



RESPONSABILIDAD SOCIAL CORPORATIVA

CANADIAN LEGAL FRAMEWORK ANTI-
CORRUPTION FOCUS:
CANADIAN CORPORATIONS OPERATING IN
FOREIGN MARKETS

Thomas C. Marshall, Q. C.

Vice-Chair and Director, Transparency International Canada

CAMERA DE COMERCIO DOMINICANA – CANADIENSE

SANTO DOMINGO, MARTES, 23 DE MARZO, 2010



Transparency International

CORRUPTION IS A GLOBAL PROBLEM

TRANSPARENCY INTERNATIONAL (TI) – ESTABLISHED IN 1993

FROM THE TI MISSION STATEMENT:

“Corruption is one of the greatest challenges of the contemporary world. It undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor. Controlling it is only possible with the cooperation of a wide range of stakeholders in the integrity system, including most importantly the state, civil society and the private sector. There is also a crucial role to be played by international institutions.”

TI-CANADA ESTABLISHED IN 1996; ONE OF 90 NATIONAL CHAPTERS



Transparency International (cont'd)

- an international, non-profit coalition against corruption, “the abuse of entrusted power for private gain”
- focuses on bribery, including cash or in-kind influences (e.g. nepotism, favouritism)



Corruption

- all pervasive
- exists everywhere; some places less visibly
- deters investment, distorts development and ultimately hurts those least able to fight back



Corruption in Business

- has impact on corporate performance
- adds significantly to shareholder risk
- unacceptable to attain productivity and profitability, essential for sustainability, through unethical behaviour
- *reputation* takes years to build; moments to destroy
- corruption can lead to social unrest within organizations and communities where established and can present real questions for long-term viability of company



Tools to reduce risk - OECD

Organization of Economic Cooperation and Development's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Anti-bribery Convention) – signed in December 1997; into force 15 February 1999 (Canada ratified 17 December 1998)



Tools to reduce risk – OECD (cont'd)

PREAMBLE TO OECD ANTI-BRIBERY CONVENTION:

“...Bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”

All countries share responsibility to combat bribery in international transactions

Other organizations (UN, World Bank, IMF, WTO, OAS, EU) all active



Tools to reduce risk – OECD (cont'd)

Article 1 – obligations of states:

“Each party shall take measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”



Tools to reduce risk – OECD (cont'd)

- OECD Anti-bribery Convention calls upon parties to enact appropriate criminal sanctions, including financial penalties and jail
- OECD recognized efforts of companies, business organizations, trade unions and other NGOs to combat bribery
- Bribery has impact on both ultimate interests of business and the social, economic, environmental and cultural communities in countries where those businesses are active



Tools to reduce risk - CFPOA

The Corruption of Foreign Public Officials Act – 14 February 1999:

“Every person commits an offence who, in order to obtain an advantage in the course of business, directly or indirectly, gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official.”

Up to five years in jail; unlimited financial penalty

Offense must be committed in whole or part in Canada



Tools to reduce risk - UNCAC

The United Nations Convention against Corruption:

- Adopted by General Assembly 31 Oct 2003
- Came into effect 14 December 2005
- Ratified by Dominican Republic 26 October 2006
- Ratified by Canada 2 October 2007



Tools to reduce risk – UNCAC (cont'd)

Foreword by Secretary General:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.

This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.

Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.



Tools to reduce risk – UNCAC (cont'd)

Article 1. Statement of purpose:

The purposes of this Convention are:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.



Tools to reduce risk – UNCAC (cont'd)

UNCAC reflects international preoccupation with development of increasingly efficient and effective anti-corruption tools.

Bribery of foreign public officials identified as criminal offence and measures adopted to pursue those who commit such acts

UNCAC mandates much broader strategy or sets of strategies, including development of tools to combat corruption



Enforcement in Canada

Royal Canadian Mounted Police (RCMP) – national Canadian police authority responsible for investigation of allegations under CFPOA.

Investigation and charging of criminal offences are independent of any political interference.

Justice Canada (Department of Justice - DOJ) advises the RCMP



Enforcement in Canada - DOJ

- International Responsibilities:
 - Provide information on Canadian implementation
 - Review other states' implementation
 - Follow-up on recommendations – policy development
- International Assistance Group
 - Acts as authority for Mutual Legal Assistance Treaties (MLAT) and extradition related to UNCAC/CFPOA
 - Provides advice to law enforcement
 - Liaises with Department of Foreign Affairs and International Trade



Enforcement in Canada - RCMP

International Anti-Corruption Units

- established by RCMP
- two, seven-person International Corruption Units
- responsible for investigations, prosecutions, prevention and detection
- compared with other countries, this is a significant commitment

Mandate

- To investigate matters concerning the corruption of foreign public officials by a Canadian business or persons.
- Also to investigate matters concerning the corruption of domestic public officials by a foreign person or business.
- To investigate matters in accordance with MLAT obligations.



Enforcement in Canada – The Future

At present, enforcement of CFPOA left to Criminal Law.

By contrast, in the US:

- Foreign Corrupt Practices Act (FCPA) in existence since 1977
- More charges in last 5 years than previous 20
- In US, civil remedies undertaken by Securities regulators and Stock Exchanges, etc., where material filings require financial data that would capture prohibited payments
- Civil stand of proof easier



Enforcement in Canada – The Future (cont'd)

American approach under discussion in Canada; corporations, as part of their compliance obligations, have regard for potential. Trend highlights values of good corporate governance and transparency in international dealings

Compliance with Canadian law and international obligations very much part of CSR policies.



CSR

Canadian government CSR – a definition:

“Corporate Social Responsibility refers to the way firms integrate social, environmental and economic concerns into their values, culture, decision making, strategy and operations in a transparent and accountable manner and thereby establish better practices within the firm, create wealth and improve society.”

The role of the Counsellor is to assist companies and stakeholders in resolution of disputes related to corporate conduct abroad.



CSR (cont'd)

CSR also refers to conduct of business in socially and environmentally sustainable way, i.e., implying ongoing relationships with the person affected

Policy of Canadian government to work with Canadian business community, civil society groups, foreign governments and communities, as well as other stakeholders, to foster and promote CSR



CSR (cont'd)

Social, environmental and economic concerns can reflect need to address wide range of impacts – from human rights/civil rights concerns to challenges of operating in countries without a traditions of the rule of law or functioning democratic institutions and all that those notions embrace.



CSR (cont'd)

Recall UNCAC Foreword by Secretary General:

“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.”

One fundamental principle underlying CSR program must be to adopt measures designed to effectively combat corruption, both because it is in corporation's interests to do so, and because a failure to promote effectively anti-corruption conduct can lead to sever financial and personal consequences.



A culture free of corruption

Such a culture needs to value the rule of law, human rights and the dignity of each of the government's subjects. The road that might eventually lead to such a culture, where a society's values are shared and supported by the bulk of the citizenry, is long and arduous.



A culture free of corruption (cont'd)

Characteristics:

- 1) Reflecting general support for rule of law institutions and perception that the law will be applied fairly and, so far as possible, predictability exists. Human rights and equality before the law are actively supported;
- 2) Existence of independent judiciary (professionally trained);
- 3) An independent bar, conscious of its role in society (i.e., the source for appointment of judges)



A culture free of corruption (cont'd)

- 4) An Attorney General publicly accountable for administration of justice and supported by large group of professionals
- 5) An independent and free press
- 6) A permanent and professional civil service
- 7) A government that recognizes that its function is to serve the interests of the people it governs and which recognizes essential nature and value of those matters noted above.



SIX ACTIONS FOR COMPANIES AND TOOLS TO HELP

STAGE	COMPANY RELEVANCE	TOOLS
ASSESS	Where do you stand? What are the risks?	TI ABC Anti-bribery checklist TI Bribe Payers' Index, TI Corruption Perceptions Index
PLAN	Benchmark against best practice using a code and develop detailed policies	Business Principles for Countering Bribery, a multi- stakeholder developed framework SME Edition of the Business Principles
ACT	Implement your no-bribe policies through detailed procedures	TI Guidance Document TI Six Step Implementation process



SIX ACTIONS FOR COMPANIES AND TOOLS TO HELP (cont'd)

MONITOR	Carry out continuous self-check and improvement	TI Self-Evaluation Tool ABS Enablon self-assessment software
REPORT TO STAKEHOLDERS	Report internally and externally on what you do	The UNGC-TI Guidance for reporting on the 10th principle against corruption TRAC – a global survey by TI of reporting by companies of anti-bribery practices
ASSURE	Raise the credibility of what you do	Discuss with a potential assurance provider



Conclusion

- All stakeholders must be involved in fight against corruption
- The legal net is gradually closing in on business acting in a corrupt manner
- Companies can contribute to fight against corruption – put own house in order; work with others to avoid corruption
- Zero tolerance to bribery and corruption
- Interlinked CSR strategy