

Korea Anti-Corruption Commission
Remarks on Limitations of the International Anti-Corruption Regime
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Excellencies, distinguished guests, ladies and gentleman. The organizers have asked me to speak about the limitations, or at least the challenges, that continue to face the international-anti-corruption regime to a room full of people who have worked so hard to build that regime. I feel like a sacrificial lamb.

But before I begin doing that I should explain why I am here and why I believe this is such an important topic.

My research concerns the relationship between law, on the one hand, and on the other hand, economic development. So that means that I focus on the developing world, and I look at things from the perspective of the people who suffer from corruption. So when I think about the international anti-corruption regime from their perspective, I don't think about how many treaties have been ratified, or how many agencies have been established, or even the number of investigations and prosecutions. I think about whether it helps to reduce the total amount of harm caused by corruption. Those are the results that really matter.

So what are obstacles to achieving those results? What are the challenges? I see three main challenges.

Indifference

The first challenge is Indifference. The purpose of the regime is to make governments in one country care about controlling corruption in other countries; in other words, to get them to overcome their indifference to corruption overseas.

The United States has overcome its indifference; it certainly cares about controlling foreign corruption. Investigations and prosecutions under the Foreign Corrupt Practices Act are at an all-time high. When he announced his new Global Development Policy two weeks President Obama made it clear that his administration views anti-corruption law as a central part of his foreign policy.

Some of the European countries also care about controlling foreign corruption, with Germany being the prime example.

But overcoming indifference is still a challenge. First of all, it is a challenge in geographic terms. As far as I can tell it is an open question whether governments outside the US and Western Europe have overcome their indifference to foreign corruption. We

have seen a tremendous increase in prosecutions for foreign bribery, but where are the prosecutions by Brazil, Russia, India, China, Korea?

Overcoming indifference is also a challenge in terms of the kinds of foreign corruption that people care about. The greatest successes of the anti-corruption regime have come in relation to just one form of corruption: bribery in government procurement. That is certainly a good thing: people care when their governments pay too much and get too little in return; they care when the government pays twice as much as it should for a bridge that falls down just because some government official was bribed.

But the international regime has not overcome its indifference to other forms of corruption, and those other kinds of corruption are incredibly harmful. Think about the harm when companies pay bribes so that they can continue polluting rivers and destroying forests or exploiting workers. Or when they pay bribes to avoid taxes and duties. Or when foreign banks help leaders steal from them. Or when they make facilitation payments that reinforce cultures of corruption.

So if you ask me about the limitations of the international anti-corruption regime I would say that a significant limitation is that its successes are limited to bribery in government procurement while there are many other kinds of corruption that are just as harmful. It will be a challenge to overcome the idea that the international community is indifferent to these other forms of corruption.

Inflexibility

The second challenge is one I will call Inflexibility.

Anti-corruption law should not be one size fits all. It is clearly important to hold countries to minimum standards, but we do not need the same standards for countries that are facing very different problems with corruption. The challenge for the anti-corruption regime is to balance the need for minimum standards against the need for flexibility.

Let me explain by discussing an issue that I have spent a lot of time thinking about recently. Under the OECD Convention the focus has been on taking a zero-tolerance approach to firms and individuals who pay bribes to foreign officials. Zero tolerance means criminal prosecutions, penalties in the hundreds of millions of dollars, annulment of contracts, debarment from public procurement, and perhaps new forms of civil liability.

The message is clear, when a corrupt official comes to you with his hand out, *just say no*.

In some countries, that is clearly the right policy. If most firms just say no, officials will stop asking for bribes and do their jobs.

In other countries I would argue zero-tolerance is the wrong approach.

There are two potential problems with zero-tolerance. First, I worry that it will cause prudent foreign firms to start saying no to entire countries rather than just individual officials. If that happens, the people of those countries will suffer. What happens if all honest firms say no to countries at the bottom of the corruption perception rankings? What if they just stop investing in Haiti or Burundi or Laos? In theory the public officials will stop asking for bribes, but I think we will all agree that is unrealistic. In the meantime the population does without the jobs and the technology transfer that those firms would bring.

A second problem is that zero-tolerance will sometimes discourage firms that have already paid bribes, or fear that they have already paid bribes, from taking steps to mitigate the harm. We want firms to adopt internal controls and to self-report bribery because that is often the best way of finding and prosecuting corrupt public officials. But unless there is some sort of leniency program, firms will not adopt internal controls or self-reporting policies simply because it is easier for law enforcement agencies and other stakeholders to detect misconduct and punish the firm.

For both these reasons I think that the international regime should be more flexible about alternatives to zero-tolerance. That flexibility could take several forms. For example, judges could be allowed to consider extortion as an affirmative defense to allegations of bribery—perhaps firms should be relieved from responsibilities if they can show that greater harm would have come from just saying no as opposed to paying the bribe and then cooperating with the authorities. Or perhaps we can exempt firms that promptly report bribes they have paid. A third approach is to allow reporting and cooperation to serve as mitigating factors in sentencing.

The current international regime is not very sympathetic to these alternatives. For one thing, the US courts and the OECD Working Group try to limit the scope of affirmative defenses. Second, there is no formal mechanism for co-ordinating enforcement and penalties. So long as one major country takes a zero-tolerance approach it is hard for any other country to offer leniency in exchange for cooperation: firms will fear that if they cooperate they will simply be punished by the zero-tolerance country. That is why we need the kind of flexibility being explored by UNDOC with its new cooperation initiative.

Institution Building

To be honest, I doubt whether the international regime will ever overcome the challenges of indifference and inflexibility. Most countries have enough problems of their own to spend much effort on the corruption problems of other countries. It also appears to be difficult to create international regimes that are both effective and flexible. Tremendous international coordination would be required to ensure that countries adopt leniency programs in good faith instead of as a way of shirking their responsibilities.

That is why I think that the solution to corruption problems will generally lie at the local level. As far as I can tell the countries that have succeeded in tackling corruption have

done it largely by relying on local institutions, not international ones. Countries like Hong Kong and Korea have overcome corruption primarily by building strong local institutions, not by relying on the international community.

This is why the third challenge for the international community is to build strong local anti-corruption institutions. This means stepping in to provide technical assistance. But it can also mean stepping back to allow local institutions to develop on their own. It can mean encouraging civil society to lobby for more prosecutors rather than complaining to the US Department of Justice or the World Bank. Or it might mean letting local prosecutors take the lead in prosecutions so that they can develop expertise.

The ultimate goal is to set up local institutions that will not be indifferent and which are interested in responding flexibly to local circumstances.

Conclusion

To summarize then, I think that the challenges facing the international anti-corruption regime include:

- Overcoming indifference on the part of all countries, including emerging powers in international business
- Overcoming indifference to forms of corruption besides bribery in government procurement
- Allowing greater flexibility in deciding how to respond to corruption
- Helping to build anti-corruption institutions in countries where they are not yet strong