferred Prosecution Agreements (DPAs) were introduced, in the UK on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013. They are available to the Crown Prosecution Service and the Serious Fraud Office.

17 January 2017- Rolls-Royce entered into a DPA agreement, for criminal conduct (allegations of bribery) during three decades, in seven jurisdictions and involving three business sectors. The DPA involves payments of £497,252,645 (comprising disgorgement of profits of £258, 170,000 and a financial penalty of £239,082,645) plus interest. Rolls-Royce are also reimbursing the SFO's costs in full (c£13m).

Since 2000, it is estimated that monetary recovery in the US as a result of deferred prosecution agreements as well as non-prosecution agreements has totalled more than US\$37 billion in publicly disclosed agreements alone. (Source: Norton Rose, Full Bright 2014)

Addressing Corruption within an Organization



Internal policies, compliance, training programs;

Consider whether, incentives need to be given to employees to report, improper behaviour conducive to corrupt practice, or corrupt acts;

Once an internal report has been made, by a whistle blower, there should be procedure in place to investigate and resolve the matter expeditiously

Contracting out of Corruption (I)



Integrity Clause

"The Consultant shall take steps to ensure that no person acting for it or on its behalf will engage in any type of fraud and corruption during the contract execution.

Transgression of the above is a serious offence and appropriate actions will be taken against such Consultant."

Termination Clause

"If the Consultant, in the judgment of the Client, has engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices in competing for or in performing the Contract."

Contracting out of Corruption (II)



The International Chamber of Commerce: Anti-Corruption Clause

The International Chamber of Commerce suggests that in order to comply with best international practice and limit the likelihood for prosecution for breaching bribery and corruption laws, organisations should include anti-corruption clauses as a matter of routine in all significant contracts.

An anti-corruption clause allows the parties to state that they have not and will not be involved in the giving or receiving of bribes or other corrupt conduct within the context of the contract. Should one of the parties breach an anti-corruption clause, under the contract the non-breaching party may be entitled to suspend or terminate the contract or claim damages.
