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Editorial

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Qu'il est difficile en ces temps troublés de prendre la plume. Que dire lorsque l'on est interpellé, comme nos lecteurs l'ont certainement été ces dernières semaines, sur la pertinence du droit devant l'usage de la force ?

La question de la légalité de l'intervention en Irak aura retenu l'attention au cours de ces derniers mois, dépassant le cadre limité des spécialistes du droit international pour interpeller une partie plus large de la population. Le moins que l'on puisse dire, c'est que les pays qui sont à l'origine de l'intervention se sont mis en dehors de la légalité internationale. L'argument de la 'légitime défense préventive' qui avait un temps été avancé pour tenter de justifier le déclenchement des hostilités, ne saurait convaincre. On se rapportera aux nombreuses dénonciations, dont celle d'Alain Pellet (parue dans le Monde des 23 et 24 mars 2003), ou encore à l'appel signé par de nombreux juristes concernant le recours à la force en Irak (cf. www.ulb.ac.be/droit/cdi) pour se rappeler combien cet argument est antinomique avec le droit international.

Les Etats-Unis semblent d'ailleurs avoir renoncé à invoquer une quelconque légitime défense, préférant reporter leurs espoirs sur une autorisation 'implicite' du Conseil de Sécurité. L'argument – on pourrait même parler d'une véritable pirouette juridique – a encore été répété dans la lettre adressée le jour du début des hostilités par le représentant permanent des Etats-Unis au Conseil de Sécurité. Il voudrait que la résolution 678 adoptée suite à l'invasion du Koweit par l'Irak ait « survécu » pour constituer un fondement à l'intervention actuelle.

Nos lecteurs ont déjà eu l'occasion d'apprécier la validité de l'argument à l'occasion des actions militaires menées depuis la fin de la guerre du Golfe en 1991 contre certaines zones du territoire irakien. Comme l'écrivait Christoph Schreuer dans cette revue (volume 3, no. 2, 2001, pp. 72 e.s.), c'est faire une utilisation bien extensive d'une autorisation accordée dans un contexte particulier, fort éloigné des circonstances actuelles. On aurait pu espérer que le Conseil de Sécurité vise expressément la résolution 'ressuscitée' dans le corps de la Résolution 1441, ce qu'il n'a pas fait. Au-delà de cet aspect purement formel, comment oublier que l'intervention actuelle visait expressément à provoquer un changement de régime, un but pour le moins différent de la mission assignée à l'intervention de 1991, qui était de repousser une agression.

Il faut dès lors conclure que l'intervention armée ne peut en appeler à une quelconque légalité internationale. Ce n'est certes pas la première fois qu'une coa-

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lition contourne les exigences de la Charte des Nations-Unies pour imposer par la force ce qu'elle n'a pu obtenir par le droit. Certains ont cru pouvoir faire la comparaison avec l'épisode tragique de la guerre du Kosovo, qui n'avait pas non plus fait l'objet d'une autorisation du Conseil de Sécurité. Cette intervention pouvait certes en appeler à l'assentiment d'une plus grande partie de la communauté internationale et s'appuyer sur une certaine légitimité, déduite des risques avérés encourus par les populations civiles victimes des exactions de Milosevic. Elle n'en constituait pas moins un dangereux précédent. Or Anne Marie Slaughter, pour ne citer qu'elle, a laissé entendre que, tout comme le rôle joué par les Nations-Unies dans l'administration du Kosovo après guerre a contribué à effacer le souvenir de l'illégalité première, une mainmise des Nations-Unies sur l'Irak d'après-guerre pourrait atténuer l'illégalité première dont est affectée l'intervention (dans le New York Times du 18 mars 2003). Une telle légalisation *a posteriori* semble toutefois extrêmement douteuse.

Enfin, il sera permis de faire peu de cas de l'argument parfois invoqué selon lequel l'intervention devrait être tolérée puisqu'elle vise à imposer le respect des résolutions du Conseil, en particulier en ce qu'elles exigent le désarmement de l'Irak. Loin d'ignorer les exigences du droit international, l'action armée serait dans cette vision à leur service. Le raisonnement est fallacieux. On n'est pas loin en effet de la fin qui justifie les moyens. A suivre cette logique, chaque Etat pourrait s'affranchir du système de sécurité collective pour imposer, quand il le juge approprié, telle ou telle solution.

Car au-delà de tous les arguments, c'est bien le caractère *unilatéral* de l'intervention qui choque et nuit le plus au principe de la sécurité collective que les Etats-Unis disent vouloir garantir. On peut ainsi regretter que les tenants du trop célèbre "camp de la paix" n'aient pas énoncé des propositions concrètes qui auraient pu faire sortir la Communauté internationale du blocage dans lequel elle était tombée et que la France ait clairement annoncé son intention de s'opposer à toute résolution empêchant ainsi la situation d'évoluer.

L'occasion était pourtant belle de se pencher sur la question de la *qualité* du régime de certains Etats et de définir une limite extrême au-delà de laquelle la communauté internationale ne peut rester indifférente. De même, la voie était ouverte pour une réflexion sur les structures de décision, une adaptation de celles-ci aux nouvelles réalités géopolitiques s'avérant indispensables. De tout cela il n'a malheureusement rien été.

Doit-on en conclure que la légalité internationale n'est qu'un paravent que les plus forts peuvent se permettre d'ignorer quand bon leur semble ? L'intense débat qui a précédé l'intervention militaire laisse penser le contraire. Il a mis en lumière l'importance que revêt (l'argument de) la légalité internationale dans le processus

de décision des Etats souverains. On en veut pour preuve les importants efforts entrepris par les forces 'coalisées' pendant de longues semaines pour tenter d'obtenir l'autorisation du Conseil de Sécurité, au prix de marchandages dont on a pu dire qu'ils faisaient des débats au sein du Conseil de véritables maquignonnages ?

Même si l'intervention armée est le signe d'un échec de la préférence accordée par l'article premier de la Charte des Nations Unies aux « mesures collectives efficaces en vue de prévenir et d'écarter les menaces contre la paix et de réprimer tout acte d'agression ou autre rupture de la paix », on ne saurait dès lors en déduire que le droit international a perdu toute pertinence. Cette insistance sur la légalité internationale dans tous les discours trahit sans conteste l'ampleur des doutes sur la légitimité même de l'intervention.

Aucun Etat ne peut mettre le droit international entre parenthèses, fut-ce de façon temporaire, sans se mettre au ban de la communauté internationale. Pour n'avoir pas su faire preuve de réserve dans l'usage de la force, les Etats-Unis ont, comme Sparte lorsqu'elle déclara la guerre à Athènes, perdu une chance de s'approprier les louanges que Thucydide réservait au plus fort lorsque celui-ci savait se montrer humble.

Nous avons conscience que les quelques lignes qui précédent peuvent paraître à beaucoup de nos lecteurs comme trop schématiques. Nous accueillerons toute contribution que ceux-ci voudront bien nous faire parvenir. Nous ne manquerons pas de revenir sur ce qui aurait pu être et surtout nous voulons nous pencher sur l'avenir en préparant un numéro sur la gouvernance mondiale après la guerre en Irak.

Au-delà de l'actualité pressante, notre revue offre aussi le temps de la réflexion. Celle-ci s'articule sur le thème de la 'gouvernance et de la corruption', qui peut être décliné de multiples façons. Les contributions rassemblées pour le thème récurrent montrent qu'un sujet qui jusqu'il y a quelques décennies était du ressort exclusif des Etats souverains, confiné à quelques dispositions ésotériques du droit pénal, peut, dès lors qu'un consensus se fait au sein de la communauté internationale sur un objectif bien défini, déborder largement et acquérir une dimension internationale nécessaire à sa juste réglementation. Il ne faut dès lors pas désespérer du droit international …

Editorial

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How difficult it is in these troubled times to put pen to paper. What does one say when questioned, as our readers will certainly have been during the past weeks, about the relevance of law in the face of the use of force?

The question of the legality of the intervention in Iraq has held our attention in recent months, reaching far beyond the limited community of international law specialists to engage the concern of a broader segment of the population. The least that can be said is that the countries responsible for the intervention have placed themselves beyond the pale of international legality. The argument of 'legitimate preventive defence', which had at one point been advanced in an attempt to justify the unleashing of hostilities, is unconvincing. It has been subject to numerous criticisms, among them that of Professor Pellet (which appeared in *Le Monde* on 23 and 24 March) and also the appeal signed by numerous lawyers concerning the use of force in Iraq (cf. www.ulb.ac.be/droit/cdi), which show how out of line this argument is with international law.

The United States seem, furthermore, to have given up invoking any kind of legitimate defence, preferring to place their hopes in an 'implicit' authorisation by the Security Council. The argument – which could almost be described as a legal pirouette – was repeated again in the letter sent to the Security Council by the United States Permanent Representative on the day hostilities began. It claimed that Resolution 678, adopted by the Security Council after Iraq's invasion of Kuwait, had 'survived' so as to provide a basis for the present intervention.

Our readers have already had the opportunity to evaluate the validity of this argument on the occasion of the military action undertaken since the end of the Gulf War in 1991 against certain zones of Iraqi territory. As Professor Schreuer wrote in this journal (volume 3, No. 2, 2001, pp. 72 et seq.), it purports to make very extensive use of an authorisation given in a specific context, far removed from the present circumstances. One might have hoped that the Security Council would express the intention to 'resuscitate' that resolution in the body of Resolution 1441, but it did not do so. Going beyond this purely formal aspect, it is scarcely possible to overlook the fact that the present intervention was expressly intended to bring about a change of regime — a different objective, to say the least, from the stated mission of the 1991 intervention, which was to repel an aggressor.

The conclusion to be drawn from this is that the armed intervention is without any international legality. It is certainly not the first time that a coalition has by-

passed the requirements of the United Nations Charter in order to impose by force what it has been unable to obtain by law. Some have tried to make a comparison with the tragic episode of the war in Kosovo, and that, too, had no authorisation from the Security Council. That intervention certainly had the consent of a greater part of the international community, and could claim a certain legitimacy, deriving from the acknowledged risks to the civil population that was the victim of Milosevic's violence. It nonetheless makes a dangerous precedent, but, as one might have feared, it has been invoked in the present circumstances. Dean Slaughter, to cite only one, would have us believe that, just as the role played by the United Nations in administering Kosovo after the war has gone some way to wiping out the memory of the original illegality, post-war United Nations control of Iraq could mitigate the original illegality attaching to this intervention (in the New York Times of 18 March 2003). Such an *a posteriori* legalisation seems highly questionable, however.

Finally, there is no need to attach much importance to the argument sometimes made that the intervention should be tolerated because it was aimed at imposing respect for Security Council resolutions, especially in that they demanded the disarmament of Iraq. Far from disregarding the requirements of international law, armed action would, on this view, be serving them. This reasoning is fallacious. In fact, it comes close to the end that justifies the means. Following this logic, each state could free itself from the system of collective security in order to impose one or another solution when it sees fit.

Beyond all the arguments, it is the unilateral nature of the intervention that is the most shocking, and that does the most damage to the principle of collective security that the United States say they wish to assure. It is also a matter of regret that those in the all-too-famous "peace camp" had no concrete proposals to put forward which might have helped the international community escape the impasse – and that France stated its intention of opposing any resolution, thus blocking any progress.

A good opportunity existed to reflect on the question of the *quality* of the regime in certain states and to set an outer limit beyond which the international community cannot remain indifferent. At the same time, the way was opened up for reflection on the decision-making structures, whose adaptation to new geopolitical realities has shown itself to be essential. None of this, unfortunately, has happened.

Must we conclude from this that international legality is no more than a screen which the strongest can ignore whenever it suits them? The intense debate which preceded the military intervention would suggest the opposite. It brought to light the important part played by arguments of international legality in the decision-

making process of sovereign states. If proof were needed, we have the long weeks of major effort invested by the 'coalition' forces to obtain the authorisation of the Security Council, the price for which was bargaining of the sort that could be said to have reduced the Security Council debates to the level of horse-trading.

Even if armed intervention is a sign of failure of the preference Article 1 of the United Nations Charter gives to 'effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace', it does not follow that international law has lost all its relevance. The insistence on international legality in all the speeches betrays beyond question the extent of the doubts about the very legitimacy of the intervention.

No state can place international law in parentheses, even temporarily, without placing itself beyond the pale of the international community. Because they proved themselves unable to show restraint in the use of force, the United States, like Sparta when it declared war on Athens, have forfeited the chance to appropriate the praise which Thucydides reserved for the strongest when they showed themselves capable of humility.

We are well aware that this brief treatment might appear to many of our readers as an oversimplification of the situation, and we would welcome any contributions they wish to make. We will certainly come back to the question of what might have been, and will, above all, look to the future by planning an issue on world governance after the war in Iraq.

Aside from these pressing current events, our journal also offers time to reflect. This centres on the theme of 'governance and corruption', which can be interpreted in many different ways. The contributions we have gathered on this recurring theme show that a subject which, up until a few decades ago, was the exclusive preserve of sovereign states, confined to a few esoteric provisions of criminal law, can, once a consensus is achieved among the international community on a clearly defined objective, overflow these bounds and take on the international dimensions necessary to ensure its proper regulation. Which means that we should not despair of international law …

Recurring Themes / Thèmes récurrents

Corporate Governance and corruption / "Corporate governance" et corruption

Introduction

Corporate governance is, or should be, one of the most effective tools in the fight against corruption. Ideally, it should make corruption more difficult. The notions of corporate governance and corruption need to be given a very broad meaning if the relationship between them is to be understood, and the distinctions between public and private, national and international, rapidly become blurred. Corporate governance, as Michel Germain points out, operates essentially in the private domain, while corruption is more usually perceived and defined as a public problem. And even though the main objective of most measures of corporate governance is the essentially private one of shareholder protection, it is still relevant to ask how effective corporate governance can be in the fight against corruption.[1] One thing is certain: both governance and corruption have become increasingly, and rapidly, internationalised. In the case of corporate governance, this has taken the form of moves towards the strengthening and harmonisation of a whole raft of international accounting and auditing standards and practices, set in motion in response to the wave of corporate scandals in the United States and, more recently, in Europe. And a series of major international conventions has begun to overcome what has traditionally been seen as a barrier to a coordinated fight against corruption: the principle of territoriality of criminal law. The convergence of interests, and the potential for interaction, between public and private international law has never been more vividly demonstrated.

It helps to understand that corruption has both an international and a national dimension. The problem is undeniably global, both in scale and in the ways it manifests itself. The only way it can be addressed is by locally enforceable measures, but these measures must be part of a coherent international effort, and not simply taken in isolation. Also, in order to be effective, steps taken nationally need

[1] Another area in which the fight against corruption has been the 'collateral' beneficiary of initiatives taken primarily for other reasons is money laundering. Several states have passed recent laws in an effort to cut off terrorist funding, reinforcing existing legislation, which will inevitably make it harder to dispose of the proceeds of bribery as well as of other types of organised crime.

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to attack the problem on all fronts: it is not enough to enact criminal laws against bribery, or even to enforce them – the former does not always assume the latter. There are known methods of practical prevention, detection and deterrence which can usefully be deployed right across a country's economic system. It can be made unlawful, for example, for a bribe to be tax-deductible. Companies found to be involved in bribery might be excluded from eligibility to bid for government contracts, or be denied the benefit of export assistance. Bank secrecy rules can be amended so that this is not allowed to hinder criminal investigations, and the proceeds of crime can be made subject to seizure (the UK's Proceeds of Crime Act, 2002, setting up the Assets Recovery Agency, is an ambitious and far-reaching example). It is in this context that corporate governance plays its anti-corruption role: by putting in place accounting and auditing regulations that will make corruption difficult to disguise, and encouraging the adoption of principles of business ethics which reward compliance and deter transgression. Fighting corruption calls for an integrated approach – exactly the sort of attitude that has been described in another context as "joined-up government".

The OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions is an excellent example of an integrated approach. It is, by design, a flexible tool, setting clear objectives to be achieved by parties within their own varied legal structures and traditions, and allowing them a great deal of latitude in how they do so. The principle of functional equivalence – leaving states to work within their own systems to bring about a given result – maximises the potential for adherence (though adherence is no mere formality, and in practice requires evidence of serious ongoing commitment). The Convention departs in some respects from the traditional model of an international law instrument – not least in that it has no dispute resolution clause, but instead imposes submission to ongoing peer review as one of its substantive obligations. Lucinda Low describes the workings of this feature in her article about the review of how the United States has implemented the Convention in practice. This review process, which should foster mutual dialogue and cooperation as well as encouraging compliance in the formal sense, helps to ensure that the Convention continues to be a living instrument and not a dead letter. The OECD Convention is also remarkable for the manner in which it has harnessed the forces of both soft law and hard law. Recognised as a forum for standard-setting through its guidelines (including the Guidelines for Multinational Enterprises) and recommendations, the OECD successfully prepared the ground in a series of soft law instruments (recommendations in 1996 on denial of tax deductibility, and in 1997 on various measures to combat bribery of foreign public officials) for the transition to a binding Convention, which was adopted in November 1997.

Another reason for the perceived success of the OECD Convention is that it is clearly focused only on one area, that of foreign official bribery – its aims and scope are explicit, understandable, and capable not only of being implemented but of being measured by a process of peer review. It avoids being over-ambitious. It addresses only the 'supply' side of foreign official bribery, albeit from all the relevant angles, while leaving the corrupt official's country to deal with the 'demand' side.

The proposed UN Convention Against Corruption aims to be much broader in scope. Inevitably, this invites the question: at what point do anti-corruption instruments become too diluted to be meaningful, or too wide-ranging for compliance to be capable of being monitored and measured? It is too early to pronounce. One positive, though rather subtle, effect of the rush to make corruption the subject of international conventions is the de-politicisation of bribery– the growing consensus that it is a harmful phenomenon whose long-term effects transcend political boundaries.

That said, not every player on the international stage can usefully participate in the combat – far from it. There are still states – too many – where corruption is not only tolerated, but fostered by the regime in power for its own reasons. It is not only a question of political will, however. The primacy of the rule of law, underpinned and upheld by a strong and independent judiciary, is an absolute precondition for the success of anti-corruption initiatives in any country. Judicial reform, along with that of the public administration, is sometimes a necessary first step, and sometimes, it has to be admitted, it is only possible to address corruption in the context of sweeping overall political reform.

Nor should the role of civil society be underestimated. However cynical one might feel about the apparent current obsession with league tables and measurement, there is no denying the impact on the mind of the general public – as well as of governments – of the corruption perception indexes published by Transparency International. In promoting awareness, in stimulating debate, in exposing instances of corruption and in supporting and helping to refine and develop legislative initiatives, both nationally and internationally, non-governmental organisations, provided they are genuinely disinterested, add a vital dimension of continuity, objectivity and balance.

'Genuine disinterest' should equally be the cornerstone of measures of corporate governance. Increasing the proportion of independent, non-executive directors on a company's board is a step in the right direction – but, as Michel Germain rightly asks, how genuinely disinterested, ultimately, can they be if they, like the rest of the company's senior managers, are partly remunerated in stock options? Part of their interest is tied to the company's performance, as measured by its share

price. The Sarbanes-Oxley Act, a major pillar of the US response to the Enron scandal, requires publicly-traded companies to disclose whether they have a code of ethics for senior financial officers. Auditors must be rotated, accounting firms can no longer provide certain non-audit services to the companies they are auditing, and they are now also subject to regulation by the Public Company Accounting Oversight Board. All of these measures are directed, quite legitimately, at the avoidance of conflicts of interest. The devastating economic consequences of allowing conflicts of interest to flourish in the corporate environment have been graphically illustrated.

In the domestic corporate context, the definition in Black's Law Dictionary, 5th edition, looks a little dated: a conflict of interest is a "clash between the public interest and the private pecuniary interest of the individual concerned." Nowadays, the "public" interest is often eclipsed by another set of private interests: the individual manager versus the body of shareholders. This is not always so. Those exercising public office or public responsibilities need, more than ever, to demonstrate genuine disinterest: there should not only be no conflict of interest, but not even the appearance of any. It does not take much for cynicism to begin to undermine the advances that have been so painstakingly achieved. But there is reason to doubt that this principle is always understood, or taken seriously. It certainly is not always acted on, even at the highest levels. It is a little hard, for example, to reconcile the welter of legislation in the US designed to promote corporate probity and uprightness with the recent revelation that the chairman of a high-level defence review board, which advises the Pentagon, held a consulting contract with an international conglomerate under which he was to receive varying amounts of money depending on the results achieved by lobbying the US government on that company's behalf. He remains a member, though no longer chairman, of the government's advisory board. The implications of this episode for the credibility of corporate governance initiatives remain to be digested. Whatever happened to Caesar's wife?[2]

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[2] Caesar's wife, according to an oral tradition recorded in Plutarch's Lives, was supposed to be above suspicion.

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« Corporate governance » et corruption

MICHEL GERMAIN*

1. L'on peut avoir l'impression que le « corporate governance » est l'allié naturel du moment dans la lutte contre la corruption car il a pour but de protéger la société de la déloyauté de ses dirigeants. Or, des dirigeants fidèles à l'intérêt social devraient être soucieux de lutter contre les ravages de la corruption. Mais il faut, pour apprécier cette convergence apparente dans les finalités, s'arrêter d'abord sur chacun de ces termes ou expressions pour savoir ensuite quels rapports ils entretiennent exactement entre eux.

L'acte de corrompre, c'est, selon la définition qu'en donne le dictionnaire Robert, engager quelqu'un par des dons, des promesses ou par la persuasion à agir contre sa conscience ou son devoir.

Le « corporate governance » est une organisation de la société visant à rendre les dirigeants plus attentifs à l'intérêt de la société qui les a choisis et à contrôler qu'ils ne détiennent pas leurs pouvoirs à leur seul profit.

Le rapprochement de ces deux réalités conduit à se demander si le fait illicite particulier de la corruption peut être contrôlé d'une certaine manière par le « corporate governance ».

2. On a tendance à voir dans la corruption le fait d'acteurs publics détournés de leur devoir par des acteurs privés. Mais, en réalité, la corruption peut apparaître entre sujets privés. Eve déjà corrompait Adam et, aujourd'hui, pour prendre le seul exemple du droit pénal français, il est clair que celui-ci s'intéresse aussi bien à la corruption de fonctionnaire qu'à la corruption d'employé.

L'affaire Enron est très symptomatique de cette corruption du deuxième type. Ceux qui ont été détournés de leurs missions et conduits à ne pas regarder de trop près les comptes d'Enron et à ne pas relever un grand nombre de périls qu'on multipliait comme à plaisir ont été à la fois les administrateurs de la société et les membres d'Arthur Andersen, choisi comme auditeur de la société. Dans le cas d'Enron, comme dans d'autres affaires signalées au même moment et concernant d'autres sociétés, des analystes financiers indépendants ou appartenant à des banques privées ont été sensibles aux demandes de sociétés qui souhaitaient qu'on portât un

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jugement optimiste sur leur situation financière. Ces différents exemples montrent une corruption entre acteurs privés : un corrupteur attend du corrompu un avantage qu'il lui paie d'une manière ou d'une autre.

Les classifications ne peuvent être aussi rigoureuses qu'un esprit cartésien pourrait le souhaiter et un acteur privé peut être aussi un transfuge du monde politique ou de la haute administration. Dans ce cas, l'acteur n'est sans doute privé qu'en apparence, car il fait profiter la société de son image publique et de son savoir politico-administratif. C'est ainsi qu'Enron avait embauché sans difficulté d'anciennes hautes personnalités du monde administratif ou politique. Comme le note Marie-Anne Frison Roche, cette pratique correspondait à un management des hommes jugé particulièrement efficace et politiquement correct : « on doit apprécier désormais cette porosité entre chefs d'entreprise et dirigeants des autorités de régulation avec plus de méfiance » (Les leçons d'Enron, éd. Autrement, 2003, p. 19).

Sous cette réserve de quelques corrompus presque publics, ceux-ci sont, dans le cas d'Enron, très isolés au milieu d'un cortège de corrompus privés, que sont essentiellement les administrateurs et les auditeurs. Que peut le « corporate governance » dans ce genre de cas ? On commencera par remarquer que cette idée a été un échec complet puisque la société Enron – pour prendre cet exemple – passait pour un modèle de « corporate governance ». On pourra rétorquer que cet argument est privé de sens dans la mesure où une escroquerie intellectuelle a transformé un principe de contrôle en un discours d'illusionniste. Cette proposition n'est cependant qu'à moitié satisfaisante, car le « corporate governance » avait justement pour ambition de fabriquer les armes d'une autorégulation capable d'éviter les dérives possibles du contrat d'agence.

3. Examinons alors la réalité. Le « corporate governance » ne s'était pas beaucoup intéressé au contrôle externe, mais essentiellement au contrôle interne, celui qui est réalisé par les administrateurs. Or, l'attitude des administrateurs d'Enron a été un habile mélange d'hypocrisie et de lâche acceptation de tout ce que la direction décidait pour bénéficier des rémunérations et des stock-options. Mais est-ce encore de la corruption ? Le corrupteur et le corrompu ne sont-ils pas semblables ? Certes les dirigeants, en tant qu'ils représentent la société sont des corrompus. Mais en tant qu'ils représentent leurs propres intérêts, ils sont corrupteurs et profitent de la violation de l'intérêt social qu'ils devraient représenter. Il faut donc penser que ce cas est un cas de corruption, même si c'est un cas peu ordinaire. Il participe en réalité d'une autre catégorie qui porte le nom de conflit d'intérêts. Le conflit d'intérêts apparaît d'ailleurs très étrangement même chez les administrateurs indépendants, qui sont un des éléments symboliques du catéchisme du « corporate governance ». Une partie des administrateurs de chez Enron étaient indépendants.

En effet, l'administrateur indépendant est celui qui n'est en rien lié à la société. Mais cette pureté des apparences s'est révélée inefficace au regard de l'octroi des stock options. Comme ceux-ci étaient liés à la valeur boursière de la société, l'administrateur indépendant s'est trouvé intéressé à la seule valeur boursière, le temps de la vente de ses actions. La notion d'administrateur indépendant s'est trouvée comme corrompue de l'intérieur.

Le contrôle externe assuré par les auditeurs n'a pas mieux résisté aux charmes de la corruption. Là aussi, le maître mot est celui de conflit d'intérêts. En effet, il est apparu que le cabinet Arthur Andersen assurait dans la société des activités de conseil pour un montant d'honoraires égal à celui du commissariat aux comptes. On comprend que, dans ces conditions, Arthur Andersen n'ait pas eu envie de critiquer ce qu'il conseillait par ailleurs de manière très hardie pour une rémunération considérable. Y avait-il même conflit d'intérêts ? En apparence oui, mais on peut penser que le conseil n'était souvent qu'un habillage habile de ce que voulait la direction, comme il en va dans beaucoup d'opérations de consulting …

4. Le « corporate governance » et le contrôle des auditeurs ont échoué complètement. Peut-on améliorer l'un et l'autre ? Voyons déjà la réaction américaine, qui s'exprime dans la loi Sarbanes Oxley de juillet 2002. Très schématiquement elle s'efforce d'organiser un meilleur fonctionnement des administrateurs et des auditeurs en prévoyant une dissuasion des attitudes préjudiciables à l'intérêt social. Les dirigeants doivent certifier, sous peine de leur responsabilité civile et pénale, que les comptes des sociétés ne contiennent à leur connaissance aucune information inexacte et qu'ils ont établi des procédures efficaces de contrôle interne. Cette nouvelle obligation a été remarquée à cause de l'introduction d'une nouvelle infraction pénale en droit des sociétés. Mais il n'a pas été souligné combien elle était astucieuse, tant sur le plan civil que sur le plan pénal : le dirigeant ne doit pas seulement faire la preuve de sa bonne foi au regard de la vérité de l'information. Il doit prouver qu'il a pris les mesures convenables pour que l'information soit vraie. En dehors de la loi Sarbanes Oxley, les marchés boursiers, comme le Nasdaq et le Nyse prévoient de leur côté d'exiger une majorité d'administrateurs indépendants dans les conseils. Mais c'est relativement aux auditeurs que la loi américaine est sans doute la plus novatrice. Pour éviter des conflits d'intérêts et accroître leur indépendance, ils ont l'interdiction de fournir à leurs clients des services qui ne relèvent pas du contrôle des comptes.

5. Cette vue du champ de bataille d'Enron et de la réaction législative américaine permet-elle d'affirmer que de nouveaux Enron ne sont pas possibles ? Le « corporate governance » américain est-il la bonne solution et doit-il être suivi partout ?

La première évidence est que l'on a quitté les rives de l'autorégulation, proclamée il y a peu comme unique réponse à la complexité du monde. Le « corporate governance » était l'une des expressions de l'autorégulation, puisqu'il comptait sur les seuls ressorts de la société pour échapper aux manœuvres de ceux qui capteraient les richesses de la société à leur profit. Mais il va de soi qu'on ne peut s'en écarter que partiellement dans une société libérale qui postule une liberté d'agir antérieure à tout contrôle.

Le « corporate governance », tel qu'il apparaît actuellement, met en œuvre des exigences de pureté et de transparence. Il est de ce point de vue bien américain (voir La tache de Ph. Roth). On ne discutera pas de ce qu'il est étonnant que le monde économique use d'un discours moraliste pour se comprendre, même si toutes les activités économiques ont toujours entraîné dans leur sillage une certaine corruption, ce qui rend l'éradication de la corruption bien utopique : à côté des illégalismes populaires, « la bourgeoisie se réserve le domaine fécond de l'illégalisme des droits ; la possibilité de tourner ses propres lois et de faire assurer tout un immense secteur de la circulation économique par un jeu qui se déploie dans les marges de la législation » (M. Foucault, Surveiller et punir, Gallimard, 1975, p. 103 – Voir aussi B. Oppetit, Les incertaines frontières de l'illicite in L'illicite dans le commerce international, Colloque CREDIMI, Litec, 1997, p. 14). Mais la corruption tolérée dans les marges, comme le dit M. Foucault, devient insupportable, quand elle peut subvertir complètement le système comme dans le cas Enron. La question devient alors de savoir si les concepts de « corporate governance » remplissent leurs fonctions ? Des concepts moraux sont-ils efficaces pour encadrer une économie de la modération ?

La pureté de l'administrateur indépendant paraît inadaptée. Elle participe de cette croyance américaine dans les règles formelles de procédure. Mais s'il est nécessaire que le juge soit indépendant, c'est parce qu'il ne participe pas aux exigences de l'action. Dans la vie de la société, la recherche de l'indépendance est vaine. Ou l'indépendance est simulée. Elle l'est d'autant plus que l'administrateur indépendant comme les autres profite des stock-options et devient dépendant du cours de bourse, qu'on améliore pour lui-même indépendamment de tout souci de l'intérêt social.Comme le rappelle le Professeur Joseph Stiglitz, Prix Nobel d'économie en 2001, « les options sur actions ont fortement encouragé les dirigeants à augmenter rapidement la valeur de leurs actions. Ce n'était pas la solidité sur le long terme qui importait, mais son apparence sur le court terme. Au cours des quinze dernières années, la compensation des dirigeants est ainsi montée en flèche aux Etats-Unis. Les partisans des marchés financiers ont raison lorsqu'ils affirment que les incitations mal conçues ne créent pas de réelle richesse : elles sont seulement la source d'une mauvaise allocation des richesses dans l'économie … » (Les Echos,

25 novembre 2002). Il faudrait certainement plutôt supprimer les stock-options qu'inventer des administrateurs indépendants.

La transparence paraît plus adaptée à l'exigence d'une information vraie, gage d'un marché boursier efficient. Comme le dit encore le Professeur Joseph Stiglitz, « avec des informations parfaites, ces problèmes ne se seraient jamais produits » (*ibidem*). Mais là encore il faut traduire ce concept moral en concept juridique, car une surinformation est une perversion de l'idée de départ. La loi Sarbanes Oxley s'est efforcé de donner vigueur au rôle des auditeurs externes, qui doivent contrôler l'information. Ils sont eux-mêmes contrôlés par une nouvelle autorité, placée sous les ordres de la SEC, le Public Company Accounting Oversight Board. C'est peut-être là que se trouve l'une des clefs importantes d'une nouvelle confiance dans l'économie des sociétés capitalistes. A quoi l'on ajoutera bien sûr une responsabilité forte des dirigeants fautifs, qui doit inquiéter les acteurs de la corruption, car « l'on sait que l'on ne supprimera jamais les risques de conflits d'intérêts, ni dans le public ni dans le privé. Mais en les ayant constamment à l'esprit et en acceptant certaines règles du jeu plus ou moins contraignantes, on peut espérer en limiter les conséquences » (J. Stiglitz, *ibidem*).

Milestones in Mutual Evalution: The Phase 2 Review of the United States under the OECD Antibribery Convention

LUCINDA A. LOW*

Introduction

The leading international instrument in the fight against corruption is the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions (the "OECD Antibribery Convention or "Convention"). Negotiated in 1997, this Convention entered into force in early 1999 and currently has 35 States Parties.[1] In contrast to several other anticorruption conventions of broader scope, the Convention is a highly focused instrument seeking principally to address the problem of transnational official bribery.[2] Prior to the Convention's adoption, the only country to criminalize this activity was the United States, through its Foreign Corrupt Practices Act ("FCPA").[3]

The OECD Antibribery Convention defines the offense of "bribery of a foreign public official" in Article 1(1) in terms similar, although not identical, to the antibribery prohibitions of the FCPA, and requires that States Parties adopt implementing legislation within the framework of its own criminal laws that is functionally equivalent to that offense. The Convention also obligates States Parties to criminalize certain offenses closely related to the bribery of foreign public officials (Articles 1(2), 7), requires cooperation of States Parties in investigations and enforcement of alleged corrupt practices, through mutual legal assistance and extra-

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[1] Convention or Combating Bribery of Foreign Public Officials in Internalized Business Transactions, *signed* December 18, 1997, *entered into force* February 15, 1999, *reprinted* at 37 I.L.M. 1 (1998). Ratification statistics come from the OECD's website, http://www.oecd.org, and are as of October 10, 2002.

[2] *Compare* Inter-American Convention Against Corruption *signed* March 29, 1996, *entered into force* March 6, 1997, *reprinted at* 35 I.L.M. 724 (1996), and Council of Europe Criminal Law Convention Against Corruption, *signed* January 27, 1999, *entered into force* July 1, 2002, ETS No. 173, available at http://www.coe.fr/englegaltxt/173e.html.

[3] The FCPA is codified at 15 U.S.C. §§78dd-1, dd-2, and dd-3 (antibribery provisions) and 78m (books and record provisions).

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dition, (Articles 9(1), 10(1)), and obligates State Parties to implement measures to prevent and penalize the use of off-book accounts, slush funds, and other accounting devices designed to conceal bribery (Article 8).

This paper focuses on the monitoring mechanism (procedure for self- and mutual evaluation) established by the Convention, and in particular the recent OECD review, pursuant to that mechanism, of the effectiveness of the U.S. system for enforcement of the FCPA. The first part of this paper describes the monitoring mechanism as set forth in the Convention and as developed by the OECD. The second part details the recent review of the United States, the so-called "Phase 2" review of enforcement effectiveness, and sets forth the author's observations regarding that review. In addition to observations on the substance of the review, my comments will focus in particular on those aspects of the Phase 2 review process that, in my view, are critical to the future success of other reviews and to the success of this type of monitoring mechanism more generally.[4] The final section will discuss the potential impact of the U.S. Phase 2 review in the United States and elsewhere.

I. The OECD Convention's Monitoring Mechanism

A. Provisions of the Convention and the Monitoring Procedure Adopted by the Working Group

Recognizing that the effectiveness of the Convention is dependent on adoption of implementing legislation and on enforcement at the national level, the OECD Convention required all States, as a condition of adherence, to join its Working Group on Bribery in International Business Transactions (the "Working Group").[5] It also established a peer review mechanism, implemented through the Working Group, for monitoring the Convention's implementation and enforcement by States Parties. Modeled after mechanisms developed in the anti-money laundering arena,

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[4] I had the privilege of participating in the review process as an organizer of the civil society input into the U.S. Phase 2 review, on behalf of the American Bar Association's Task Force on Standards for Corrupt Practices and Transparency International-USA. I also served as a member of the U.S. Delegation to the June 2002 meetings of the Working Group on Bribery at which the draft report was presented and discussed. The observations that follow are mine alone and do not necessarily represent the views of any of the aforementioned organizations.

[5] Convention, Article 13. Membership in the Working Group and the Convention are open to non-OECD members, but the Working Group functions as an OECD body.

the OECD Convention's monitoring provisions, described in more detail below, represent the first such mechanism to be adopted in the anticorruption area.[6]

The OECD Convention provides in Article 12 for a process of "self and mutual evaluation", pursuant to which: (1) States Parties will report to the OECD on steps taken in their country to implement and enforce the Convention and the OECD's 1997 Revised Recommendation of the Council on Combating Bribery (which also urges prompt implementation of its Recommendation on Tax Deductibility of Bribes to Foreign Public Officials, adopted 11 April C(96) 27/FINAL)), and (2) other States Parties will assess the extent to which those States Parties have in fact implemented the Convention and are enforcing it effectively. Thus, the process envisioned is a peer review process. The Convention did not detail how that process was to occur but left its elaboration to the Working Group.

The Working Group has established a two-stage process for monitoring implementation of the Convention. In Phase 1, monitoring focuses on the extent to which the implementing legislation enacted by a country (its FCPA-equivalent legislation) is consistent with the requirements of the Convention. In Phase 2, monitoring focuses on enforcement and the overall effectiveness of the country's systems and structures in preventing, deterring, and punishing transnational bribery.[7]

The review at each stage is conducted by two other States Parties designated as peer reviewers and personnel from the OECD Secretariat. In both Phases, the OECD reviewers submit detailed written questions to appropriate authorities of the country under review and receive written responses. The Phase 2 process also includes a site visit to the country under review. The reviewers prepare a draft report, which is discussed in the OECD Working Group on Bribery. The final report, once it has been transmitted to the OECD Council, is a public document that can be found on the OECD's website.[8]

The Phase 2 review is an intergovernmental process; business groups and other non-governmental organizations are not invited to participate in the formal evaluation process, including consultations in the Working Group and the evaluation exercise. Informal civil society consultations during the site visit are encouraged,

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[6] Since adoption of the OECD Convention, two regional bodies, the Council of Europe and the Organization of American States, have adopted mutual evaluation mechanisms for their respective anticorruption conventions.

[7] *See* OECD, Bribery Convention: Procedure of Self- and Mutual Evaluation, Phase 2, available at http: www.oecd.org/pdf/M00007000/M00007223.pdf.

[8] *See* http://www.oecd.org (click on "Corruption").

however, to help the examiners assess what impact the laws and regulations have had on the compliance practices of private actors. The host country is to be consulted regarding the matter of seeking such input. Whether information submitted to the OECD in the course of a review is kept confidential is to be determined the State Party under review, although as noted earlier, once the final report is transmitted to the Council, it becomes public. However, publication of the report can lag the actual evaluation by a significant period of time.

At this writing, Phase 1 reviews have been completed for all States Parties except for a few recent adherents to the Convention. The Phase 2 process, however, is still in the early stages. Finland was the first country to be reviewed in late 2001. In 2002, the United States, Germany, Bulgaria, and Iceland were reviewed. Canada and France are undergoing evaluation in 2003. Funding constraints have slowed the pace of reviews and raised concerns among outside observers about the effectiveness of the monitoring process. At the present pace, it will take more than ten years before a full cycle of Phase 2 reviews of States Parties is completed.

B. The Phase 1 Review of the United States

The Phase 1 examination of the United States took place in 1999. This review focused primarily on the consistency of the FCPA, as amended in 1998 in anticipation of U.S. ratification of the Convention, with the Convention. While generally finding that the FCPA "implements the standards set by the Convention in a detailed and comprehensive manner", the Phase 1 review identified several specific issues for further discussion in the Phase 2 evaluation process. These included not only certain aspects of the antibribery offense itself, but also questions about the FCPA's exception for facilitating payments and its statutory affirmative defenses (one for payments which are legal under the written law of the host country, and the other for certain promotional expenses),[9] jurisdictional issues, the limited scope of the FCPA's books and records provisions, disparities in penalties between the U.S. domestic bribery offense and the FCPA, and the adequacy of the statute of limitations.[10]

II. The Phase 2 Review of the United States

The Phase 2 review of the United States provided a unique opportunity for the Working Group with respect to the monitoring process. Unlike the other States

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[9] *See* 15 U.S.C. §§ 78dd-1(c)(1), (2), 78dd-2(c)(1), (2), and 78dd-3(c)(1), (2).

[10] *See* United States, Review of the Implementation of the Convention and 1997 Recommendation (available on the OECD website cited above).

Parties, which have only recently adopted legislation criminalizing transnational bribery and have yet to bring any appreciable number of enforcement actions under such legislation, the United States has enforced the FCPA for approximately twenty-five years. In that time, there has been criminal, civil, and administrative enforcement of the FCPA by the U.S. Department of Justice and the Securities and Exchange Commission.[11] Although not perfect, the FCPA is consequently a more mature legal regime than is currently found in other States Parties. Given this fact, the Phase 2 examination of the United States was viewed by many as an important benchmark. Its early placement in the cycle of Phase 2 reviews also represented an important opportunity to set standards regarding the conduct of the review process itself.

A. The Phase 2 Review Process for the United States

Work on the U.S. Phase 2 review began months before the March 2002 on-site visit. The review team was constituted, with peer reviewers from the United Kingdom and France, as well as members of the OECD Secretariat, designated to participate. The reviewers submitted a detailed questionnaire to the U.S. Government. The U.S. Government, led by the Justice Department ("DOJ"), provided detailed written answers, including documentary appendices, to the review team; these answers have been made public.[12] An extensive list of issues to be discussed in the on-site visit was submitted by the reviewers to the U.S. Government shortly before the on-site review was scheduled to begin. (To this author's knowledge, a formal, written set of responses to the issues list was not provided, although the questions were discussed during the onsite review.) The Responses of the U.S. Government to the questionnaire are an impressive and useful compilation for anyone interested in gaining a more detailed understanding of the U.S. Government's, and especially DOJ's, interpretation and enforcement of the FCPA.

The on-site visit took place March 11-15, 2002, in Washington, D.C. The review team met with representatives of a number of U.S. Government agencies and departments, including the Department of Justice, the Securities and Exchange

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[11] The SEC has no criminal authority, and its jurisdiction is limited to companies that qualify as "issuers" and their officers, directors, agents, employees, and shareholders.

[12] *See* Procedure for Self- and Mutual Evaluation of Implementation of the Convention and Revised Recommendation, Phase 2, United States, Response to the Phase 2 Questionnaire, OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International investment and Multinational Enterprises, Working Group on Bribery in International Business Transactions, DAFFE/IME/BR/WD(2002)9, 5 June 2002 (English).

Commission, the Internal Revenue Service, the Commerce Department, and others relevant to the prevention and detection of FCPA violations and enforcement, as well as with members of Congress and congressional staff. In addition, the review team spent close to two full days of the five-day review period in consultations with the private sector. One afternoon was devoted to auditing and accounting issues, which had achieved a high profile with the reviewers as a result of the unfolding U.S. corporate accounting scandals; a day was devoted to private sector compliance and consulting; a private sector panel addressed tax compliance issues in the context of provisions of the U.S. Internal Revenue Code that eliminate tax deductions and benefits for payments violating the FCPA; and certain members of the review team met separately from the U.S. Government with members of the bar at the conclusion of the week.

The draft report and recommendations based on the review team's evaluation was presented and discussed at a meeting of the OECD Working Group on Bribery in June 2002. The final report was issued in October 2002, and is available on the OECD's website.[13]

B. Observations Regarding the Review's Substantive Observations and Recommendations

The U.S. Phase 2 review focused on two major areas: (1) whether the United States has effective measures for preventing and detecting the bribery of foreign public officials; and (2) whether the United States has adequate mechanisms for the effective prosecution of foreign bribery offenses and the related accounting and money laundering offenses. In each of these areas, the Report includes recommendations made by the Working Group. In addition, the Report identifies certain issues as areas for follow-up by the Working Group.[14]

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[13] United States: Phase 2, Report of Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations Concerning Bribery in International Business Transactions, October 2002, OECD, Directorate for Financial, Fiscal and Enterprise Affairs, available at www.oecd.org (click on "Corruption") (hereinafter, "US Phase 2 Report").

[14] Of the Report's seventeen individual recommendations, nine focus on measures for prevention and detection, five on mechanisms for effective prosecution, in each case directed to the United States, and three involve Working Group follow-up. The recommendations follow from the substantive findings. Some of the recommendations require only that the United States "consider" taking certain actions, while others are recommendations for specific action.

In many, perhaps even most, respects, the examiners found the U.S. measures and mechanisms to be effective. Notwithstanding what may have been initial skepticism on the part of the reviewers arising from the relatively low number of criminal prosecutions of FCPA violations, the reviewers ultimately concluded that effectiveness could not be measured simply by this yardstick.

Despite this finding of overall effectiveness, however, a number of issues were identified. These included: the need to promote awareness and prevent violations by small and medium-sized enterprises, including through the extension of the books and records provisions of the FCPA to non-publicly traded companies; the need to improve enforcement administration, including by institutionalizing and increasing the transparency of enforcement policies and priorities of the government and by increasing the availability of certain data deemed important to assessing effectiveness; returning to the central findings of the Phase 1 review, the continued existence of concerns about certain aspects of the statutory scheme; and the need to enhance awareness on the part of the accounting profession of the FCPA's subtleties. Of surprise to some observers was the absence of a finding of ineffectiveness with respect to the conduct of foreign subsidiaries. These points are detailed below.

1. Effectiveness with Respect to Small- and Medium-Sized Enterprises, and Non-Issuers

The review team was not convinced that the FCPA is currently as effective as to small- and medium-sized companies, and non-publicly traded companies, as it is with respect to issuers. The review team expressed concern about the absence of any uniform books and records requirements for non-issuers, and the absence of an external auditing requirement. Notwithstanding the (probably constitutionally surmountable but perhaps politically difficult) issues the imposition of such requirements at the federal level would raise for the United States, suggestions were made that the FCPA's books and records provisions be extended to non-publicly traded companies (in FCPA parlance, "issuers"), at least non-issuers that are of a certain size or that engage in a certain level of international trade. Concerns were also raised that small and medium-sized enterprises are less aware of the FCPA, have fewer resources to devote to compliance, and in general represent an area of significant compliance risk.

2. FCPA Enforcement Administration

Considerable attention was paid during the on-site review to the desirability of the issuance by the DOJ of guidelines providing greater insight than is currently available through the existing processes to enforcement officials' interpretations of the statute. This issue arose particularly in regard to respect to those areas of the FCPA

which the review team found most difficult conceptually, such as the exception for facilitating payments and the two affirmative defenses, discussed under subsection 3 below.

The 1988 amendments to the FCPA called for the issuance of such guidelines. However, when the DOJ subsequently requested public comment on whether such guidelines would be useful, it received only five responses, three of which were opposed. Accordingly, it declined to issue specific guidelines, although more recently both DOJ and the Department of Commerce have published guidance memos on the FCPA. The OECD review's recommendations may revitalize this debate, however, particularly since awareness of the FCPA and attention to compliance issues is today much greater than in 1988.

The review also identified other process questions, including whether the DOJ should issue a statement regarding its enforcement priorities, given that the last such statement was issued in 1981, and whether the Department should maintain statistics with respect to FCPA enforcement.

3. Statutory Issues

The Phase 2 review process caused many of the interpretive issues with respect to the antibribery provisions of the FCPA identified in Phase 1 to resurface and even expand. Extensive and repeated questions were raised about the application of the exception for facilitating payments, including concerns about the absence of any specific monetary ceilings, and the two affirmative defenses. These defenses, added to the statute in 1998, are for payments which are legal under the written laws of the host country and certain types of promotional expenses paid to government officials.[15] Notwithstanding some input from civil society to the contrary, there seemed to be a general lack of acceptance among the review team members of the necessity for the defenses, and difficulty understanding why it would not be possible simply to rely on the "corruptly" element of the statute to achieve the same result. Although the "legal under the written law of the host country" affirmative defense is recognized as a defense in the Commentaries to the OECD Convention, that recognition did not spare this defense (which was not raised as an area of concern in Phase 1) from being questioned in the Phase 2 review, given the limited ambit in which this defense is useful. Regarding the second affirmative defense, the reviewers' specific concerns seemed to focus on the uncertainty created by possibly differing interpretations of the defense.

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[15] *See* note 9, *supra*.

The Phase 2 review also revealed continued concerns over other statutory issues raised in the Phase 1 review. These included: the failure of the statute to define "instrumentality" and the concern over the absence of a specific reference to judges in the definition of "foreign official"; the statute's applicability to payments provided at the request of an official to third-party beneficiaries; and others.

Most importantly, however, the review team focused anew on the question of the placement of the "improper advantage" language of the Convention in the 1998 amendments to the FCPA in light of the District Court's ruling in the *Kay* case, *U.S. v David Kay and Douglas Murphy* (D. Houston April 16, 2002), holding that payments to secure customs clearance did not constitute payments to "obtain, retain, or direct business to any person" as required by the FCPA). Since the Phase 1 review, the OECD Working Group had been concerned that Congress' placement of this language in the statute would lead to a narrower interpretation of the FCPA than the Convention requires.[16] With the narrow construction of this element in the *Kay* case, these concerns were reinforced. Should the District Court's decision be upheld on appeal, it is likely the United States will feel pressure from the OECD to amend the FCPA to rectify this problem.

4. Additional Detection and Enforcement Issues

The OECD reviewers focused, naturally, on the ability of accountants and auditors to detect FCPA antibribery issues in the wake of Enron and other U.S. scandals that have tarnished the image of the U.S. system. Specifically, the reviewers questioned the extent to which accountants and auditors are adequately sensitized to FCPA issues in their professional standards and training. They also expressed concerns about appropriateness of materiality requirements as applied in the provisions of the Private Securities Litigation Reform Act, which in some circumstances imposes a duty on auditors to report fraud to the SEC.

The Phase 2 reviewers also continued to express concerns about the adequacy of the statute of limitations for FCPA violations, possibly due to the fact that the

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[16] The OECD Convention defines the final element of the offense of transnational bribery established in Section 1(1) as "to obtain or retain business or other improper advantage in the conduct of international business." The 1998 Amendments to the FCPA, however, placed the "unproven advantage" language in a different element of the FCPA, the improper purpose/*quid pro quo* element. This author was among several who questioned the placement of this language at the time. *See* "In the Wake of the 1998 Amendments – The Elements of the FCPA," *ABA, The Foreign Corrupt Practices Act: How to Comply Under the New Amendments and the OECD Convention*, Marina del Rey, California, Feb. 19, 1999; Coral Gables, Florida, March 12, 1999.

statute in other countries for similar criminal violations may be longer. However, the Phase 1 concern about the disparity in penalties between domestic bribery and FCPA bribery was mooted with the adoption, effective November 2002, of amendments to the Federal Sentencing Guidelines that change the base classification for FCPA bribery in a way that closed that gap. Concerns about the ability to seize bribe proceeds expressed in Phase 1 may also have been alleviated by the expansion of corruption-related predicate offenses to the Money Laundering Control Act, making them subject to civil and criminal forfeiture laws through that avenue. These domestic changes represent a direct impact of the OECD Convention in the legal regimes of States Parties.

5. Evaluation of Overall Effectiveness in Reaching Foreign Subsidiaries

Probably the greatest impact of the on-site review, and particularly the private sector input, was to convince the review team that the FCPA's effectiveness could not be judged by the number of prosecutions alone. In particular, the review team appeared to have been significantly influenced in its thinking by the input from both private companies and in-house counsel about the important role played by corporate compliance programs in the prevention and detection of FCPA bribery. The detailed insight the review process provided into the scope and operations of those programs, including the interplay of the U.S. accounting and tax provisions, also helped demonstrate that the FCPA does effectively reach the conduct of the foreign subsidiaries of U.S. companies, in particular, the subsidiaries of publicly-traded U.S. companies subject to the FCPA (and therefore the books and records provisions as well as the antibribery provisions) as "issuers".

C. Process Observations Regarding the U.S. Phase 2 Review

1. Importance of Technically Qualified and Apolitical Reviewers and of Host Country Cooperation

To assess the adequacy of enforcement, the Phase 2 review by its nature must probe deeply into the workings of a country's criminal justice system. The reviewers need to know, for example: who within the country has enforcement authority; whether they have adequate powers and resources to investigate and enforce transnational bribery cases, by definition, complex, typically multi-jurisdictional, cases; how the offense of transnational bribery fits into the criminal justice system, in terms of related or ancillary offenses such as attempt or conspiracy; what penalties may be assessed; how the criminal justice process may affect a case of this nature; and the interaction between prosecutors and other governmental authorities who have authority over other relevant measures (for example, provisions of the tax code denying the deductibility of bribes, accounting and internal control standards).

In addition, the reviews consider the adequacy of mechanisms existing within a country to prevent and detect bribery. These topics extend the scope of review beyond the criminal justice system, for example, into those agencies of government that work with industry to communicate business standards, into private voluntary compliance measures, and into the roles of other groups in society, including non-governmental organizations, labor, and the press.

Given this scope, the Phase 2 reviews may well represent one of the most probing and ambitious mutual evaluation mechanisms currently in existence. This inherent character makes the capacity of the review team, and the cooperation provided by the State Party under review, critical to the success and credibility of the review process. Unwillingness to cooperate, as well as politicization of the review process, including mutual back-scratching by peer reviewers, would quickly vitiate the effectiveness and credibility of the process.

This did not occur with the U.S. review. To the contrary, the review exemplified the best of what such mechanisms can achieve. As an observer to the on-site consultations, and one who provided informal input to the reviewers, I was consistently impressed with the level of preparation of the members of the review team, their thoughtful and probing questions, and their effort to understand the complexities of the U.S. system. A reading of the final report likewise conveys, even to those not present during the consultations, the extensive study and consideration that the examiners gave to the task entrusted to them. It is manifest that this was no cursory or surface look at the U.S. criminal justice system. Rather, it was a dedicated, apolitical and thoughtful effort, by highly technically competent specialists, to grapple with the intricacies of a system that, even within the United States, may not be well known or understood.

From the reviewed country side, the report notes the importance of the commitment and dedication of U.S. Government officials, particularly from the Department of Justice, who have primary enforcement responsibility for FCPA enforcement, to educating the review team, particularly with regard to the larger context in which the FCPA functions.[17] Rather than treating the review as an unwanted intrusion, a violation of sovereignty, or inappropriate given the maturity of the U.S. system, U.S. officials embraced it as an opportunity for education and dialogue.

Both of these elements were critical to the effective functioning of the Phase 2 review.

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[17] U.S. Phase 2 Report, *supra* note 12, at 5.

2. Civil Society Input and Transparency

The extensive consultations with civil society in the Phase 2 review of the United States were also a key element in the success of the review. Civil society provides insights into the functioning of a country's criminal justice system and related institution system from an entirely different perspective than the government. It thus helps ensure that the review is complete, and balanced. It also provides insights that may not be available from official consultations. For example, in the U.S. review, the detail provided by civil society representatives with regard to the internal compliance programs maintained by companies was of critical importance in evaluating the effectiveness of the FCPA, for several reasons. First, voluntary compliance is a complement to enforcement, and effectively extends the enforcement capacity of the criminal justice authorities. Second, such compliance efforts are critical to gaining a true picture of the effective jurisdictional reach of U.S. law with respect to the foreign subsidiaries of U.S. companies, since most major companies apply their compliance programs on a worldwide basis, without regard to the technicalities of FCPA jurisdiction.[18] Many U.S. FCPA practitioners see DOJ enforcement as only the tip of an iceberg, with the remainder of the iceberg consisting of voluntary compliance efforts. But without the civil society input, the rest of the iceberg would have been invisible to the reviewers.

For truly effective civil society input to occur, of course, it should not be under the control of the host government. Government control of such input can mean that what the reviewers hear will be filtered and restricted. This was not a practical problem in the Phase 2 review of the United States, since there is long tradition of mutual criticism and dialogue between the private sector and enforcement officials, but it could be a significant issue in other countries.

Leaving the issue of confidentiality solely to the discretion of the host government is also a potential challenge to the success of the process in the future. Governments may hamstring civil society input by refusing to make relevant information available. Again, this was not a problem in the Phase 2 review of the United States, since the U.S. Government opened almost the entire process to civil society observation. In situations where civil society organizations have less experience on which to draw, however, it could be a significant problem.

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[18] Although the law does not apply to foreign subsidiaries as such, the practice of parent companies extending their compliance programs to their foreign subsidiaries, especially when taken in conjunction with the operation of the books and records provisions (for issuers) and tax compliance provisions, gives a very different picture regarding control of the activities of foreign subsidiaries than a perusal of the law might suggest.

Although the degree of transparency to be accorded to an intergovernmental monitoring process is always a delicate issue, it is even more so in an area such as this one, official corruption, that can readily be politicized and by definition invariably involves political figures and governmental sensitivities. In this author's view, the OECD monitoring process, to be truly effective over time, will need to move towards a greater degree of consultation with civil society in the Phase 2 process.

III. Impact of the U.S. Phase 2 Review

A. On the United States

The full impact of the Phase 2 review of the United States on U.S. administration of the FCPA will not be known for some time. In particular, the extent to which the United States will implement the fifteen recommendations set forth in the report is an open question at this writing.

It seems clear, however, that both U.S. reviews (Phase 1 and 2) have already had an impact on the legal framework in which the FCPA is enforced, and on FCPA enforcement. The amendment to the Federal Sentencing Guidelines and to U.S. money laundering laws described earlier in this paper are but two concrete examples of the impact the Phase 1 review has already had. There was also a perception in the FCPA bar that, in anticipation of the Phase 2 review, U.S. enforcement authorities stepped up the pace of enforcement.

There is no question that the U.S. reviews have shown the benefit of a fresh look even at a "mature" legal regime. Approaching the U.S. system through lenses of the OECD Convention has exposed issues that are important but might not have surfaced in a purely domestic analysis, for example, the scope of the books and records provisions, and the statute of limitations issue raised in the Phase 2 review.

B. On Other Countries

If the U.S. review has a legacy for the Phase 2 reviews more generally, one may hope it will be in the area of process. The quality of the review, the cooperation on the part of the reviewed country, the transparency of the process, and the prominent role of civil society were, as this paper has outlined, key ingredients in the success of the U.S. Phase 2 review. They are critical ingredients, in this author's view, not just for a review of a more mature statutory regime such as that represented by the FCPA, but for the regimes of all States Parties.

Combating Corruption: The emergence of new international law

JEREMY P. CARVER*

The war against slavery was fought for some two hundred years before victory could be claimed. The first national legislation inhibiting slavery was adopted in Britain in the 18th Century; yet slavery was still widely practiced in parts of the world in the second half of the 20th Century. Do we have to wait a similar gestation period for corruption to be universally outlawed?

Various factors suggest that this is too pessimistic a prognosis, and that the war against corruption is already arming itself with innovative legal weapons from which we can hope to see corruption condemned as contrary to both national and international legal standards – standards which are already growing real teeth by which they can be enforced against the parties indulging in corrupt practices, and against the States who tolerate such conduct.

This process owes relatively little to the traditional methods whereby international law has been created. There has been progressive legislation at the national level: notably, the Foreign Corrupt Practices Act of the United States, adopted in response to the Lockheed scandal in Saudi Arabia in the 1970's.[1] But European nations proved to be particularly resistant to passing similar laws.[2] It was not until December 1997 that a new convention was signed, in Paris, under the auspices of the OECD: the *Convention on Combating Bribery of Foreign Public Officials in International Transactions*.[3]

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[1] It is often forgotten that that the real impetus for adopting the FCPA came, not from any high moral principle, but from hard-headed concerns of the Securities and Exchange Commission that unacceptable share price volatility resulted from reliance of quoted companies on major contracts induced by bribes.

[2] The United Kingdom was the most backward of all, for which it was roundly criticised in the first round of monitoring under the Anti-Bribery Convention. But the United Kingdom has recently presented to parliament a comprehensive new law on corruption expected to be passed during 2003.

[3] *See* text at http://www.oecd.org/EN/document/0,,EN-document-88-3-no-6-7198-88,00.html

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The 1997 Anti-Bribery Convention entered into force within barely a year of signature, and has been ratified by 34 States. More surprising still, nearly all those States have fully implemented their obligations under the Convention: where necessary, by changing their domestic law as the Convention requires. This owed much to the innovative procedure written into the Convention whereby member State performance is reviewed critically by other members, and then disclosed. The second phase of implementation review, in which members submit their enforcement mechanisms and structures to review by experts from other members and the OECD, is now well in hand, and is due to be completed during 2005.[4]

This process of mutual review is intended to be both critical and collaborative. No State can claim perfection in its national detection and prosecution of corruption. A constructive attitude will achieve multiple benefits. Cross-pollination of techniques and experience should improve skills and capacity at the national level. Lasting advantage should derive from the ability of national authorities to work *internationally* by means of the greater familiarity with each other's resources.

The success of the OECD Convention has in turn spurred the completion of other international anti-corruption measures: at the regional level and in the United Nations, where progress was thought to be impossible until relatively recently. And because the mix of international obligation and national enforcement underlies improvements required across the board in the fight against narco-traffic, money-laundering, organised crime and international terrorism, the lessons being learnt in implementing the Anti-Bribery Convention are having a much wider effect in these other important areas.

This substantial progress reflects a fast-evolving awareness that corruption is not merely immoral: it is highly destructive of economic and human development and leads directly to insecurity and conflict. The writer prefers the phrase "failing States" to that more often applied in the West of "failed States", because no State ever reaches a condition of complete "failure"; but *all* States fail to some extent, and the differences are often not defined by reference to geography or GDP. And this perhaps is one reason why the fight against corruption has been more successful than other international movements. The campaign recognises that unacceptable conduct often derives from the more developed economies and causes harm in the economies of both payer and receiver of bribes.

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[4] Nevertheless, the monitoring process is severely under-resourced and behind schedule; and Transparency International ("TI") is not alone in prophesying the failure of the Anti-Bribery Convention if the OECD is unable to overcome the reluctance of its members to prosecute foreign bribery cases (*Global Corruption Report 2003*, page 2).

That consciousness has been fuelled very largely by civil society, and in particular by the extraordinary "coalition against corruption" that is Transparency International: now in its tenth year. Its roots are described in its website:

> "The formal launch of the fledgling organisation, in May 1993, attracted a number of prominent personalities. Press attention was generated by Frank Vogl, one of the founders, and the reaction from around the world was instantaneous. Thousands of letters poured in to the new small office in Berlin, all giving thanks for the fact that someone, somewhere, was at last trying to do something about corruption."[5]

TI has maintained and expanded this initial momentum, with an increasing range of global and individual initiatives directed at the progressive elimination of corruption. Globally, its Corruption Perceptions Index has drawn attention at a comparative level to the extent to which each country covered is corrupt. The first CPI report was published in 1995, and it has steadily expanded its coverage and reliability on an annual basis ever since.[6] Further economic and legal criteria have been developed to become comparative "league tables" measuring other aspects of national conditions conducive to bribe-giving; and the States shown to be failing in such surveys are now taking these annual results seriously. They do so not merely because of the domestic criticism governments receive from publication of the survey; but because lenders and aid donors now treat these surveys as valid indicators of creditworthiness and ability to use development funds.

The main strength of TI, however, lies not in its worldwide initiatives or in its international Secretariat. The "owners" of TI are its national Chapters: national NGOs formed in response to specific concerns and conditions present in that community. Given the diversity of such conditions, it is inevitable that there are wide variations between Chapters. Moreover, given the prolific nature of corruption, often extending into every part of a nation's public and private systems, the range of activities undertaken by Chapters is extraordinary.

To capture the strength of this diversity, TI relies on ever-improving communications between Chapters, and an annual opportunity to come together at the Annual Meeting, which combines in alternate years with the International Anti-Corruption Conference.[7] In 2001, TI published the first *Global Corruption Report*, which aims

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[5] TI website: http://www.transparency.org/about_ti/history.html

[6] TI website: http://www.transparency.org/cpi/2001/cpi2001.html

[7] The next IACC is at Seoul: http://www.10iacc.org

to be an annual report on the fight against corruption at all levels. The 2003 Report was published in February 2003.[8] Despite a certain rigidity of production, which means that information in the Report is never less than eight months out of date, the GCR provides an invaluable account of news and developments relevant for corruption at the national, regional and global levels, from a formidable variety of journalists, academics, judges, professionals, business and civil society.

The primary theme of the 2003 GCR is "Access to Information". Information, it is argued, exposes the corrupt and strengthens the public to ensure that corruption is rooted out. Its importance is not confined to particular regions, or political systems. One heritage of colonial administrations was an obsession with maintaining the secrecy of official communications, matched – even exceeded – in east and central European States now in transition. Recent months have shown that corporations, however large, also hide their most corrupt conduct behind elaborate disclosure regulations.

The only remedy is the right of the public to obtain the relevant information. Article 19 of the Universal Declaration of Human Rights is no more than a starting point, because it aims to curtail State censorship rather than promoting government transparency. The response to '9/11' presented a new threat to transparency as the security establishment argued that the "war against terrorism" could be won only by preserving secrecy. The misconception – so often self-serving among those unwilling to expose their conduct to public criticism – was exposed by Judge Keith in the US Court of Appeals for the Sixth Circuit, who warned that "democracies die behind closed doors". He continued in terms evoking Orwell's *1984*:

> "When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of our Constitution."[9]

Reverting to the opening theme of this short contribution, the question remains whether this wide-ranging activity aimed at a particular social evil can be said to constitute international law. There are manifestly traditional norm-creating elements: the OECD and other anti-bribery conventions. These conventions go further, and reflect new mechanisms whereby international law can be made effective at the national level by means of critical and collaborative peer monitoring.

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[8] *See*: www.globalcorruptionreport.org

[9] *New York Times*, 2 September 2002.

Beyond this, we are in newer territory: the vast range of local, regional and global initiatives do not fit the traditional definition of "State practice"; but they witness an international involvement in what is self-evidently the adoption of international legal standards which will bind all States and peoples, at all levels.

Civil society has a long and honourable record in pressing for the setting of human rights standards at the levels enshrined in texts now more than fifty years old. Civil society has already played a prominent role in the establishment of new environmental standards of increasing global application. In the fight against corruption, civil society is also setting the pace for governments. Perhaps its recent success owes much to the fact that corruption is at last recognised as being far more than a social illness. Corruption devalues, and ultimately destroys, all systems: social, political and economic. Corruption is "bad business" for everyone!

Gouvernement d'entreprises et corruption : quelques enseignements des événements récents

RENÉ RICOL*

Les affaires récentes ont révélé tout le sens de la notion de « gouvernement d'entreprises ».

Jusqu'à présent, cette notion restait un concept général qu'il était de bon ton d'afficher et de commenter dans les rapports annuels sans qu'elle donne lieu à réforme profonde de l'organisation ni à coûts excessifs.

La mise en lumière de profonds dysfonctionnements dans certaines entreprises et la défaillance totale des systèmes de sécurité mis en place a provoqué un électrochoc salutaire.

Les dirigeants ont compris qu'au-delà du phénomène de mode, au-delà du simple respect de textes législatifs ou réglementaires, il était de leur intérêt de se doter d'un système efficace qui, en démultipliant les niveaux de décision, les mettait à l'abri d'éventuels conflits d'intérêts.

L'énormité des mouvements financiers brassés quotidiennement par les entreprises suscitent des tentations qui peuvent mener à des comportements déviants. La corruption est maintenant présente sur tous les marchés même les plus développés. Cette évolution nécessite des adaptations rapides.

Même si les événements récents sont de nature très différente, ils montrent, s'il en était encore besoin, les liens entre corruption et blanchiment d'argent, et l'importance de la composante financière dans tout acte terroriste. Au-delà, ils interpellent les gouvernements, les régulateurs, les entreprises et la profession comptable, tous membres d'une chaîne sécuritaire, à réaliser leur aggiornamento pour répondre aux besoins d'une nouvelle transparence.

1. Au premier niveau : la fixation de règles du jeu claires par les gouvernants et les autorités de réglementation

Le système capitaliste traverse une crise profonde : depuis la chute du mur de Berlin, il n'a plus de challenger, donc plus de garde-fou.

Le système a progressivement dévié vers un univers dérégulé, où l'argent est roi. La déconnexion entre le marché financier et la réalité des entreprises devient totale. Dans ce contexte, il est extrêmement difficile pour une entreprise de conserver un état d'esprit serein et une vision de long-terme.

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La création de la bulle Internet, puis son explosion rapide, comme toutes les bulles, la difficulté à accepter de passer du statut de « roi de la cote », à celui de roi déchu, a favorisé des comportements peu rationnels : sophistication croissante des montages financiers pour faire fructifier au mieux l'argent investi, croissance exponentielle des mouvements de capitaux. Sans vouloir tomber dans le procès d'intention, il est de plus en plus difficile de déterminer la frontière entre le licite et l'illicite.

La mise en œuvre de vigilance et de sécurités nouvelles s'impose donc.

a) En matière d'information financière et de normalisation comptable : je ne peux que saluer les efforts faits par l'Union Européenne pour promouvoir un langage financier commun et de qualité tout en tentant d'amender tout projet qui serait de nature à augmenter la volatilité des marchés, comme celui sur les instruments financiers.

Ainsi, l'adoption des normes internationales émises par l'IASB[1] par toutes les sociétés cotées européennes en 2005 va dans le sens d'une plus grande transparence notamment si elle s'accompagne d'un mouvement équivalent aux Etats-Unis. Il est sans doute trop tôt pour juger de la réalité des efforts faits par les organisations américaines pour une plus grande convergence des normes et pour une acceptation des normes internationales sans rapprochement avec les normes locales. Il n'en demeure pas moins que la tentation est toujours grande pour l'organisme de normalisation américain, d'utiliser l'IASB comme un laboratoire d'expérimentation des normes qu'il souhaite, mais ne parvient pas, à imposer sur son territoire.

Aucune réforme ne portera ses fruits tant que les sociétés n'auront pas l'obligation d'appliquer à travers le monde le même corps de règles, simples, claires, non susceptible d'interprétations divergentes. La crise Enron constitue paradoxalement une opportunité à cet égard : le système de normalisation américain longtemps considéré comme le meilleur car le plus sophistiqué et le plus contraignant, montre sa défaillance. Les normes internationales, plus claires et finalement plus efficaces car fondées sur des principes simples et incontournables, devraient ainsi pouvoir être plus facilement imposées aux Etats-Unis.

L'édifice créé par le nouvel IASB reste cependant une construction fragile et les régulateurs devront, en amont des auditeurs, veiller à la bonne application des règles internationales : il serait inconcevable qu'un régulateur national admette une interprétation d'une norme internationale qui serait proscrite par un autre régulateur. En d'autres termes, il n'est plus imaginable qu'un lobbying efficace exercé

[1] IASB : International Accounting Standards Board.

par les entreprises conduise les régulateurs à prendre des positions nationales non relayées au plan international.

b) Il est nécessaire d'encadrer de façon rigoureuse la spéculation, et probablement d'interdire certaines pratiques, notamment la spéculation à la baisse par vente à découvert. L'entreprise si elle doit pouvoir couvrir de façon adéquate ses risques, en particulier liés au cours des devises ou des matières premières, n'a pas pour vocation de spéculer.

Il me semble qu'une réflexion salutaire pourrait également passer par une meilleure information et une plus grande responsabilisation des actionnaires.

La bourse n'est pas un jeu, il s'agit aussi d'un acte que l'on peut qualifier de « citoyen », d'investissement dans une entreprise.

Lorsque l'on achète une action sur la base d'un PER démesuré, voire même lorsque les résultats sont négatifs sur la base d'un multiple de chiffre d'affaires déraisonnable, il faut s'attendre à des lendemains qui déchantent. Il me paraît choquant dans ce contexte qu'un actionnaire qui a acheté à un niveau manifestement trop élevé, soit fondé à introduire une action judiciaire contre les dirigeants, lorsque le cours retrouve des niveaux plus raisonnables et plus en ligne avec les agrégats financiers de la société.

Internet a déjà bousculé bien des pratiques, il faut mettre cet outil au service d'un accroissement de la transparence financière, d'une convergence entre le marché et l'économie réelle, d'une transparence sur les règles de concurrence.

c) Concernant la lutte contre la corruption : la corruption s'est infiltrée sur tous les marchés développés, même les mieux organisés et les plus contrôlés.

Cette question concerne tous les acteurs du monde économique :

- en tout premier lieu les gouvernants, qui doivent s'engager totalement et consciemment dans le combat en définissant un comportement cohérent à l'égard des pays qui sont reconnus comme des lieux de blanchiment, ou encore à l'égard de ceux qui ne fournissent pas de garanties suffisantes
- en deuxième lieu, les institutions internationales : il faut aider la Banque Mondiale et les grandes banques régionales à orienter les subventions vers les cœurs de cible plutôt que de privilégier les aides globales. En effet, dans les pays en développement, une aide globale représente un apport financier considérable et risque de créer une tentation forte de corruption. Dans ce contexte, il serait sans doute pertinent de former très rapidement des acteurs qui pourraient contrôler l'utilisation des subventions accordées et ainsi renforcer l'efficacité réelle des aides au tissu économique et social.

L'IFAC[2], l'organisation internationale de la profession comptable, a beaucoup réfléchi au sujet et estime qu'il faudrait former 20 à 30.000 comptables dans les cinq années à venir en s'appuyant sur les institutions et sur tous ceux qui ont un savoir-faire en ce domaine. Les comptables, pilier de la vie économique, ne réussiront cependant à moraliser les affaires, que s'ils peuvent s'appuyer sur des gouvernements impartiaux et ayant banni toute notion de corruption de leur fonctionnement, ainsi que sur des régulateurs au fonctionnement transparent.

2. Au deuxième niveau : la mise en œuvre d'un véritable gouvernement d'entreprise

Le gouvernement d'entreprises a été mis en cause pour son incapacité à s'inscrire dans des stratégies de développement durable.

Les comités des comptes fonctionnent peu, les dirigeants restent souvent seuls impliqués dans les grandes décisions d'arrêté de comptes, et ont parfois du mal à trancher entre la sauvegarde du cours de bourse et la stratégie de l'entreprise à long-terme.

L'intéressement du management au capital, qui est certainement nécessaire pour fidéliser le management tant qu'il ne dépasse pas certaines limites, devient pernicieux lorsqu'il constitue l'essentiel des rémunérations.

Une véritable répartition des pouvoirs doit être instaurée au sein de chaque entreprise :

- l'exécutif doit se recentrer sur son rôle essentiel qui est la gestion de l'entreprise et non le pilotage du cours de bourse
- le reporting comptable et l'information financière doivent être préparés sous la responsabilité de comités d'audit ou d'arrêtés des comptes indépendants du management
- les décisions relatives à la nomination, la rémunération et l'étendue des fonctions des auditeurs contractuels et / ou légaux doivent également être confiées à un comité d'administrateurs spécifique
- le contrôle interne doit être renforcé avec la création de véritables départements de revue de la qualité
- toute opération d'envergure impliquant le recours à un intermédiaire ou à une structure ad hoc (montages déconsolidants, sociétés écrans, portage …) devrait être également revue par un comité d'administrateurs spécifique et indépendant du management.

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[2] IFAC : International Federation of Accountants.

3. Au troisième niveau : un renforcement de l'indépendance et de l'apparence d'indépendance de la profession comptable

Il faut reconnaître que la notion d'indépendance est complexe et éminemment subjective ; il est impossible d'être totalement indépendant : des relations se créent nécessairement avec le client à l'occasion des contacts permanents au cours de la mission, une apparence de dépendance existe également en raison du paiement par le client des honoraires.

L'objectif d'indépendance et d'apparence d'indépendance doit être complété de l'impératif d'intégrité, plus facilement atteignable. La question devient alors : comment faire face aux pressions qui se sont multipliées ces dernières années, sous l'effet conjoint :

- du système d'appel d'offres qui banalise la mission d'auditeur légal et finit par créer un vrai problème de rentabilité de ce type de mission. Ce système conduit inéluctablement l'auditeur à proposer d'autres services à côté de la mission d'audit légal pour améliorer la profitabilité
- de l'augmentation du risque liée à la complexification des affaires, à leur internationalisation et au goût plus prononcé des dirigeants pour la croissance de la valeur de l'entreprise à court-terme
- de l'implication croissante des dirigeants dans les questions financières et dans les grandes décisions d'arrêtés de comptes et de communication financière

De nombreuses réformes sont en cours dans tous les pays du monde : de la création d'un haut conseil du commissariat aux comptes à la rotation obligatoire des auditeurs au sein des cabinets en passant par le renforcement des contrôles qualité.

Toutes les solutions envisagées partent de l'idée que pour mieux résister aux pressions, il est plus facile d'être plusieurs.

Le contrôle tel qu'il est organisé dans les PME, avec l'intervention d'un expert-comptable qui conseille le management dans les grandes orientations d'arrêté de comptes et d'un commissaire aux comptes, d'autant moins soumis aux pressions des dirigeants qu'il n'a pas participé aux décisions d'arrêté de comptes, ainsi que le dispositif du co-commissariat dans les sociétés têtes de groupes, ont répondu pendant de nombreuses années aux besoins de transparence de l'information financière.

Mais l'avenir est certainement dans un renforcement du contrôle interne au sein des firmes d'audit en vue d'un nouveau management.

Les commissaires aux comptes effectuent leurs contrôles parallèlement au processus d'arrêté des comptes de façon à ce que l'information financière soit publiée dans les délais. Cette situation, de nature à augmenter leur connaissance des trans-

actions peut également brouiller leur capacité de jugement dans le cas d'opérations complexes sur lesquelles ils sont obligés de donner un avis dans un délai bref.

Malgré toutes les précautions dont les commissaires aux comptes s'entourent en pareille situation, malgré notamment le recours de plus en plus fréquent au département Doctrine du cabinet, l'urgence dans laquelle les décisions sont prises n'est pas propice à une réflexion sereine et ne garantit pas que les meilleurs choix soient effectués. D'où la nécessité de recourir à une revue concurrente par un autre professionnel du cabinet ou le département contrôle interne pour valider les décisions prises.

Dans cette perspective, l'IFAC a remis en chantier la norme sur le contrôle qualité.

La nouvelle norme IFAC constituera un nouvel outil de management des cabinets qui devront repenser leur organisation en conséquence. La revue indépendante des dossiers de commissariat aux comptes sera désormais l'une des diligences obligatoire avant l'émission d'un rapport.

La création d'un département indépendant au sein des cabinets d'audit, chargé d'apprécier les risques sur l'information financière, avant l'émission de tout rapport, de même que l'existence d'un contrôle qualité (interne au cabinet ajouté à celui déjà exercé par l'institution) sont désormais incontournables pour assurer la sécurité de l'information financière publiée.

Profile / Profil

Philippe Kahn

CATHERINE KESSEDJIAN

La vie se charge de forger le caractère de chacun d'entre nous et de creuser le chemin qui sera le nôtre, chemin droit et sans surprise pour certains, courbe et aventureux pour d'autres.

Quand vous êtes installé face à Philippe Kahn dans sa maison, havre de paix au fond d'un jardin du vieux Dijon, et que vous l'écoutez raconter ce qu'il décrit comme son « indifférence à l'échec », on comprend mieux comment il a pu, durant tant d'années participer aux travaux scientifiques parmi les plus importants du XXème siècle sur le droit des investissements, les contrats d'Etat et la lex mercatoria, et souvent les conduire avec un dirigisme non sans une certaine souplesse, sans jamais se départir d'une distance qui, pour toute personne ne le connaissant pas bien, pouvait passer pour du dilettantisme.

Enfant de la seconde guerre mondiale (il avait à peine 8 ans quand elle éclata), il en ressort riche d'une expérience dont il tirera les leçons plus tard, ayant vécu une partie de cette période caché dans une ferme du Forez. Peu après la libération, un séjour de cinq années en sanatorium, laissera des traces indélébiles qui marqueront définitivement ses orientations. Lorsqu'il sera question de ses choix d'études et de carrière professionnelle, ses fragilités physiques influenceront ses choix. Comme il le dit joliment, il vient au droit « par soustraction » alors qu'il n'est pas ordonné, déteste les fiches et les raisonnements mathématiques, mais est un chercheur, un inventif, un explorateur. Un de ses maîtres dira de lui, « c'est le poète du droit ».

Sous la houlette de son directeur de thèse, Berthold Goldman, qui, au début des années 1960, commençait à avoir l'intuition de l'importance grandissante de la fameuse lex mercatoria, Philippe Kahn participe à tous les travaux de l'époque sur les investissements y compris les travaux de l'association de droit international qui, en 1966, adopte un premier rapport sur les investissements étrangers dans les pays en voie de développement (selon l'expression consacrée à l'époque) et vote une résolution qui fera date mais qui sera en grande partie modifiée par les rapports subséquents, particulièrement par le 5ème présenté à New Dehli en 1974, dont Philippe Kahn dit aujourd'hui qu'il était « trop à droite ».

C'est durant cette même période qu'il s'intéresse à la vente internationale de marchandises, contrat roi des relations économiques internationales. Il n'a pas l'esprit abstrait et les règles de droit international privé classiques (notamment la convention de La Haye de 1955 à la négociation de laquelle Berthold Goldman avait

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participé) ne l'intéressent que très modérément. Il est beaucoup plus intéressé par la pratique, par les contrats eux-mêmes et comment, à partir de leur étude, il est possible de mettre en lumière des règles que l'on qualifierait aujourd'hui « d'auto-régulation ». Il appliquait ainsi pour la première fois la méthode qui fera la fortune intellectuelle de la fameuse école de Dijon et du CREDIMI (Centre de Recherches et d'études sur le droit des marchés) et lui permettra de constituer une des plus riches « contratothèques » des centres français de recherche. C'est d'ailleurs la première partie de sa thèse consacrée à l'analyse de ces contrats (réunis en grande partie grâce aux travaux de la Commission économique pour l'Europe basée à Genève) qui fera l'essentiel de l'intérêt des membres de son jury de doctorat qui, délaissant la seconde partie consacrée aux règles de conflit de lois, considèrent que son véritable apport doctrinal réside dans la confirmation de l'existence de clauses types, de principes récurrents, de règles acceptées par les opérateurs économiques internationaux indépendamment de tout droit étatique éventuellement applicable à leurs opérations. C'est en partie sur ces constatations et conclusions (et sur celle de deux autres de ses thésards, Jean Stoufflet et Philippe Fouchard) que Berthold Goldman se fondera pour écrire l'article qu'il fera paraître aux Archives de Philosophie du droit en 1964 au moment même où Schmithoff, pour les pays de langue anglaise, parvenait à des conclusions similaires.

Le contraste entre la personnalité de Philippe Kahn, non conformiste, un rien frondeur, peu enclin à suivre les voies toutes tracées, et l'objet de ses recherches, la société des marchands, peut étonner plus d'un observateur. Mais, après réflexion, c'est finalement très cohérent que quelqu'un comme lui se soit attaqué au monolithisme du droit étatique. Qu'il ait démontré la pluralité des sources du droit tout en conservant un profond esprit républicain, correspond bien à cet esprit curieux et libre.

C'est dans un autre domaine que le droit que sa soif de liberté s'est également révélée. Encore étudiant à Dijon, choqué par les difficultés d'accès au ciné club de la ville (les étudiants sont des trublions, on le sait), il crée, avec un ami étudiant de la même promotion, un ciné club concurrent, le ciné club universitaire qui lui permettra d'affirmer petit à petit une véritable passion pour ce 7ème art alors dans une période particulièrement riche. Mais Philippe ne s'arrêtera pas là. Il participera à toutes les structures culturelles des années soixante et soixante-dix : le choix des artistes pour le 1%[1] sur le nouveau campus universitaire en sa qualité de Président

[1] En France, toute construction effectuée sur des deniers publics entraîne la création d'une oeuvre d'art (à placer sur le site de la construction) pour un budget équivalent à 1% du coût de la construction.

de la Commission culturelle de l'Université ; le fonds régional d'art contemporain ; les journées du cinéma.

Philippe est donc, avec son épouse Anne-Marie, véritablement un homme de la Cité participant pleinement à toutes ses activités. Sur le campus de Dijon, Philippe est une « figure », connu de tous, pas seulement des juristes, son avis est souvent requis pour des questions diverses. Reconnu par ses pairs, il fut décoré à plusieurs reprises y compris par le CNRS, qui fut le navire avec lequel il choisit de poursuivre ses activités professionnelles. Mais ce qui le caractérise peut-être le plus complètement est la photo montage qu'il a envoyée à tous les amis qui, de près ou de loin, directement ou indirectement, avaient participé à l'édition des Mélanges qui lui ont été dédiés[2] : on y voit Philippe Kahn dans une chaise longue flottant sur un tapis volant, dans un espace que l'on veut croire extra-atmosphérique, un bras replié sous la tête et lisant « ses » Mélanges en tenant le livre … à l'envers !

[2] Souveraineté étatique et marchés internationaux à la fin du 20ème siècle – A propos de 30 ans de recherche du CREDIMI, Paris, Litec, 2000.

Work in Progress / Travaux en cours

Capacity-Building for Judges and other Legal Stakeholders in the Field of Environmental Law

LAL KURUKULASURIYA*

The judiciary is a crucial partner in the development, interpretation, implementation and enforcement of environmental law. Judges also play a key role in promoting sustainable development by balancing environmental, social and developmental considerations in judicial decisions. Courts of law in many countries have demonstrated sensitivity to promoting the rule of law in the field of sustainable development through their judgements and pronouncements.[1]

Recognising this fact, the United Nations Environmental Programme ("UNEP") has set in motion capacity-building programmes aimed at judges and other legal stakeholders. UNEP's commitment to this is based on the specific mandate provided for in the Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century (Montevideo Programme III), which sets the ten-year strategy for UNEP's activities in the field of environmental law. The Programme, adopted by the Governing Council of UNEP in 2001 by its decision 21/23 of 9 February 2001, identifies the judiciary as one of the key target groups for capacity-building activities in the field of environmental law.

UNEP's work focusing on the judiciary commenced with the organisation of regional symposia for judges on environmental law, sustainable development and the role of the judiciary, convened in Africa (1995), South Asia (1997), South-East Asia (1999), Latin America (2000), Caribbean (2001) and the Pacific (2002). Two further regional meetings for judges, in Arab countries and in Europe, were held in 2002.

Based on the outcome of these symposia, UNEP convened the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg,

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[1] *See* the three Volumes of UNEP Compendia of Summaries of Environment Related Cases.

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South Africa, on 18-20 August 2002, as a parallel event to the World Summit on Sustainable Development.[2]

The outcome of the Global Judges Symposium, the Johannesburg Principles on the Role of Law and Sustainable Development,[3] was presented to the UN Secretary General and to the World Summit on Sustainable Development ("WSSD") by the Chair of the Symposium, Hon. Justice Arthur Chaskalson, Chief Justice of South Africa.

The UNEP Global Judges Symposium, hosted by the Chief Justice of South Africa and co-sponsored by several partner organisations, gathered more than 120 Chief Justices and Senior Judges from about 60 countries and several judges from international courts and tribunals. The main aim of the Symposium was to lay the foundation for a programme aimed at strengthening the capacity of judiciaries around the world to implement environmental law, improve governance and promote the rule of law in this field at national level.

The participants shared their experiences and views on the role of law and the judiciary in promoting sustainable development in their respective countries. The discussion focussed on the role of law with respect to topics such as sustainable development, national environmental governance, environmental justice, human rights and the role of the United Nations and others in promoting the progressive development and national implementation of environmental law in the context of sustainable development. At the closing session, the participants unanimously adopted a set of recommendations concerning the role of law and the judiciary in the promotion of sustainable development.

The recommendations – the Johannesburg Principles on Sustainable Development and the Role of Law – contain a series of principles "that should guide the judiciary in promoting the goals of sustainable development through the application of the rule of law and the democratic process", and a series of recommendations concerning the programme of work for the realisation of those principles.

The Global Judges Symposium laid a strong foundation for a long-term, sustained programme of capacity-building of the judiciary and other legal stakeholders in the field of environmental law, to be implemented mainly at national level. Following the Symposium, UNEP prepared a practical plan of work, and organised a meeting of a small group of judges representative of the world's legal systems and regions from among those participating in the Symposium, to secure their advice on the plan of work. That meeting – the Judges Ad Hoc Meeting for the

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[2] http://www.unep.org/dpdl/symposium/Judges_symposium.htm

[3] http://www.unep.org/dpdl/symposium/Principles.htm

Development of a Plan of Work as a Follow-Up to the Global Judges Symposium Relating to Capacity Building of Judges, Prosecutors, and Other Legal Stakeholders – was held in Nairobi, Kenya, on 30-31 January 2003, one week before the 22nd session of the Governing Council of UNEP.[4] Twenty-five judges – mainly Chief Justices, representing different regions and legal systems – participated in the meeting, in which they discussed the practical implications of the different options proposed for the capacity-building programme. They adopted a final document containing suggestions on how to develop and implement the capacity-building programme, which was presented to the Governing Council of UNEP at its opening session on 3 February 2003 by the Chief Justice of South Africa. In the document, the judges recognised the positive impact that the capacity-building programmes being undertaken by UNEP could have in terms of achieving a tangible and measurable improvement with regard to awareness and enforcement of environmental law, and expressed full support and co-operation to UNEP for the development and implementation of these capacity-building programmes.

The 22nd session of the Governing Council, held in Nairobi on 3-7 February 2003, endorsed UNEP's commitment in this field in its decision 22/17 of 7 February 2003 on Governance and Law, part II A, on Follow-Up to the Global Judges Symposium focusing on capacity-building in the area of environmental law.

The decision calls on the Executive Director to support, within the framework of the Montevideo Programme III:

> "the improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law at the national and local levels such as judges, prosecutors, legislators and other relevant stakeholder, to carry out their functions on a well informed basis with the necessary skills, information and material with a view to mobilising the full potential of the judiciaries around the world for the implementation and enforcement of environmental law, and promoting access to justice for the settlement of environmental disputes, public participation in environmental decision-making, the protection and advancement of environmental rights and public access to relevant information".

It also requests the Executive Director to report to the Governing Council, at its 23rd session, on progress in the implementation of the decision.

The capacity-building programme being undertaken by UNEP basically involves training activities tailored to the needs of each target group, mainly carried

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[4] http://www.unep.org/dpdl/symposium/Default.htm

out through national institutions (e.g. National Judges Training Institutes), with support of expert advice and materials from UNEP and its partner agencies. Regional "Training-the-Trainers" programmes will be held to create the necessary reservoir of national experts who would be able to carry out the national training activities, in national languages, when required, with the support of international experts from UNEP and the partner agencies. Training materials, electronic information systems, publications and other means will be produced and further developed for dissemination worldwide – also in national languages.

The ultimate objective of this broadly conceived programme is to address not only the judiciary, but all those legal stakeholders who play a key role in developing, implementing and enforcing environmental law, such as prosecutors, enforcement officers, lawyers and public litigation groups.

Conference Scene / Le tour des conférences

A report on the Symposium "Interference with navigation: modern challenges", International Tribunal for the Law of the Sea, Hamburg, Germany, March 15, 2003

E.K.J. PLADDET*

Introduction

Safety at sea is under threat from terrorism, organised crime, piracy and armed conflict. These topics were considered during the symposium, "Interference with navigation: modern challenges". During the symposium, papers were presented on the following topics: maritime security in a multilateral context,[1] maritime security in a bilateral context,[2] legal possibilities for protecting foreign ships against piracy and terrorism[3] and the protection of navigation in the event of armed conflict.[4]

This essay will not present a comprehensive account of the topics discussed at the symposium, but will focus on the intensivee discussion that took place on the topic of terrorism and the measures taken after September 11. That discussion reflected divergences between the policies on maritime security as developed by the United States of America and the International Maritime Organisation ("IMO").

The terrorist attacks on the US resulted in a global demand for enhanced security measures. On the one hand, those international organisations that have maritime security issues within their remit, the IMO in particular, reviewed existing international legal and technical measures, and developed new regulations to prevent and suppress terrorist attacks and increase international security. On the other hand, the US has acted upon its understanding that the war on terrorism justifies a unilateral approach to dealing with international threats to its security.

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[1] Hartmut Hesse, IMO, "Maritime security in a multilateral context".

[2] Ashley Roach, U.S. Department of State, "Container and port security: the bilateral perspective".

[3] H.E. Judge Jose Luis Jesus, ITLOS, "Legal possibilities to protect foreign ships against piracy and terrorism".

[4] Wolff Heintschel von Heinegg, University of Frankfurt / Oder, "The protection of navigation in case of armed conflict".

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The security of the US, according to its own policy, precedes international security. During the symposium the two approaches were presented: Hartmut Hesse of the IMO presented policy development within that organisation and Ashley Roach of the US Department of State presented developments in US policy.

Measures taken by the IMO

The IMO is a specialised organisation within the United Nations system. Its mandate is to develop international standards for purposes of promoting safe and environmentally sound shipping activities.

In the wake of September 11, the IMO Secretary-General, William O'Neill, held consultations on the need to review IMO measures to combat acts of violence and crime at sea. The 22nd Assembly of IMO (November 2001) subsequently decided to organise the Conference on Maritime Security. This conference would review existing regulations and adopt new ones to enhance ship and port security and to avert shipping from becoming a target of international terrorism. The Assembly also agreed to review measures and procedures that aim to prevent acts of terrorism and approved a technical cooperation program of UK £1.5 million to help developing countries with maritime security issues. In addition, in order to ensure that perpetrators of acts of violence at sea are properly brought to trial and convicted, the Legal Committee of the IMO is reviewing the existing SUA Conventions.[5]

The Conference on Maritime Security, held in December 2002, subsequently adopted the following decisions. First, a number of amendments to the 1974 Safety of Life at Sea Convention ("SOLAS") were adopted. The most important of these amendments is the new International Ship and Port Facilities Security Code ("ISPSC"). The code contains detailed security-related requirements for governments, port authorities and shipping companies in a mandatory section, together with a series of guidelines about how to meet these requirements in a second, non-mandatory section. The ISPSC basically provides a risk management process. Contracting governments first are required to identify and evaluate important assets and infrastructures; secondly, governments are to identify actual threats to these assets and infrastructures; and thirdly, they are to identify weaknesses in their protection. After completion of this assessment, contracting governments can accurately evaluate any risks to which the asset or infrastructure may be exposed.

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[5] The Convention for the Suppression of Unlawful Acts against the Safety of Navigation, 1988 and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 ("SUA Conventions").

In addition, the conference adopted a series of resolutions to encourage the widespread application of the measures, for example, to ships not formally covered by ISPSC. Finally, the need for the development of a security consciousness, a safety culture and an environmental conscience was expressed. In July 2004 a new security regime for international shipping will come into force.

Measures taken by the US

Nearly half of the twelve million cargo containers in the world pass through a US port during any given year. Only four percent of these containers are inspected at any given time. In the aftermath of September 11, the US developed a security regime, the so-called Container Security Initiative, that minimises the risk of terrorist attacks without influencing the speed of cargo transportation. The new security regime comprises the following policies: the installation of automatic identification systems on ships; security plans for ships, port facilities and offshore terminals; review of the need for identification, verification and background security checks for seafarers; and ensuring a secure "chain of custody" for containers from their port of origin to their destination.

The goal of the Container Security Initiative is to reduce the vulnerability of cargo containers to, for example, the smuggling of terrorist weapons, while accommodating the need for efficiency in global commerce. The Initiative will establish criteria for identifying high-risk containers, screen containers before they are shipped to the US and use technology to develop screening methods for high-risk containers as well as to develop smart and secure containers. The Custom Service plans to focus its measures on the largest foreign seaports that are responsible for shipping the greatest number of sea containers to the US and to that effect seeks to establish bilateral cooperation.

After September 11, the Coast Guard Security Authorities changed the 24-hour notice of arrival requirement before entering a US port into a 96-hour rule. Furthermore, new special rules apply to all vessels carrying dangerous cargoes and additional information is to be submitted by way if the Advance Notice of Arrival. The notice must include the vessel's name, country of registry, call sign, official number, the registered owner of the vessel, the operator, the name of the classification society, a general description of the cargo and the date of departure from the last port along with that port's name. Moreover, the port's Coast Guard Captain may employ any security measures deemed necessary to ensure the safety and security of the port and the presence of armed patrols in ports has been increased.

Discussion

The main difference between the maritime security policy of the US and IMO is without any doubt their respective goals. While US policy aims to protect US

territory against terrorist attacks, IMO's policy aims to improve international maritime security. The newly implemented US regulations, for example, do not aim to protect European countries. As a result of this unilateral focus of US policy, Roach's presentation received a lot of skepticism from the judges of the International Tribunal for the Law of the Sea ("ITLOS") and from other participants. The US, somewhat ironically, was invited to become a party to the United Nations Convention of the Law of the Sea ("LOS Convention"), the treaty that established ITLOS, provides the legal framework for regulating activities at sea – including maritime security – and to which the US is not a party. Roach stated that current US policy necessarily is focused on the short term because it is a direct reaction to the threat of terrorist attacks on the US. Cargo in the US, therefore, is at its centre of attention. While no containers and ports have thus far been used for terrorist attacks, Roach held that it is of utmost importance that we be prepared for the worst scenario imaginable, as containers are already being used for criminal purposes such as the smuggling of drugs and human beings.

According to the International Labour Organisation ("ILO"), also represented at the symposium, it is at present impossible to abide by all the US security rules due to the cost and bureaucracy involved. The consequences for crew members provide a good example. For each vessel that has crew members of more than one nationality onboard, the US prescribes an identification, verification and a personal background check. This means that the position of sailors is fully controlled by the US. In parallel to US regulations, the ISWG[6] agreed on the need for urgent action to develop a revised seafarer identification document, in cooperation with the ILO. The topic is an urgent item on the agenda of the 91st Session of the International Labour Conference, to be held in June 2003. The aim is to adopt a Protocol to the Seafarers' Identity Documents Convention of 1958 (ILO Convention No. 108). In practice, it will only be possible to establish a new identification regime for seafarers if the US accepts international regulations. While it is preferable to have a single regime instead of two divergent regimes, this means that two different aims have to be accommodated: the aim of the US to prevent terrorism and the aim of the ILO and IMO to improve maritime security. The US, however, seems to demand that all countries accept US rules to protect it against terrorism, while it is not willing to become a party to the LOS Convention. During the discussion, some called the US policy "dictatorial".

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[6] ISWG is the Maritime Safety Committee's Intercessional Working Group on Maritime Security.

Conclusion

Policies that aim to address terrorism and the threat to navigation are strongly influenced by the two most important regimes on maritime security, namely that of the US and the IMO, each having developed a new security regime in the aftermath of September 11. The aim of the US was to protect itself against terrorism, while the aim of the IMO was to improve international maritime security. During the symposium concern was expressed about the unilateral approach of the US in fighting terrorism and improving the maritime security. The problem is that at present seafarer's are forced to obey two sets of rules: those developed by the IMO and those developed by the US. Since the US is not a party to the LOS Convention, it is on that basis not obliged to enforce new international rules concerning safety at sea which the IMO may develop. Given the economics of maritime trade, all countries, however, do have to adapt themselves to the new US rules against terrorism. According to a large number of participants at the symposium in Hamburg, the US should participate in the international regime and amend its unilateral way of dealing with terrorism and maritime security.

I contend that safety at sea will not improve if the shipping world has to continue to comply with two regimes on maritime safety. As terrorism, organised crime, piracy and armed conflicts extend beyond the national level, unilateral measures are inadequate to address their consequences. Moreover, having different rules applicable to similar situations is likely to work in favour of terrorists and other criminals. In order to improve maritime safety, the US should become a party to the LOS Convention, stop its unilateral way of dealing with maritime security and cooperate within the IMO. The general consensus at the Hamburg symposium was that in the long run international cooperation is the only way to improve maritime security.

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