

CORRUPTION IN THE ENERGY SECTOR: CRIMINAL FINES, CIVIL JUDGMENTS, AND LOST ARBITRATIONS

*Gordon Kaiser**

Synopsis: This article examines the anti-bribery legislation of three countries, the United States, Canada, and the United Kingdom. The legislation of the three countries is compared and virtually all the criminal prosecutions are examined in some detail. There is also a detailed analysis of the extraterritorial effect of the legislation in each of the three countries. The article outlines the degree of international cooperation between governments enforcing this legislation as well as the extensive use of enforcement mechanisms such as whistleblowing and immunity programs. The article then goes on to look at the civil liability that invariably follows the criminal prosecutions driven by class actions based on misrepresentations under the securities laws and breach of fiduciary duties by directors. Finally, the article examines the consequences of anti-bribery prosecutions on arbitration proceedings and the non-enforcement of arbitration awards under the New York Convention where a breach of public policy is discovered. In an industry where virtually all agreements have arbitration clauses, this is no small matter.

I.	Introduction	195
	A. The United States	195
	B. The Canadian Industry	197
	C. The United Kingdom	198
	D. Extraterritorial Enforcement	199
	E. International Co-Operation	200
	F. Civil Liability	200
	G. Arbitration Awards	201
II.	The American Legislation	201
	A. Loss of Government Contracts	204
	B. Disgorgement of Profits	204
	C. Territorial Jurisdiction	205
	D. Employees, Subsidiaries and Joint Ventures	206
	E. The Whistle Blowing Bounty	207
	F. Monitors	208
	G. Compliance Programs	209
	H. Contractual Protections	209
	I. Opinion Procedures	210
	J. Statute of Limitations	210
	K. The Latest Guideline	211
	1. Gifts, Entertainment, and Travel	211
	2. Charitable Contributions	211

* Gordon Kaiser is an arbitrator in domestic and international energy and infrastructure disputes. He practices at the JAMS Resolution Center in Toronto and Dallas and Energy Arbitration Chambers in Calgary. Mr. Kaiser is the former Vice Chair of the Ontario Energy Board.

	3. Foreign Officials	211
	4. Promotional Expense Affirmative Defense	212
	5. Internal Controls	212
	6. Jurisdiction	212
	7. Parent-Subsidiary Liability	213
	8. Successor Liability	213
	9. Self-Reporting	213
	10. Compliance Programs	213
	L. The Enforcement Record	214
	M. Individual Liability	217
III.	The Canadian Legislation	217
	A. Domestic Bribery	218
	B. Foreign Bribery	220
	C. The Offenses	221
	D. The Penalties	222
	E. The Defenses	223
	F. Statute of Limitations	224
	G. Territorial Jurisdiction	224
	H. Enforcement Issues	226
	I. Extradition	227
	J. Mutual Assistance	227
	K. Disgorgement	227
	L. Probation Orders	228
	M. The Enforcement Record	229
	N. Civil Liability	230
	O. New Legislation	231
IV.	The U.K. Legislation	232
	A. The Offenses	232
	B. The Penalties	235
	C. The Defenses	235
	D. Territorial Jurisdiction	236
	E. Enforcement Issues	236
	1. SFO Whistleblower Service	236
	2. Self Reporting	237
	3. Facilitation Payments	238
	4. Hospitality Payments	238
	F. The Enforcement Record	238
	G. Civil Liability	241
	H. Other Remedies	241
V.	The Major Differences	242
	A. Extraterritoriality	242
	B. Commercial Bribery	243
	C. Passive Bribery	243
	D. Defenses	243
	E. Penalties	244
	F. Failing to Prevent Bribery	244
	G. Limitation Periods	244
	H. Civil Proceedings	245
	I. Remedies	245

J.	Corporate Officers and Directors.....	245
K.	International Double Jeopardy.....	246
L.	Opinions.....	246
VI.	Civil Actions.....	246
VII.	Arbitration and Corruption.....	248
A.	ICC Case No. 1110.....	251
B.	World Duty Free v. Republic of Kenya.....	252
C.	Siemens AG v. Argentina.....	253
D.	Burden of Proof.....	254
E.	The Duty to Investigate.....	254
F.	Is There a Duty to Report?.....	255
VIII.	What's Down the Road?.....	256

I. INTRODUCTION

For the past fifty years, the greatest threat to multinational corporations in terms of criminal liabilities fell under the competition laws and antitrust laws. In the last five years, that has changed. This initiative began in the United States when the Foreign Corrupt Practices Act (FCPA) was enacted in 1977.¹ Serious enforcement activities only began five years ago, but the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have certainly made up for lost time.

A more modest version of the U.S. legislation came in the form of the Canadian anti-bribery legislation in 1998.² However, in 2011 the United Kingdom (U.K.) Bribery Act arrived on the scene with extensive extraterritorial reach.³ Even more jurisdictions are now implementing anti-bribery legislation. The Mexican government enacted a law in June of 2012,⁴ and the European Union (EU) is drafting anticorruption laws that will make it illegal for oil, gas, and mining companies to make bribes to officials in resource rich countries.⁵

The energy sector is particularly vulnerable to anti-bribery legislation. The industry operates worldwide and is constantly negotiating leases with foreign governments and engaging in exploration and production on these properties through a wide variety of subsidiaries, agents, and contractors, as well as joint venture partners.

A. *The United States*

“Since 2009, the Justice Department has brought 108 cases while the SEC has brought 77, yielding a total of more than \$2 billion in penalties.”⁶ The high

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78dd-3, and 78ff (2012)).

2. Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34 (Can.).

3. Bribery Act, 2010, c. 23 (U.K.).

4. Ley Federal Anticorrupción en Contrataciones Públicas [LFACP] [Federal Law Against Corruption in Public Procurement], Diario Oficial de la Federación [DO], 11 de Junio de 2012 (Mex.).

5. Barbara Lewis, *EU Politicians Vote for Tough Oil, Gas Anti-Corruption Law*, REUTERS UK (Sept. 18, 2012), <http://uk.reuters.com/article/2012/09/18/uk-eu-transparency-idUKBRE88H12020120918>.

6. Christopher M. Matthews, Joe Palazzolo & Shira Ovide, *U.S. Probes Microsoft Bribery Allegations*, WALL ST. J., Mar. 20, 2013, at B1.

water mark was 2010 when companies settling FCPA related charges “paid a record \$1.8 million in financial penalties to the DOJ and the SEC.”⁷

The first major energy prosecution was the Siemens case in 2008, which involved the corporation’s subsidiaries in Argentina, Bangladesh, and Venezuela.⁸ The contracts related to the construction of electricity generation and distribution facilities. “Siemens agreed to pay U.S. authorities . . . [a] \$450 million [fine] and \$350 million in disgorgement of profits. . . . The company [also] agreed to pay German authorities \$850 million in similar penalties and disgorgement of profits.”⁹

Four companies paid a total of \$1.5 billion in fines to U.S. authorities for bribery involving a joint venture constructing LNG facilities in Nigeria. The four companies, Kellogg Root & Brown (and then-parent company Halliburton), Technip SA, Snamprogetti, and JGC Corporation, all pleaded guilty.¹⁰

In September 2010, ABB Ltd. of Sweden settled FCPA charges with the DOJ and the SEC regarding bribes to officials at Mexican state-owned electric utilities and UN Oil-for-Food Program kickbacks in Iraq. The company paid a \$19 million criminal fine to the DOJ and \$39 million in penalties and disgorgement to the SEC.¹¹

Panalpina World Transport Ltd. and a number of oil-and-gas services companies paid a total of \$156 million in criminal penalties and \$80 million in civil disgorgement and penalties.¹² Between 2002 and 2007, Panalpina paid bribes totaling \$27 million to officials in Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan.¹³

Transocean Ltd., one of the oil drilling services providers, agreed to pay the DOJ a \$13.44 million criminal penalty and \$7.2 million in disgorgement to resolve bribery charges related to their freight-forwarding agent, Panalpina.¹⁴

Pride International Inc. and its wholly-owned French subsidiary pled guilty for bribes paid to extend drilling contracts in Venezuela.¹⁵ The agreement

7. Richard Cassin, *2010 FCPA Enforcement Index*, FCPA BLOG (Jan. 3, 2011, 7:02 AM), <http://www.fcpcbog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html>.

8. ROBERT W. TARUN, AM. BAR ASS’N, *THE FOREIGN CORRUPT PRACTICES HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS, AND WHITE COLLAR CRIMINAL PRACTITIONERS* 339 (2d ed. 2012) [hereinafter TARUN 2D].

9. *Id.*

10. *Id.* at 344-45, 367-71 (summarizing the history and outcome of the companies’ joint venture in Nigeria and citing the following holdings: *United States v. Kellogg Brown & Root LLC*, No. 4:09-cr-00071 (S.D. Tex. Feb. 12, 2009); *SEC v. Halliburton Co.*, No. 4:09-cv-00399 (S.D. Tex. Feb. 17, 2009); *SEC v. Technip, S.A.* No. 4:10-cv-02289 (S.D. Tex. June 28, 2010); *SEC v. ENI, S.p.A.*, No. 4:10-cv-02414 (S.D. Tex. July 20, 2010); *United States v. JGC Corp.*, No. 11-cr-00260 (S.D. Tex. Apr. 6, 2011)).

11. *Id.* at 377-78 (citing *United States v. ABB, Inc.*, No. 4: 10-cr-664 (S.D. Tex. Oct. 1, 2010); *United States v. ABB Ltd.*, No. 4:10-cr-665 (S.D. Tex. Sept. 29, 2010); *SEC v. ABB Ltd.*, 1:10-cv-01648-PLF (D.D.C. Oct. 12, 2010)).

12. *Id.* at 381-84 (citing *United States v. Panalpina, Inc.*, 4:10-cr-00765 (S.D. Tex. Dec. 16, 2010); *United States v. Panalpina World Transport (Holding) Ltd.*, No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010)). Panalpina’s investigation led to agreements for payment from associated international oil and gas drilling contractors including Noble, SNEPCO, Pride International, Tidewater, and Transocean. *Id.* at 383.

13. *Id.* at 381-82.

14. *Id.* at 388-90 (discussing *United States v. Transocean Inc.*, No. 4:10-cr-768 (S.D. Tex. Nov. 4, 2010), and *SEC v. Transocean Inc.*, No. 10-CV-01891 (D.D.C. Nov. 4, 2010)).

required payment of a \$32.6 million criminal penalty and \$23.5 million in disgorgement.¹⁶

As the year 2012 came to a close another worldwide energy conglomerate agreed to a major fine. French oil giant, Total SA, agreed to pay the DOJ and SEC \$398 million,¹⁷ the fourth largest FCPA fine to date.¹⁸ The allegations related to payments that allowed Total SA to win the rights to gas fields in Iran.

Finally, in February 2013, Parker Drilling Company agreed to pay nearly \$16 million in proposed settlements with the DOJ and the SEC to settle claims relating to bribes in Kazakhstan and Nigeria.¹⁹

In the end the energy sector has accounted for FCPA penalties of almost \$2.8 billion to date,²⁰ almost 60% of the total U.S. fines as determined by the author.

B. The Canadian Industry

The energy sector in Canada has also experienced extensive exposure to anti-bribery charges. The Canadian legislation was first enacted in 1998²¹ and the first serious prosecution occurred in 2011. Niko Resources, a Calgary oil and gas exploration company, was charged with providing a Toyota Land Cruiser and travel expenses to the Minister of Energy in Bangladesh.²² Niko pleaded guilty and received a fine of \$9.5 million.²³

The second prosecution under the Canadian legislation also concerned the energy sector. On January 25, 2013, Griffiths Energy International Inc., a Calgary oil and gas company, agreed to pay a \$10.35 million penalty, the largest

15. *Id.* at 384-85 (discussing *United States v. Pride Int'l, Inc.*, No. 4:10-cr-00770 (S.D. Tex. Nov. 4, 2010); *United States v. Pride Forasol S.A.S.*, No. 4:10-cr-00771 (S.D. Tex. Dec. 7, 2010); *SEC v. Pride Int'l Inc.*, No. 10-cv-4335 (S.D. Tex. Nov. 4, 2010). Beyond the Venezuela drilling contracts, the DOJ fines also stemmed from Pride bribes to secure a favorable decision in India, and to avoid customs in Mexico. *Id.*

16. *Id.* The SEC disgorgement and interest total was related additionally to other "books-and-records and internal controls violations in the Congo, Kazakhstan, Libya, Mexico, Nigeria, and Saudi Arabia." *Id.* at 385.

17. Christopher M. Matthews, *Total Reserves €308 Million for FCPA Settlement*, WALL ST. J. CORRUPTION CURRENTS BLOG (Nov. 6, 2012, 4:46 PM), <http://blogs.wsj.com/corruption-currents/2012/11/06/total-reserves-e308-million-for-fcpa-settlement/>.

18. TARUN 2D, *supra* note 8, at 248 (listing the largest FCPA penalties as of 2011, with the 4th largest at the time sitting at \$365 million (*Snamprogetti*)).

19. Saabira Chaudhuri & Ben DiPietro, *Parker Drilling to Take Charge for SEC, DOJ Settlement*, WALL ST. J. CORRUPTION CURRENTS (Feb. 15, 2013, 5:18 PM), <http://blogs.wsj.com/corruption-currents/2013/02/15/parker-drilling-to-take-charge-for-sec-doj-settlement/>.

20. Siemens (Germany) \$800 Million (2008); KBR Halliburton (USA) \$579 Million (2009); Snamprogetti (Holland) and ENI S.p.A (Italy) \$365 Million (2010); Technip, S.A. (France) \$338 Million (2010); JGC Corporation (Japan) \$219 Million (2011); Panalpina (Switzerland) \$82 Million (2010). TARUN 2D, *supra* note 8, at 248 (figures rounded). Total, S.A. (France) \$398 Million (2012). Matthews, *supra* note 17.

21. Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34 (Can.).

22. Greg McArthur, *Niko Resources: Ottawa's Corruption Test Case*, THE GLOBE AND MAIL (Aug. 25, 2011), <http://www.theglobeandmail.com/report-on-business/rob-magazine/niko-resources-ottawas-corruption-test-case/article542842/>.

23. *Id.*

fine that the Royal Canadian Mounted Police (RCMP) has obtained.²⁴ The company admitted that a former senior officer had made a \$2 million payment to a company owned by the wife of the Chad Ambassador to Canada under the guise of a consulting contract.²⁵ The bribe allowed the company to obtain exclusive rights to three large oil and gas concessions in Chad.²⁶

In 2011, the RCMP announced that it was investigating the SNC-Lavalin Group for possible corruption involving a World Bank project in Bangladesh.²⁷ “An international consortium, led by the World Bank, [had] agreed to lend Bangladesh up to \$2.9 billion for the construction of a 6 km . . . bridge over the river Padma.”²⁸ Subsequently, Canadian authorities laid charges in a Toronto court against two former SNC Lavalin executives.²⁹ In a separate proceeding a former SNC executive responsible for global construction projects was charged by Swiss officials regarding an inquiry into alleged corruption in North Africa.³⁰ A more recent inquiry with respect to the company alleges improper payments in connection with the construction of power plants in India.³¹

C. *The United Kingdom*

While the U.K. legislation³² has been in place for only a short time, energy companies have figured prominently in the first prosecutions. In November 2012, the Crown Office in Scotland obtained a £5.6 million civil recovery against a Scottish drilling company, Abbot Group Ltd.³³ The company admitted that it had used corrupt payments in a contract between one of its overseas subsidiaries and an overseas oil and gas company.³⁴ The payments were made in 2007 and the amount of civil recovery represented the profit under the contract.³⁵

In the United Kingdom, as in Canada, international construction companies have also had their difficulties. In 2009, Mabey and Johnson pleaded guilty to corruption charges and agreed to pay £6.5 million in fines and reparations to

24. Kelly Cryderman, *Judge Approves \$10.35-million Fine for Griffiths Energy in Bribery Case*, THE GLOBE & MAIL (Jan. 25, 2013), <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/judge-approves-1035-million-fine-for-griffiths-energy-in-bribery-case/article7858675/>.

25. *Id.*

26. *Id.*

27. Andrea Shalal-Esa & Tim Ahmann, *Canadian Authorities Probing Employees of SNC-Lavalin Group*, REUTERS (Sept. 2, 2011), <http://www.reuters.com/article/2011/09/03/us-worldbank-canada-idUSTRE78206C20110903>.

28. *Id.*

29. Sylvain Larocque, *Two Former SNC-Lavalin Executives Arrested*, THE CANADIAN PRESS (June 22, 2012), <http://www.metronews.ca/news/canada/273947/two-former-snc-lavalin-executives-arrested/>.

30. *SNC-Lavalin Stops Payments to ex-CEO Arrested for Fraud*, REUTERS (Dec. 13, 2012), www.reuters.com/article/2012/12/13/snclavalin-arrest-idUSL4N09N42320121213.

31. *SNC Lavalin Case: SC Issues Notices to CBI, Kerala Govt*, DECCAN HERALD, <http://www.deccanherald.com/content/22582/tv-talk.html> (last visited Mar. 3, 2013).

32. Bribery Act, 2010, c. 23 (U.K.).

33. Press Release, Crown Office and Procurator Fiscal Service, *Abbot Group Limited to Pay £5.6 million after Corruption Report* (Nov. 23, 2012), <http://www.copfs.gov.uk/News/Releases/2012/11/Abbot-Group-Limited-pay-%C2%A356-million-after-corruption-report>.

34. *Id.*

35. *Id.*

foreign governments.³⁶ In January 2012, the Serious Fraud Office (SFO) obtained a civil recovery order against the company, which required it to pay back dividends of £130,000 that were obtained from a bridge building contract in Iraq.³⁷

D. Extraterritorial Enforcement

Corporations must also be concerned with the extraterritorial effect of both U.S. and U.K. anti-bribery legislation. While the Canadian law has limited extraterritorial effect, that is not true of the U.S. law.³⁸ The U.K. Bribery Act of 2010, which came into force July 1, 2011, has even greater territorial scope.³⁹

Examples of U.S. extraterritorial prosecutions include *Panalpina*, where a foreign company was charged as an agent for its domestic customers,⁴⁰ and *KBR Haliburton* and *Snamprogetti*, where a foreign affiliate was charged for causing false entries on the parent's books.⁴¹ In *Technip* and *Snamprogetti*, jurisdiction over foreign corporations was asserted based on corrupt payments made from foreign banks having cleared through those banks' correspondent accounts at U.S. banks.⁴² United States authorities have also charged a number of individuals including individuals who are not citizens of the United States.⁴³ In some years more than half of the individuals charged were non-residents and non-citizens.⁴⁴

36. David Leigh & Rob Evans, *British Firm Mabey and Johnson Convicted of Bribing Foreign Politicians*, THE GUARDIAN (Sept. 25, 2009), <http://www.guardian.co.uk/business/2009/sep/25/mabey-johnson-foreign-bribery>.

37. Press Release, Serious Fraud Office, Shareholder Agrees Civil Recovery by SFO in Mabey & Johnson (Jan. 13, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx>.

38. PRICEWATERHOUSECOOPERS FORENSIC SERVICES, CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT 2 (2012) [hereinafter PWC CFPOA REPORT], http://www.pwc.com/en_CA/ca/risk/forensic-services/publications/pwc-corruption-foreign-public-officials-act-2012-04-en.pdf. The Canadian legislation "[r]equires a 'real and substantial' link between the offense and Canada," while the FCPA "[r]equires a U.S. nexus." *Id.*

39. *Id.* (noting that the Bribery Act's jurisdiction extends to "any offense committed anywhere in the world, as long as the company has a branch or subsidiary in the UK").

40. TARUN 2D, *supra* note 8, at 381-82 (discussing *United States v. Panalpina Inc.*, No. 4:10-cr-00765 (S.D. Tex. Dec. 16, 2010)).

41. *Id.* at 344-45, 369-70 (discussing *SEC v. Haliburton Co. & KBR Inc.*, No. 09-CV-0399 (S.D. Tex. Feb. 11, 2009) and *SEC v. ENI, S.p.A.*, No. 4:10-cv-2414 (S.D. Tex. July 7, 2010)).

42. SHEARMAN & STERLING LLP, THE OTHER FCPA SHOE DROPS: EXPANDED JURISDICTION OVER NON-U.S. COMPANIES, FOREIGN MONITORS, AND EXTENDING COMPLIANCE CONTROLS TO NON-U.S. COMPANIES (July 19, 2010) [hereinafter SHEARMAN & STERLING EXPANDED FCPA JURISDICTION], <http://www.shearman.com/files/Publication/e8cb70ac-9a93-4c60-b8aa-3ac7d491c50b/Presentation/PublicationAttachment/20ae6874-5a8b-4c46-8ec7-62ca5d7ce034/LT-071910-The-Other-FCPA-Shoe-Drops.pdf>.

43. KATHLEEN J. HARRIS ET AL., ARNOLD & PORTER LLP, THE EXTRATERRITORIAL REACH OF THE FCPA AND THE UK BRIBERY ACT: IMPLICATIONS FOR INTERNATIONAL BUSINESS 1 (Mar. 2012), http://www.arnoldporter.com/resources/documents/Advisory%20Extraterritorial_Reach_FCPA_and_UK_Bribery%20Act_Implications_International_Business.pdf.

44. *Id.* (noting that in 2011, twelve of eighteen individuals charged were non-U.S. citizens).

E. International Co-Operation

Enforcement of corporate crime in this area has benefited from enhanced enforcement mechanisms including international cooperation, wiretapping, whistleblowing, and immunity programs.

As in antitrust, international co-operation between prosecutors is the norm. *BAE Systems*, which yielded a \$400 million fine for the Americans in 2010, was a joint project of the U.S. DOJ and the U.K. SFO.⁴⁵ *AGCO Corporation*, in 2009, involved co-operation between the United States and Denmark.⁴⁶ The *Siemens* prosecution in 2008, which resulted in a record U.S. fine of \$800 million, involved co-operation between the United States and Germany.⁴⁷ *Akzo Nobel*, in 2007, involved co-operation between the United States and the Netherlands,⁴⁸ while *Statoil*, in 2006, was a United States and Norway investigation.⁴⁹

F. Civil Liability

As often happens, collateral civil litigation follows government prosecutions. Significant liabilities from class-action suits for securities fraud and shareholder derivative actions for breach of fiduciary duty by directors and officers are the norm.

In the fall of 2011, the RCMP indicated that they were investigating SNC-Lavalin with respect to bribery in the \$1.2 billion Padma bridge project in Bangladesh.⁵⁰ In June 2012, the RCMP charged two executives of Lavalin.⁵¹ The previous month, however, two pension funds sued the corporation and all directors for breach of fiduciary duty on the basis that they had not implemented proper procedures to prevent bribery.⁵² In the end, the penalties are serious. Investigations can also have a substantial impact on a company's stock market price.⁵³ To this we can add the costs of litigation and investigations, disbursement of profits, and possible disbarment from public contracting.

45. TARUN 2D, *supra* note 8, at 361.

46. Press Release, U.S. Dept. of Justice, AGCO Corp. to Pay \$1.6 Million in Connection with Payments to the Former Iraqi Government Under the U.N. Oil-For-Food Program (Sept. 30, 2009), <http://www.justice.gov/opa/pr/2009/September/09-crm-1056.html> (noting "coordinated enforcement actions" between U.S. and Danish authorities).

47. Press Release, U.S. Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html>.

48. Shearman & Sterling LLP, *U.S. v. Akzo Nobel, N.V.*, FCPA.SHEARMAN.COM, <http://fcpa.shearman.com/?s=matter&mode=form&id=108> (last visited Mar. 2, 2013).

49. Press Release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), http://www.justice.gov/opa/pr/2006/October/06_crm_700.html.

50. Shalal-Esa & Ahmann, *supra* note 27.

51. Larocque, *supra* note 29.

52. *SNC-Lavalin Hit with \$1.65 Billion Class-Action Lawsuit*, THE CANADIAN PRESS (May 9, 2012), <http://www.ctvnews.ca/snc-lavalin-hit-with-1-65-billion-class-action-lawsuit-1.807441>.

53. *Id.*

G. Arbitration Awards

Finally, bribery can result in losing the ability to enforce arbitration awards under the New York Convention⁵⁴ and the Model Law⁵⁵—not a small consideration in an industry where over 90% of the agreements have arbitration clauses.

The \$800 million in fines that Siemens paid to the U.S. government in 2008 with respect to bribes contrary to the FCPA was just the start of their problems. In 2007, Siemens had obtained a \$200 million award in an International Centre for Settlement of Investment Disputes (ICSID) arbitration which related to fees the company believed it was entitled to with respect to sales to power plants owned by the Argentine government.⁵⁶ When the government of Argentina refused to pay those fees, Siemens instituted an arbitration proceeding, which was successful.⁵⁷ However, shortly after the award was rendered, information about the investigations by both the American and German anticorruption agencies with respect to Siemens' worldwide bribery surfaced.⁵⁸

Argentina filed a petition to annul the award. A year later, after Siemens settled with the U.S. and German governments, "Argentina and Siemens announced that they were discontinuing" the arbitration.⁵⁹ Siemens agreed to walk away from its \$200 million arbitration award.⁶⁰

The reason for this was that courts will not enforce an arbitration award under the New York Convention which applies in over 148 countries⁶¹ if there is evidence that enforcement of the award would be contrary to public policy.⁶² Since bribery is an offense under the laws of almost forty countries that have implemented the Organisation for Economic Co-operation and Development (OECD) convention,⁶³ bribery is the leading ground for invoking this principle.

II. THE AMERICAN LEGISLATION

In 1977, Congress enacted the Foreign Corrupt Practices Act of 1977 (FCPA).⁶⁴ The FCPA consists of two types of provisions: (1) record keeping provisions; and (2) anti-bribery provisions.

54. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention].

55. United Nations Comm'n on Int'l Trade Law, Model Law on International Commercial Arbitration, U.N. Doc. No. A/40/17 (June 21, 1985) (amended in 2006) [hereinafter UN Model Law].

56. Jason W. Yackee, *Investment Treaties & Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723, 723-24 (2012).

57. *Id.* at 724.

58. *Id.*

59. *Id.* at 725.

60. *Id.*

61. *Contracting States*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/new-yor-convention-countries/contracting-states> (last visited Mar. 3, 2013).

62. New York Convention, *supra* note 54, at 2520.

63. *Bribery in International Business*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm> (last visited Mar. 3, 2013).

64. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified at 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78dd-3, and 78ff (2012)).

The record-keeping provisions are found in section 13(b) of the Securities Exchange Act of 1934.⁶⁵ They apply to issuers who have securities registered with the SEC or who file reports with the SEC. The provisions require parties keep books and records accurately, in reasonable detail, and in a manner that fairly reflects transactions.⁶⁶

The anti-bribery provisions are found in section 30(a) of the Securities Exchange Act.⁶⁷ They prohibit a payment, offer, or promise of anything of value to a foreign official or any other person while knowing that such person will provide all or part of the thing of value to a foreign official with corrupt intent for the purpose of influencing an official act, or inducing a foreign official to use his influence with a foreign government to influence a government decision in violation of his official duty.⁶⁸

The term “foreign official” is broadly defined to mean any officer or employee of a foreign government, agency, or instrumentality, or any person acting in an official capacity on behalf of such government department, agency, or instrumentality.⁶⁹ One of the controversies in interpreting this legislation is the broad interpretation that prosecutors take with the definition of instrumentality. Federal prosecutors apply the legislation to even low-level employees of state-owned institutions and extend the scope of legislation to institutions or agencies over which the government has some control.⁷⁰

There is always a question of what knowledge is required on the part of those being charged. Generally speaking, a conviction requires actual knowledge of the conduct⁷¹ but in the United States, as in Canada, courts will find guilt where there’s willful blindness or deliberate ignorance.⁷²

There are certain exceptions and defenses to the anti-bribery violations. These include facilitation payments which will expedite or secure the performance of routine government actions.⁷³ This is viewed as a narrow exception that applies only to nondiscretionary acts.⁷⁴

There are, however, two affirmative defenses. The first is the written law defense. It is an affirmative defense if the payment gift or offer was lawful under the written laws and regulations of the recipient country.⁷⁵ It is also an

65. Securities Exchange Act of 1934, ch. 404, § 13, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78m(b) (2012)).

66. 15 U.S.C. § 78m(b)(2)(A).

67. Securities Exchange Act of 1934, ch. 404, § 30, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78dd-1(a)).

68. 15 U.S.C. § 78dd-1(a).

69. *Id.* § 78dd-1(f)(1)(A).

70. See generally Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, 11-9 BRIEFING PAPERS 1, *3-4 (Aug. 2011).

71. 15 U.S.C. § 78dd-1(f)(2)(A)-(B).

72. TARUN 2D, *supra* note 8, at 7 (discussing legislative history of the FCPA); Mark N. Sills and Jennifer L. Eggsgard, *Canada’s Anti-Bribery Laws: It May Not Be Enough to Say You Didn’t Know*, 98 NORTHERN MINER, no. 51, Feb. 4-10, 2012.

73. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

74. U.S. DEP’T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM’N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 25 n.162 (2012) [hereinafter FCPA RESOURCE GUIDE], available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (citing *United States v. Kay*, 359 F.3d 738, 750-51 (5th Cir. 2004)).

75. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-1(c)(1), 78dd-3(c)(1).

affirmative defense if the payment, offer, or promise was a reasonable expenditure related directly to the promotion of products or services.⁷⁶ In the case of both defenses, the defendant has the burden of proof.⁷⁷

The FCPA is administered by two institutions. The DOJ has exclusive jurisdiction to prosecute criminal violations under the Act.⁷⁸ The DOJ and the SEC share jurisdiction over the civil enforcement actions.⁷⁹ Most prosecutions are settled on the basis of a Deferred Prosecution Agreement (DPA) without trial and without admission of guilt.⁸⁰ In most cases both civil and criminal penalties are levied.

The penalties under both the criminal and civil provisions are substantial. The anti-bribery provisions carry a maximum criminal fine of \$2 million for organizations and \$250,000 for individuals per violation.⁸¹ However, under U.S. criminal law, the government can resort to alternative fines of up to twice the gain from the offense if the alternative fine exceeds the maximum fine under the statute.⁸² Individuals face up to five years imprisonment for willful violations of the anti-bribery provisions.⁸³ The FCPA applies to officers, directors, employees, or agents of any organization subject to the FCPA.⁸⁴ Anti-bribery violations also carry civil penalties up to \$10,000 for organizations or individuals per violation.⁸⁵

Willful violations of the accounting provisions carry maximum criminal fines of \$25 million for organizations and \$5 million for individuals.⁸⁶ However, the alternative fine provision also applies, allowing for fines equal to twice the pecuniary gain if that is higher than the maximum statutory fine.⁸⁷ Individuals face imprisonment of up to twenty years for willful violations of the accounting provisions.⁸⁸

Civil penalties for violating the accounting provisions include disgorgement of profits received as well as penalties up to \$500,000 for organizations and \$100,000 for individuals per violation.⁸⁹

The alternative fines are imposed pursuant to the Alternative Fines Act.⁹⁰ However, in calculating fines under the FCPA, the DOJ generally focuses on the U.S. Sentencing Guidelines. The Guidelines provide for different penalties for

76. *Id.* §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

77. TARUN 2D, *supra* note 8, at 11.

78. FCPA RESOURCE GUIDE, *supra* note 74, at 4.

79. *Id.* at 4-5.

80. *See generally id.* at 74.

81. 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571(b)(3), (e).

82. 18 U.S.C. § 3571(d), (e).

83. 15 U.S.C. §§ 78dd-2(g), 78dd-3(e).

84. *Id.* §§ 78ff(c)(2)(A), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

85. *Id.* §§ 78ff(c), 78dd-2(g), 78dd-3(e).

86. *Id.* § 78ff(a).

87. 18 U.S.C. § 3571(d), (e).

88. 15 U.S.C. § 78ff(a).

89. 15 U.S.C. § 78u(d)(3), (5).

90. 18 U.S.C. § 3571(d).

different provisions of the FCPA and set out a variety of factors to be considered.⁹¹

Most cases under the FCPA are settled on the basis of a DPA. The DOJ files charges with the court but requests that the prosecution be deferred for a period of time—usually two to three years.⁹² The filing sets out the basic facts of the case without the accused admitting liability. The DPA will usually require the “defendant to pay a monetary penalty, waive the statute of limitations, cooperate with the government, [and] admit all relevant facts.”⁹³ The agreement will also require that the accused enter a compliance program and in some cases an external monitor is imposed.⁹⁴ If at the end of the term the accused has complied with all of the requirements, the DOJ will move to dismiss the charges.⁹⁵

In addition to the fines and civil penalties there are some unique remedies that can be applied in settlements under the FCPA. These include loss of government contracts, disgorgement of profits, and the imposition of monitors.⁹⁶

A. *Loss of Government Contracts*

The loss of government contracts or debarment is a remedy that flows from the Federal Acquisition Regulations (FAR).⁹⁷ They provide that on conviction of bribery or falsification of records a party can be debarred from doing business with the federal government.⁹⁸ This decision is not made by the DOJ or the SEC but by independent authorities within the different agencies. Each authority makes a finding as to whether the respondent is ineligible for government contracting, and if cause for debarment is found to exist, the burden shifts to the party to demonstrate that debarment is not necessary.⁹⁹ Each federal department or agency is responsible for making that determination for the contractors it deals with. However, when one department or agency suspends a contractor, that suspension “applies to the entire executive branch of the federal government” unless there are compelling reasons to find otherwise.¹⁰⁰ A guilty plea or DPA does not automatically result in disbarment.¹⁰¹ In general practice the remedy is rarely used.

B. *Disgorgement of Profits*

The SEC has for a number of years been seeking disgorgement of profits in FCPA cases. This relief was first obtained in the ABB case in 2004, which involved a Swiss company that provided power and automation technology. ABB

91. See generally U.S. SENTENCING GUIDELINES MANUAL (2012); FCPA RESOURCE GUIDE, *supra* note 74, at 68-69.

92. FCPA RESOURCE GUIDE, *supra* note 74, at 74.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 69-76.

97. FCPA RESOURCE GUIDE, *supra* note 74, at 70.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

agreed to pay \$5.9 million in disgorgement of profits.¹⁰² The amounts have significantly increased since 2004. Alcatel paid \$45 million in 2010¹⁰³ and Royal Dutch Shell paid \$18 million in the same year.¹⁰⁴ In 2011, Magyar Telecom paid over \$31 million.¹⁰⁵

C. Territorial Jurisdiction

When the FCPA was originally enacted in 1977, “Congress originally limited its jurisdictional scope to U.S. companies and individuals.”¹⁰⁶ “The 1998 amendments expanded the Act’s jurisdiction to include foreign individuals and corporations.”¹⁰⁷ This was in response to the OECD convention, which the United States Senate ratified on July 31, 1998.¹⁰⁸

The OECD convention called on signatories to make it a criminal offense for “any person” to bribe a foreign public official and required them to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.”¹⁰⁹

As a result, the United States enacted the International Anti-Bribery and Fair Competition Act of 1998.¹¹⁰

In July 2010, Congress enacted the Dodd-Frank Act¹¹¹ which expanded the extraterritorial jurisdiction of the SEC and the DOJ in actions alleging violation of securities and anti-bribery laws to catch matters involving either: “(1) conduct within the U.S. that constitutes significant steps in furtherance of the violation even if the securities transaction occurs outside the U.S. and involves only foreign investors; or (2) conduct occurring outside the U.S. that has a foreseeable substantial effect within the U.S.”¹¹²

These provisions were added in response to the U.S. Supreme Court decision in *Morrison v. National Australia Bank*, which held that U.S. courts do not have jurisdiction over foreign shareholders who purchased from foreign issues on foreign exchanges, even if the conduct in question has an impact on the United States.¹¹³

102. TARUN 2D, *supra* note 8, at 20 (citing SEC v. ABB Ltd., No. 1:04-cv-1141 (D.D.C. 2004)).

103. Press Release, U.S. Sec. Exch. Comm’n, SEC Charges Alcatel-Lucent with FCPA Violations (Dec. 27, 2010), <http://www.sec.gov/news/press/2010/2010-258.htm>.

104. Edward Wyatt, *Oil and Gas Bribery Case Settled for \$236 Million*, N.Y. TIMES (Nov. 4, 2010), http://www.nytimes.com/2010/11/05/business/global/05bribe.html?_r=0.

105. Press Release, U.S. Sec. Exch. Comm’n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), <http://www.sec.gov/news/press/2011/2011-279.htm>.

106. TARUN 2D, *supra* note 8, at 45.

107. *Id.*

108. *Id.*

109. *Id.* (quoting article 4 of the OECD Convention).

110. *Id.*; International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

111. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

112. *Id.* § 929P(c)(1), (2).

113. *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2885 (2010).

Examples of extraterritorial prosecutions include *Panalpina*,¹¹⁴ where a foreign company was charged as an agent for its domestic customers, and *KBR* and *Snamprogetti*, where a foreign affiliate was charged for causing false entries on the parent's books.¹¹⁵ In *Technip* and *Snamprogetti*, jurisdiction over foreign corporations was asserted based on corrupt payments made from foreign banks cleared through accounts at U.S. banks.¹¹⁶

D. Employees, Subsidiaries and Joint Ventures

The expansive reach of the FCPA in geographical terms is just one issue. Parent companies also face potential liability for foreign subsidiaries, agents, and employees in addition to the acts of their own agents or employees.

In the United States, "a corporation can be held criminally liable for any criminal act carried out by its agents or employees if that act occurs within the scope of employment for the benefit of the corporation. [Even] [l]ow-level employees, acting contrary to expressed directions, may create criminal liability for a corporation."¹¹⁷ There are only two requirements necessary to create criminal liability from agents or employees for corporations. "First, the conduct must occur within the scope of the agent or employee's employment. Second, the conduct must in some way be undertaken for the benefit of the corporation."¹¹⁸

"The 'scope of authority' requirement means that the agent or employee was exercising the duties and authority conferred upon him [or her] by his [or her] employment position. It does not mean that the corporation must have actually authorized the agent or employee to commit [the] act[]." ¹¹⁹ The requirements that an agent is acting "for the benefit of the corporation" means the "act[]" must be intended to benefit the corporation in some way."¹²⁰ It does not mean that the benefit was "the sole reason for the agent or employee's acts [l]or [that] the corporation must have received some actual benefit."¹²¹

The Lay Guidance established by the DOJ with respect to the FCPA, states that a U.S. parent corporation may be liable for corrupt payments by employees or agents acting entirely outside the United States using money from foreign bank accounts and without any involvement of personnel located within the United States.¹²² In addition, FCPA settlements have charged parent companies and foreign subsidiaries, and there are a number of statutory and common-law theories under which a U.S. parent may be liable for the misconduct of a foreign

114. TARUN 2D, *supra* note 8, at 381-82 (discussing *United States v. Panalpina Inc.*, No. 4:10-cr-00765 (S.D. Tex. Dec. 16, 2010)).

115. TARUN 2D, *supra* note 8, at 344-45, 369-70 (discussing *SEC v. Haliburton Co. & KBR Inc.*, No. 09-CV-0399 (S.D. Tex. Feb. 11, 2009) and *SEC v. ENI, S.p.A.*, No. 4:10-cv-2414 (S.D. Tex. July 7, 2010)).

116. SHEARMAN & STERLING EXPANDED FCPA JURISDICTION, *supra* note 42; *SEC v. Technip*, No. 10-cv-02289 (S.D. Tex. June 28, 2010); *SEC v. ENI, S.p.A.*, No. 4:10-cv-2414.

117. TARUN 2D, *supra* note 8, at 48 (citations omitted).

118. *Id.*

119. *Id.*

120. *Id.* (citations omitted).

121. *Id.* (citations omitted).

122. U.S. DEP'T OF JUSTICE, FRAUD SECTION, CRIMINAL DIV. & U.S. DEP'T OF COMMERCE: OFFICE OF THE CHIEF COUNSEL FOR INT'L COMMERCE, FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS, available at http://www.dorsey.com/files/upload/MP_CCS_Layperson_Guide.pdf.

subsidiary.¹²³ First, a U.S. company may be liable for bribery under agency principles if it had knowledge or was willfully blind to the misconduct of the subsidiaries.¹²⁴ Second, a U.S. parent corporation that authorized or controlled the acts of a foreign subsidiary may be liable.¹²⁵ And, as stated earlier, the bribery scheme may be found liable under the Act's 1998 alternative theory of nationality jurisdiction.¹²⁶ Of course, a foreign subsidiary may be liable if it acts in furtherance of an illegal bribe that took place in a U.S. territory.¹²⁷

E. The Whistle Blowing Bounty

In May 2011 “the SEC issued its final rules implementing the Dodd-Frank whistleblower provisions.”¹²⁸ These rules and section 922 of the statute provide whistleblowers with a “monetary incentive to report wrongdoing” to the SEC.¹²⁹ The statute and the rules also provide “increased protection against retaliation for whistleblowers.”¹³⁰

“The bounty program applies only to individuals who provide information of securities law violations that results in sanctions greater than \$1 million.”¹³¹ Whistleblowers are “eligible to receive 10[%] to 30[%] of the amount collected,” provided that the information is voluntarily provided to the commission, is original information, and results in a successful enforcement action “in which the Commission obtains monetary sanctions totaling more than \$1 million.”¹³² While the object of the statute and the rules is to create an incentive for employees, the bounty is available to anyone who provides information within the context of the rules.

The whistleblower bounties have been successful. In the first fifty days of the program, over 334 tips were received¹³³ and tips are currently coming into the commission at the rate of eight a day.¹³⁴

“Since its inception, whistleblowers’ recoveries in [FCPA] matters [have been] in the billions. . . . In 2009, for example, a former Pfizer sales rep was awarded \$51 million for his role as a whistleblower in an investigation of Pfizer’s marketing practices.”¹³⁵ In December 2010, “a professional

123. FCPA RESOURCE GUIDE, *supra* note 74, at 27.

124. *Id.* at 27-28.

125. *Id.* at 27.

126. *Id.* at 12.

127. *Id.* at 11.

128. TARUN 2D, *supra* note 8, at 23.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 24.

133. U.S. SEC. & EXCH. COMM’N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2011, at 5 (2011) [hereinafter SEC 2011 WHISTLEBLOWER REPORT], <http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf>.

134. Luis Aguilar, Comm’r, U.S. Sec. & Exch. Comm’n, Address at the Securities Enforcement Forum 2012: Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws (Oct. 18, 2012), *available at* www.sec.gov/news/speech/2012/spch101812laa.htm.

135. Robert Plotkin & Kurt E. Wolfe, *Identifying and Resolving Fraud and Corruption Cases in the US and the UK: PART III (Rewards for Whistleblowers)*, MCGUIREWOODS BRIBERY LIBRARY (Aug. 26, 2011), <http://www.briberylibrary.com/2011/08/>.

whistleblower company . . . was awarded \$88.4 million [as a result of] a \$421 million settlement between the U.S. government and three drug manufacturers.”¹³⁶

The latest development was the September 2012 payment to Bradley Birkenfeld, the UBS whistleblower who received \$104 million from the IRS for providing insider information that led to the disclosure of private banking information relating to 4,500 Americans that had deposits at the Swiss bank.¹³⁷

The SEC can now pay up to 30% of recoveries to anyone providing actionable information about FCPA offenses.¹³⁸ The agency logged 115 FCPA whistleblower complaints during the 2012 fiscal year.¹³⁹

F. Monitors

Settlements in both the United States and the United Kingdom now routinely require the appointment of monitors. In the *Innospec* settlement with the United States and the United Kingdom there was for the first time an appointment of a joint U.S./U.K. compliance monitor, Kevin Abikoff of the Hughes Hubbard and Reed law firm.¹⁴⁰ The *Siemens* settlement involved the first non-U.S. national appointed as a monitor, the former German Finance Minister, Dr. Theo Waigel.¹⁴¹ At one time it was common to appoint external monitors in all settlements. More recently there’s been a growing trend toward self-reporting, which may reflect the increased use of adequate in-house compliance programs.¹⁴² “Only three of the twelve corporations charged in 2012 had independent monitors imposed on them, and in only one case, *Marubeni*, did the DOJ impose a monitor for the full term of the agreement.”¹⁴³ However, there has been an increase in the requirement that companies resolving FCP charges engage in annual reporting generally for a term ranging from two to three years.¹⁴⁴

136. *Id.*

137. Patrick Temple-West & Lynnley Browning, *Whistleblower in UBS Tax Case Gets Record \$104 Million*, REUTERS (Sept. 11, 2012), <http://www.reuters.com/article/2012/09/11/us-usa-tax-birkenfeld-idUSBRE88A0TE20120911>.

138. 15 U.S.C. § 78u-6(b)(1)(B) (2012).

139. SEC 2011 WHISTLEBLOWER REPORT, *supra* note 133, at app. A.

140. Nate Raymond, *Appointment of Joint U.S.-U.K. Corporate Monitor Signals New Era in Bribery Enforcement*, LAW.COM (May 23, 2011), http://www.law.com/jsp/article.jsp?id=1202494803671&Appointment_of_Joint_USUK_Corporate_Monitor_Signals_New_Era_in_Bribery_Enforcement&slreturn=20130202193811.

141. Press Release, Siemens AG, Dr. Theo Waigel Appointed as Compliance Monitor (Dec. 15, 2008), http://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2008/corporate_communication/axx20081220.htm.

142. GIBSON DUNN, 2012 YEAR END FCPA UPDATE 6-7 (Jan. 2, 2013) [hereinafter 2012 YEAR END FCPA UPDATE], <http://www.gibsondunn.com/publications/Documents/2012YearEndFCPAUpdate.pdf>.

143. SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 8 (Jan. 2013), *available at* <http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/1c3fdb0f-774a-4148-ab21-9ce1372b4a4d/FCPA-Digest-Recent-Trends-and-Patterns-in-the-Enforcement-of-the-Foreign-Corrupt-Practices.pdf>.

144. 2012 YEAR END FCPA UPDATE, *supra* note 142, at 6-7.

G. Compliance Programs

It has long been the practice in Canada and the United States for corporations to develop compliance programs instructing their employee's officers and directors of the dangers of contravening the antitrust and competition laws. This practice is just as important in the anticorruption area. As in antitrust, prosecutors will consider a corporation's compliance programs in determining whether to prosecute.¹⁴⁵ It will also impact their evaluation of the appropriate fine or penalty.¹⁴⁶ And, more importantly, an effective compliance program may prevent bribery charges (and follow on civil actions) in the first place.¹⁴⁷

In cases where there is a prosecution, the government may require even stronger compliance programs. In *JGC Corporation*, for example, the program dictated by the government required that the company retain an independent compliance consultant, subject to DOJ approval, that was responsible for overseeing the company's FCPA compliance program for at least two years.¹⁴⁸

H. Contractual Protections

A compliance program can go a long way to policing a company's employees, but dealing with third party business partners is more difficult. If a third party qualifies as an agent of the company, then liability under any of the FCPA provisions can also apply via simple common-law agency principles.¹⁴⁹ Acts of the agent within the scope of the agency are deemed to be acts of the principle. This is the same legal principle under which a company is liable for the acts of its employees.

According to the DOJ and the SEC, contractual provisions that are reasonably calculated to prevent anti-corruption violations may be important in assessing the company's liability.¹⁵⁰ There are three basic types of contractual provisions. First, there are anti-corruption representations and undertakings related to compliance with anti-bankruptcy laws.¹⁵¹ Second, there is the right to conduct audits of the books and records of the agent or business partner to assure compliance.¹⁵² Finally, there is the right to terminate an agent or business partner for a breach of the corruption laws and regulations or representations undertaken relating to those matters.¹⁵³

145. See generally SALEN CHURI, DAVID FINKELSTEIN & JOE MUELLER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A PRACTICAL PRIMER* 23 (Jan. 2012) [hereinafter *FCPA PRACTICAL PRIMER*], available at http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/FCPA_Compliance_Report.authcheckdam.pdf (published by the ABA Criminal Justice Section's Global Anti-Corruption Task Force with the University of Chicago Law School Corporate Lab and The Microsoft Corporation).

146. *Id.*

147. *Id.* at 24.

148. Deferred Prosecution Agreement, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011); Press Release, Dep't of Justice, *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty* (Apr. 6, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

149. See generally TARUN 2D, *supra* note 8, at 101-04.

150. *FCPA PRACTICAL PRIMER*, *supra* note 145, at 39, 41.

151. *Id.* at 41.

152. *Id.*

153. *Id.*

I. *Opinion Procedures*

“In 1980, the [DOJ] instituted an FCPA review or opinion procedure, and in 1992 it published a final rule.”¹⁵⁴ This procedure allows “public companies and all domestic concerns to obtain an enforcement opinion of the Attorney General as to whether prospective conduct complies with the DOJ’s enforcement policy regarding the anti-bribery provisions of the FCPA.”¹⁵⁵ The “request must relate to an actual transaction and not a hypothetical one. It also must be perspective, that is, made prior to the requestor’s commitment to proceed with a transaction.”¹⁵⁶ “A favorable opinion from the DOJ creates a rebuttable presumption applicable in any subsequent enforcement action that the conduct described in the request conformed with the FCPA.”¹⁵⁷ An opinion of the DOJ is similar to a declaratory judgment, but unlike a declaratory judgment a written opinion does not affect anyone other than the requesting party.¹⁵⁸ Opinions do not list the name of the requesting party.

Request for opinion letters from the DOJ have not been frequent. There have only been fifty-six opinions issued since 1980.¹⁵⁹ The reluctance may be partly due to a concern that a request for an opinion may cause the DOJ to conduct an independent investigation if it considers it necessary.¹⁶⁰

J. *Statute of Limitations*

The statute of limitations for most noncapital federal offenses in the United States including violations of the FCPA is five years.¹⁶¹ General conspiracy charges, which are often also used by prosecutors, also “have a five year limitation unless the alleged conspiracy involves a substantive offense [with] a different limitation.”¹⁶² If, however, “in an FCPA criminal investigation the DOJ seeks evidence located in a foreign country, the running of the statute of limitations may be suspended for a period of up to three years.”¹⁶³ Very often when the statute is about to reach its limitation prosecutors may ask for a waiver, and if they fail to obtain a waiver they may “file a criminal complaint or return an indictment . . . in order to keep the case within the statute limitations.”¹⁶⁴

154. TARUN 2D, *supra* note 8, at 22 (citing 28 C.F.R. § 50.18 (2011)).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*; *see also* 28 C.F.R. § 80.11 (2012) (the effect of an FCPA Opinion).

159. TARUN 2D, *supra* note 8, at 23.

160. *Id.* (citing Gary P. Naftalis, *The Foreign Corrupt Practices Act*, 11(8) WHITE-COLLAR CRIME REP. 6 (Sept. 1997) (“In connection with any request for an FCPA Opinion, the Department of Justice may conduct whatever independent investigation it believes appropriate.”)).

161. *Id.* at 21.

162. *Id.* (citing 18 U.S.C. § 371 (2012); *United States v. Fletcher*, 928 F.2d 495 (2d Cir. 1991) (applying a longer statute of limitations under 26 U.S.C. § 6351)).

163. *Id.* (citing 18 U.S.C. § 3292).

164. *Id.* at 22.

K. *The Latest Guideline*

On November 14, 2012, the DOJ and the SEC issued a new *Resource Guide* (the Guide) on their enforcement strategy under the FCPA.¹⁶⁵ The Guide, which consolidates the DOJ interpretation of the FCPA and the factors influencing prosecutorial decisions, is non-binding.¹⁶⁶

1. Gifts, Entertainment, and Travel

The Guide suggests that corrupt intent is what causes hospitality to cross a line from proper to improper, noting that past enforcement actions generally have targeted travel and entertainment expenses that “occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent.”¹⁶⁷ The Guide offers no *de minimis* exception for gifts and meals, but does state that “cups of coffee, taxi fare, or company promotional items of nominal value would [unlikely] ever evidence corrupt intent.”¹⁶⁸ On the other hand, extravagant gifts will likely evidence corrupt intent.¹⁶⁹ It notes that effective compliance programs should include “clear and easily accessible guidelines and processes,” with monetary thresholds, annual limitations, and “limited exceptions” with approval by “appropriate management.”¹⁷⁰

2. Charitable Contributions

The Guide emphasizes that legitimate charitable giving does not violate the FCPA, but that proper risk-based due diligence and controls are essential for ensuring donations are not “used as a vehicle to conceal” corrupt payments.¹⁷¹

3. Foreign Officials

“The FCPA prohibits payments to foreign officials, [and] not foreign governments.”¹⁷² The Guide states that an “actor need not know the identity of the [bribe] recipient” to commit an offense.¹⁷³ On the definition of “instrumentality,” the Guide states that the analysis is fact-specific—requiring consideration of an entity’s ownership, control, status, and function—and consolidates a list of non-exclusive factors approved by courts in the *Esquenazi*, *Carson*, and *Aguilar* cases.¹⁷⁴ Majority ownership or control is an important factor and “an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.”¹⁷⁵

165. FCPA RESOURCE GUIDE, *supra* note 74.

166. *Id.*

167. *Id.* at 15.

168. *Id.*

169. *Id.*

170. FCPA RESOURCE GUIDE, *supra* note 74, at 16.

171. *Id.* at 16, 19.

172. *Id.* at 20.

173. *Id.* at 14.

174. *Id.* at 20 (citing *United States v. Esquenazi*, No. 09-cr-21010 (S.D. Fla. Aug. 5, 2011); *United States v. Carson*, No. 09-cr-77, 2011 WL 5101701 (C.D. Cal. May 18, 2011); *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011)).

175. FCPA RESOURCE GUIDE, *supra* note 74, at 21.

4. Promotional Expense Affirmative Defense

Absent corrupt intent, reasonable gifts, meals, and entertainment do not violate the anti-bribery provisions.¹⁷⁶ The Guide addresses the availability of the affirmative defense for reasonable and bona fide travel and lodging expenses directly related to the promotion of products or services or the performance of a contract.¹⁷⁷ “Trips that are primarily for personal entertainment, however, are not bona fide.”¹⁷⁸

5. Internal Controls

The Guide reiterates that “an effective compliance program is a critical component of an issuer’s internal controls” and should include risk assessments, policies and procedures, communication, and monitoring.¹⁷⁹

6. Jurisdiction

The DOJ has asserted jurisdiction over non-U.S. persons based on isolated meetings as well as telephone calls, emails, or wire transfers to or from the United States¹⁸⁰ It has also based jurisdiction on the indirect use of “correspondent accounts” that foreign banks maintain at U.S. banks to clear dollar-denominated transactions.¹⁸¹ The Guide maintains that the FCPA confers jurisdiction whenever a foreign person causes an act to be done in the United States by an agent.¹⁸² Theories of agency, conspiracy, and aiding and abetting can also be used to reach non-U.S. persons “regardless of whether the foreign national or company itself takes any action in the United States.”¹⁸³

The Guide concedes that the FCPA’s accounting provisions only apply directly to issuers, but stresses that individuals, subsidiaries, and private companies may be liable for aiding and abetting, conspiring to commit, or causing violations by an issuer, “for falsifying an issuer’s books and records[,] or for circumventing internal controls.”¹⁸⁴ The Guide highlights liability for officers or directors as control persons, for false statements to auditors, and for false certifications under the Sarbanes-Oxley Act.¹⁸⁵

176. *Id.* at 15.

177. *Id.* at 24.

178. *Id.*

179. *Id.* at 40.

180. *United States v. Panalpina World Transp. Ltd.*, No. 4:10-cr-769 (S.D. Tex. Nov. 4, 2010) (charging Swiss non-U.S. issuer based on email communications between its offices in Texas and Nigeria); *United States v. Daimler Chrysler Auto. Russ.* SAO, No. 10-cr-64 (D.D.C. Mar. 22, 2010) (payments to shell companies incorporated in the United States and wire transfers to U.S. bank accounts); *United States v. Syncor Taiwan, Inc.*, No. Cr. 02-1244 (C.D. Cal. Dec. 5, 2002) (alleging “any person” jurisdiction when a budget containing a line item mischaracterizing improper payments was emailed from the California headquarters of Syncor’s parent company to Syncor’s Taipei offices).

181. *United States v. Snamprogetti Neth. B.V.*, No. 10-cr-460 (S.D. Tex. July 7, 2010); *United States v. Technip S.A.*, No. 10-cr-439 (S.D. Tex. Jun. 28, 2010); *SEC v. Siemens AG*, No. 1:08-cv-2167 (D.D.C. Dec. 12, 2008).

182. FCPA RESOURCE GUIDE, *supra* note 74, at 11.

183. *Id.* at 12 (citing *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011); *United States v. Snamprogetti Neth. B.V.*, No. 10-cr-460 (S.D. Tex. Jul. 7, 2010)).

184. *Id.* at 43 (discussing civil liability); *see also id.* at 44-45 (discussing criminal liability).

185. *Id.* at 42-44.

7. Parent-Subsidiary Liability

The Guide confirms that traditional principles of parent-subsidiary liability—agency and *respondeat superior*—apply to FCPA cases just as they do in other areas and makes clear that a parent may be held liable for the acts of its subsidiaries in at least two ways: first, directly, as a result of its own knowledge of and involvement in the acts of its subsidiary; and second, under traditional agency principles.¹⁸⁶ Whether a subsidiary is the agent of its parent depends not only on “the formal relationship between the parent and subsidiary,” but also on the degree of actual control the parent exercises.¹⁸⁷ If an agency relationship exists, the DOJ and the SEC will apply the *respondeat superior* doctrine and find the parent liable for the acts of its subsidiary.¹⁸⁸

8. Successor Liability

The Guide enforces that the liability of a successor company for the acts of a corporate predecessor is an “integral component of corporate law” and that nothing relating to FCPA enforcement alters that principle.¹⁸⁹ The Guide does not distinguish between successor liability, where a corporate entity has acquired another entity with FCPA liabilities and subsequently merged with it, and liability of a buyer for the acts of an acquired company that remains a separate legal entity.¹⁹⁰

9. Self-Reporting

The Guide emphasizes that a “high premium” is placed on voluntary and timely self-reporting, cooperation, and the implementation of meaningful remedial measures in determining the appropriate resolution of an FCPA matter as to a company.¹⁹¹

10. Compliance Programs

The Guide reaffirms the position that the effectiveness of a company’s compliance program will play a significant role in the resolution of FCPA matters.¹⁹² The effectiveness of these programs may influence whether a DPA or Non-Prosecution Agreement (NPA) is used, the length of any DPA or NPA imposed, the penalty amount, and whether a monitor or on-going self-reporting is required.¹⁹³

The Guide identifies the main features of effective compliance programs:

- Policies should address risks related to payments to officials including “use of third parties; gifts, travel, and entertainment; charitable and

186. *Id.* at 27.

187. FCPA RESOURCE GUIDE, *supra* note 74, at 27.

188. *Id.*

189. *Id.* at 28.

190. *Id.*

191. *Id.* at 54.

192. FCPA RESOURCE GUIDE, *supra* note 74, at 56.

193. *Id.*

political contributions; and facilitating and expediting payments.”¹⁹⁴ Policies should “outline responsibilities for compliance . . . [;] detail proper internal controls, auditing practices, and documentation policies[;] and [include] disciplinary procedures.”¹⁹⁵

- Periodic training and certifications should be required for all officers, directors, and “relevant employees” and, “where appropriate,” for agents and business partners.¹⁹⁶ The Guide recommends providing training in the local language, tailored to specific audiences, and implementing measures to provide compliance advice on an urgent basis.¹⁹⁷
- Companies should provide incentives for compliant behavior and provide rewards for improving the compliance program and for compliance leadership.¹⁹⁸ For example, management bonuses should not only be based on financial performance targets, but also on a compliance standard of performance.¹⁹⁹
- Managing risks related to third parties is also covered in the Guide. Certain principles always apply. These include consideration of the business reputation of the third party, the relationship with officials, the business rationale for using the third party, and payment terms.²⁰⁰ It includes confirming on an on-going basis that the third party is actually performing the work and that payment is commensurate with the work provided.²⁰¹ This would include, when appropriate, exercising audit rights and requesting annual compliance certifications.²⁰²

L. The Enforcement Record

Total criminal and civil fines imposed on corporations have increased dramatically since 2004. That year, the total fines were \$28 million, rising to \$36 million in 2005 and \$87 million in 2006.²⁰³ The 2007 level of \$155 million rose sharply in 2008 to \$800 million, dropped to \$600 million in 2009 and skyrocketed to \$1.8 billion in 2010.²⁰⁴ In 2011, \$500 million fines were collected,²⁰⁵ compared to \$260 million in 2012.²⁰⁶

194. *Id.* at 58.

195. *Id.*

196. *Id.* at 59.

197. FCPA RESOURCE GUIDE, *supra* note 74, at 59.

198. *Id.* at 59-60.

199. *Id.* at 60.

200. *Id.*

201. *Id.*

202. FCPA RESOURCE GUIDE, *supra* note 74, at 60-61.

203. SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at viii (Jan. 3, 2012), <http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b9-9d99e001dd5f/Presentation/PublicationAttachment/590a9fc7-2617-41fc-9aef-04727f927e07/FCPA-Digest-Jan2012.pdf>.

204. *Id.*

205. *Id.*

206. Richard Cassin, *2012 Enforcement Index*, FCPA BLOG (Jan. 2, 2013, 4:32 AM), <http://www.fcpablog.com/blog/2013/1/2/2012-enforcement-index.html>.

An \$800 million penalty was paid by Siemens in 2008.²⁰⁷ In 2010, BAE Systems, the British defense giant, agreed to plead guilty to one charge of conspiring to make false statements to the U.S. government regarding its ongoing compliance with the FCPA.²⁰⁸ BAE agreed to pay \$400 million in fines, the largest of 2010 and the third largest of all time.²⁰⁹ In April 2010, Daimler AG agreed to pay \$185 million in fines relating to improper payments in the form of commissions, delegation travel, and other gifts to Chinese officials in connection with the sale of commercial vehicles to Chinese government customers.²¹⁰

In July 2010, the DOJ announced that Snamprogetti and its parent, ENI S.p.A., had agreed to pay \$365 million, the fourth largest FCPA fine,²¹¹ to resolve charges stemming from the company's role in a multi-year joint venture (JV) in Nigeria.²¹² The JV won four contracts worth more than \$6 billion to build liquefied natural gas plants in Nigeria between 1995 and 2004, all of which were awarded by state-controlled companies.²¹³ The SEC collected a total of \$1.28 billion in penalties from the four companies involved in the JV.²¹⁴

In December 2011, Magyar Telekom, the largest telecommunications provider in Hungary, and its parent company, Deutsche Telekom, settled charges with the DOJ and the SEC for a total of \$95 million, alleging violations of the Foreign Corrupt Practices Act in Macedonia and Montenegro.²¹⁵ The SEC claimed that Magyar senior executives used sham consulting and marketing arrangements to pay bribes to government officials in both countries in order to block the issuances of licenses to potential competitors and to secure regulatory approval for a corporate takeover.²¹⁶ Deutsche Telekom was charged with internal control violations in failing to adequately oversee the actions of its subsidiary.²¹⁷

In January 2012, the DOJ filed a DPA requiring Marubeni Corporation (Marubeni) to pay \$54.6 million in criminal penalties for its participation in a

207. TARUN 2D, *supra* note 8, at 339.

208. Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

209. TARUN 2D, *supra* note 8, at 248.

210. *Id.* at 364-66 (citing *United States v. Daimler AG*, No. 10-CR-00063-RJL (D.D.C. Mar. 22, 2010)).

211. *Id.* at 248.

212. Press Release, U.S. Dep't of Justice, SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash (July 7, 2010), <http://www.sec.gov/news/press/2010/2010-119.htm>.

213. TARUN 2D, *supra* note 8, at 369-70.

214. Press Release, U.S. Dep't of Justice, SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash (July 7, 2010), <http://www.sec.gov/news/press/2010/2010-119.htm>.

215. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro, Litig. Release No. 22213 (Dec. 29, 2011), <http://www.sec.gov/litigation/litreleases/2011/lr22213.htm>.

216. *Id.*

217. *Id.*; Complaint at 2, SEC v. Magyar Telekom, PLC, No. 11-civ-9646 (S.D.N.Y. Dec. 20, 2011) (noting that the companies "lacked sufficient internal accounting controls to prevent and detect violations of the FCPA").

conspiracy to bribe Nigerian officials.²¹⁸ The deferred prosecution agreement requires Marubeni to “retain a corporate compliance consultant for . . . two years . . . and to cooperate with the [DOJ]’s ongoing investigations.”²¹⁹ The criminal charges against Marubeni will be dropped after two years as long as “Marubeni abides by the terms of the deferred prosecution agreement.”²²⁰

In March 2012, the DOJ and the SEC announced that Biomet, Inc., an Indiana-based medical devices company with worldwide operations, settled charges alleging that, between 2000 and 2008, it made improper payments to doctors employed by public institutions in Argentina, Brazil, and China.²²¹ Biomet paid commissions totaling \$436,000 to state-employed doctors in connection with its sales in Argentina, used a distributor to pay up to \$1.1 million in “scientific incentives” to state-employed doctors in Brazil, and paid unspecified amounts of rebates and travel sponsorships to state-employed doctors in China.²²² Biomet entered into a DPA with the DOJ, agreeing to pay a \$17.28 million criminal penalty and to retain a compliance monitor for an 18-month term.²²³ The company simultaneously settled civil FCPA anti-bribery, books-and-records, and internal controls charges with the SEC, pursuant to which it disgorged \$4,432,998 in profits and \$1,142,733 in prejudgment interest.²²⁴

In March 2012, the DOJ also announced an FCPA settlement with BizJet International Sales and Support, Inc., an Oklahoma-based provider of aircraft maintenance, repair, and overhaul services.²²⁵ The charging documents allege that, between 2004 and 2010, BizJet authorized payments to Mexican and Panamanian government officials to secure aircraft service contracts.²²⁶ BizJet agreed to enter into a DPA pursuant to which it is required to pay an \$11.8 million criminal fine and undertake other remedial measures.²²⁷ BizJet’s indirect parent company, German aircraft service provider Lufthansa Technik AG, also entered into a NPA with the DOJ.²²⁸

218. Press Release, U.S. Dep’t of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>.

219. *Id.*

220. *Id.*

221. Press Release, U.S. Dep’t of Justice, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), <http://www.justice.gov/opa/pr/2012/March/12-crm-373.html>.

222. Information at 10, 14-16, United States v. Biomet, Inc., No. 1:12-cr-00080 (D.D.C. Mar. 26, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-information.pdf>.

223. Press Release, U.S. Dep’t of Justice, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), <http://www.justice.gov/opa/pr/2012/March/12-crm-373.html>.

224. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), <http://www.sec.gov/news/press/2012/2012-50.htm>.

225. Press Release, U.S. Dep’t of Justice, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$11.8 Million Criminal Penalty (Mar. 14, 2012), <http://www.justice.gov/opa/pr/2012/March/12-crm-321.html>.

226. Information at 6, United States v. Bizjet Int’l Sales & Support, Inc., No. 4:12-cr-00061-CVE (N.D. Okla., Mar. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-information.pdf>.

227. Press Release, U.S. Dep’t of Justice, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$11.8 Million Criminal Penalty (Mar. 14, 2012), <http://www.justice.gov/opa/pr/2012/March/12-crm-321.html>.

228. *Id.*

M. Individual Liability

The U.S. government is also focusing on individuals to a greater degree. “In 2004, the DOJ charged only two individuals with FCPA violations and collected \$11 million in criminal fines. In 2009-2010, by contrast, the DOJ charged over [fifty] individuals and collected nearly \$2 billion.”²²⁹

It is significant that in 2011, “a record number of non-U.S. individuals were charged with crimes in the United States—of the [eighteen] individuals charged . . . , [twelve] were non-U.S. citizens.”²³⁰ “[T]he eighteen individuals charged in 2011 represent[ed] the second highest total in FCPA history,” second to 2009 when twenty-two individuals were charged.²³¹ “Half of [the 2011] number is attributable to the indictment of the Siemens executives and their agents,” charged three years after the original Siemens settlement.²³²

In February 2012, Jack Stanley, the former CEO of Kellogg, Brown & Root Inc., was sentenced to thirty months in prison for violations of the FCPA relating to bribes to Nigerian government officials.²³³ He was also ordered to pay \$10.8 million in restitution to KBR.²³⁴

In April 2010, a district court in Virginia handed Charles Jumet the largest prison sentence for an individual.²³⁵ He was sentenced to serve an eighty-seven month prison term after pleading guilty to conspiracy to violate the FCPA.²³⁶ Mr. Jumet was president of a company that paid over \$200,000 in bribes to Panamanian officials to secure a twenty year building contract to maintain lighthouses and buoys along Panama’s waterways.²³⁷

III. THE CANADIAN LEGISLATION

The development of the common law offense of bribery was intricately related to the wider jurisprudence of corruption. The body of law dealing with bribery itself grew not as a single coherent set of rules, but rather as a result of diverse situations, including the bribery of privy councilors,²³⁸ justices,²³⁹ corporators,²⁴⁰ coroners,²⁴¹ and jurors.²⁴² Each case of bribery differed based on the “office held

229. FCPA PRACTICAL PRIMER, *supra* note 145, at 39.

230. HARRIS ET AL., *supra* note 43, at 1.

231. SHEARMAN & STERLING, LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 2 (2012), <http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b99d99e001dd5f/Presentation/PublicationAttachment/590a9fc7-2617-41fc-9aef-04727f927e07/FCPA-Digest-Jan2012.pdf>.

232. *Id.*

233. Press Release, U.S. Dep’t of Justice, Former Chairman and CEO of Kellogg, Brown & Root Inc. Sentenced to 30 Months in Prison for Foreign Bribery and Kickback Schemes (Feb. 23, 2012), <http://www.justice.gov/opa/pr/2012/February/12-crm-249.html>.

234. *Id.*

235. Press Release, U.S. Dep’t of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), <http://www.justice.gov/opa/pr/2010/April/10-crm-442.html>.

236. *Id.*

237. *Id.*

238. *R. v. Vaughan* (1769), 4 Burr. 2494, 98 E.R. 308 (K.B.).

239. *R. v. Gurney* (1867), 10 Cox 550 (justices of the peace and police officers).

240. *R. v. Plympton* (1724), 2 Ld. Raym. 1377, 92 E.R. 397 (members of a corporation).

241. *R. v. Harrison* (1800), 1 East PC 382 (persons holding a judicial office).

or function performed by the individual concerned,” and even the mental element could “var[y] from offence to offence.”²⁴³

However, under common law, bribery was defined as “the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.”²⁴⁴ It was therefore a crime to both bribe a holder of public office and accept, as a holder of public office, a bribe.²⁴⁵

A. Domestic Bribery

The bribery of Canadian public officers has been a criminal offense since 1892.²⁴⁶ Currently, Part IV of the Canadian Criminal Code, “Offences Against the Administration of Law and Justice,”²⁴⁷ addresses the bribery of holders of judicial and political office,²⁴⁸ frauds on the government,²⁴⁹ municipal corruption,²⁵⁰ selling or purchasing public office,²⁵¹ influencing or negotiating appointments to office,²⁵² and obstructing justice through bribery.²⁵³

The Criminal Code makes it an indictable offense to corruptly give or offer any money or other valuable consideration to a holder of judicial or governmental office in respect of anything to be done or omitted by that holder in their official capacity.²⁵⁴ The Code similarly criminalizes such corrupt giving to justices, police commissioners, peace officers, public officers, officers of juvenile courts, and other such persons involved in the administration of criminal law, when such consideration is intended to interfere with the administration of justice, procure or facilitate the commission of an offense, or protect a person who has committed an offense from detection or punishment.²⁵⁵

Section 121 of the Criminal Code makes it an indictable offense to give, offer, or agree to give or offer, a loan, reward,²⁵⁶ advantage, or benefit of any

242. R. v. Young (1801) 2 East 14, 16.

243. RICHARD LISSACK & FIONA HORLICK, LISSACK AND HORLICK ON BRIBERY 57 (2011).

244. *Id.* (quoting WILLIAM OLDNALL RUSSELL & J. W. CECIL TURNER, RUSSELL ON CRIME 381 (12th ed. 1964)).

245. *Id.* at 57-58.

246. Peter M. German, *To Bribe or Not to Bribe—A Less than Ethical Dilemma, Resolved?*, 9 J. FIN. CRIME 249-258 (2002) (citing 55-56 Vict. (Dom.), c. 29, now R.S.C. 1985, c. C-46).

247. Criminal Code, R.S.C. 1985, c. C-46 (Can.).

248. *Id.* at ss. 119, 120.

249. *Id.* at ss. 121, 122.

250. *Id.* at s. 123.

251. *Id.* at s. 124.

252. *Id.* at s. 125.

253. *Id.* at s. 139(3).

254. *Id.* at s. 119(1)(b). In *Rex v. Gross*, [1945] O.J. No. 552, [1946] O.R. 1 at 9 (Ont. C.A.), Roach J., in delivering the judgment for the Court of Appeal, stated that the term “corruptly” referred to an act done “*mala fide*, and designedly, wholly or partially, for the purpose of bringing about the effect forbidden by the section [of the Criminal Code].” In *Bewdley Election Petition* (1869), 19 L.T. 676 (P.C.), Blackburn J. stated that the term “corruptly” did not mean “wickedly or immorally or anything of the sort.”

255. Criminal Code, R.S.C. 1985, c. C-46, s. 120(a). The person to whom the bribe is communicated must also be the person to whom the money is paid.

256. In *R. v. Greenwood*, [1991] O.J. No. 1616 at para. 30, 67 C.C.C. (3d) 435 (Ont. C.A.), Doherty J.A. concluded that the term “reward” connoted economic compensation for services rendered.

kind²⁵⁷ to an official or any member of their family as consideration for co-operation, assistance, the exercise of influence, or an act or omission related to any matter of business relating to the government.²⁵⁸ Culpability may be established irrespective of whether or not the official is able to co-operate or otherwise exercise the sought influence.²⁵⁹

In *Germany v. Schreiber*, the Ontario Superior Court of Justice stated that, to violate section 121, an offer “must be intentional, made with knowledge of [the official’s] position and purpose in accepting the offer, and of the nexus between the benefit and government business.”²⁶⁰ The court further stated:

It is also fundamental that the liability created by s. 121(1)(a) fastens more upon appearances than realities. It is immaterial that the official is able to co-operate, help, exercise influence or do or fail to do anything that is proposed. The section does not require that money or anything else of value actually change hands, or pass from the donor to the recipient. An offer, or an agreement to give or offer is sufficient.²⁶¹

In *R. v. Cogger*, the Supreme Court of Canada considered “whether [section 121(1)(a)] requires a ‘corrupt’ state of mind, or whether knowledge of the circumstances and an intention to commit the constituent elements is sufficient to attract culpability.”²⁶² Justice L’Heureux-Dubé, speaking for the Court, stated:

“[C]orruption” is not a required element of the *actus reus* or the *mens rea* under s. 121(1)(a). What is required is that the accused intentionally commit the prohibited act with a knowledge of the circumstances which are necessary elements of the offence. Thus, to be guilty of an offence under this section, the accused must know that he or she is an official; he or she must intentionally demand or accept a loan, reward, advantage or benefit of any kind for himself, herself or another person; and the accused must know that the reward is in consideration for cooperation, assistance or exercise of influence in connection with the transaction of business with or relating to the government.²⁶³

With respect to obtaining government contracts, if a person has made a tender to obtain a government contract, then that person cannot give, offer, or agree to give or offer any benefit to another person to withdraw its competing tender, nor can such a person accept a benefit in consideration for withdrawing its own tender.²⁶⁴

257. In *R. v. Greenwood*, [1991] O.J. No. 1616 at paras. 34-44, 67 C.C.C. (3d) 435 (Ont. C.A.), Doherty J.A. concluded that the phrase “advantage or benefit of any kind” could not be interpreted literally, otherwise the unqualified words “advantage” and “benefit” could catch conduct that was never intended to be criminalized, such as offering or accepting complimentary cups of coffee. In *R. v. Hinchey*, [1996] S.C.J. No. 121, 111 C.C.C. (3d) 353, [1996] 3 S.C.R. 1128 (S.C.C.), L’Heureux-Dubé J. stated that the phrase could include benefits of a non-monetary nature. *Id.* at para. 57 (L’Heureux-Dubé J., concurring). Relying on her analysis of legislative intent, L’Heureux-Dubé J. also concluded that a benefit caught by s. 121(1) could not be trivial. *Id.* at paras. 60-69.

258. Criminal Code, R.S.C. 1985, c. C-46, s. 121.

259. *Id.* at s. 121(a)(iv).

260. *Germany v. Schreiber*, [2004] O.J. No. 2310 at para. 259, 184 C.C.C. (3d) 367 (Ont. S.C.J.), *aff’d* [2006] O.J. No. 789, 206 C.C.C. (3d) 339 (Ont. C.A.).

261. *Id.* at para. 260.

262. *R. v. Cogger*, [1997] S.C.J. No. 73, at para. 1, [1997] 2 S.C.R. 845 (S.C.C.).

263. *Id.* at para. 24.

264. Criminal Code, R.S.C. 1985, c. C-46, s. 121(1)(f).

Section 122 of the Criminal Code makes it an indictable offense for an official to commit a breach of trust in connection with the duties of its office.²⁶⁵ Section 123 of the Criminal Code makes it an indictable offense to give, offer, or agree to give or offer a benefit of any kind to a municipal official in exchange for having that official not vote, or vote a certain way, at a municipal council meeting, obtaining aid in procuring or preventing the adoption of any measure, motion, or resolution, or performing or failing to perform an official act.²⁶⁶

Until the passing of the Corruption of Foreign Public Officials Act (CFPOA) in 1998,²⁶⁷ Canadian legislation did not directly address the bribery of foreign public officials in acquiring or retaining business in a foreign country.

B. Foreign Bribery

In 1977, the United States enacted the FCPA in response to the Watergate scandal, which revealed bribery of foreign officials.²⁶⁸ The American government then took steps to encourage the Organization for Economic Cooperation and Development (OECD) to develop an international convention prohibiting foreign bribery.

In 1997, the United States and thirty-three other countries signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.²⁶⁹ The United States, the United Kingdom, and Canada ratified the convention the following year. Canada enacted the Corruption of

265. *Id.* at s. 122. In *R. v. Gyles*, [2003] O.J. No. 3188, at para. 131, 58 W.C.B. (2d) 543 (Ont. S.C.J.), *aff'd* [2005] O.J. No. 5513, 68 W.C.B. (2d) 172 (Ont. C.A.), the court stated that for it to find a breach of trust, it must be shown that [an official] acted or failed to do an act contrary to the duty imposed on him by statute, regulation, his contract of employment or directive in connection with his office and that the act done gave [the official] a personal benefit directly or indirectly. There need not be actual deprivation or a real prejudice or loss to the public.

266. R.S.C. 1985, c. C-46, c. 123(1). In *R. v. Gyles*, [2003] O.J. No. 3188, at para. 139, 58 W.C.B. (2d) 543 (Ont. S.C.J.), *aff'd* [2005] O.J. No. 5513, 68 W.C.B. (2d) 172 (Ont. C.A.), the court found that [s]ection 123 does not require proof of an overtly corrupt action by a municipal official. Like s. 122, the offence of municipal corruption only requires a municipal official to accept money in the course of his or her lawful duties as a public official. In *R. v. Leblanc*, [[1979] C.A. 417 (Que. C.A.), *aff'd* without reasons [1982] S.C.J. No. 13, [1982] 1 S.C.R. 344 (S.C.C.),] the Supreme Court of Canada affirmed the Quebec Court of Appeal's finding that preferential treatment exercised by a municipal official is sufficient on its own to constitute an offence under this section.

267. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34.

268. F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 4 (2010).

269. ORG. FOR ECON. CO-OPERATION AND DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS: AND RELATED DOCUMENTS 6 (2011) [hereinafter CONVENTION ON COMBATING BRIBERY], available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/38028044.pdf>; *Bribery in International Business*, OECD, <http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm> (noting there are thirty-four member countries) (last visited Apr. 10, 2013).

Foreign Public Officials Act (CFPOA) in 1999.²⁷⁰ As in the United States, prosecutions took some time to develop—in this case, twelve years.²⁷¹

The Convention notes that “bribery is a widespread phenomenon in international business transactions” and that it is “the role of governments [to prevent the solicitation] of bribes from individuals and enterprises in international business transactions.”²⁷² The Convention tasks Member States’ governments with

tak[ing] such measures as may be necessary to [make it] a criminal offence . . . for any person intentionally to offer, promise or give any undue pecuniary or other advantage . . . to a foreign public official . . . [for the purpose of having] that official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.²⁷³

C. The Offenses

The operative provision of the CFPOA with respect to bribery is subsection 3(1), which states:

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

(a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.²⁷⁴

It was the intention of Parliament “that [this] offence be interpreted in accordance with common law principles of criminal culpability.”²⁷⁵ No particular *mens rea* is expressly set out in the CFPOA, and therefore the courts are “expected to read in the *mens rea* of intention and knowledge.”²⁷⁶

There are several elements going to the *actus reus* of the offense. First, the offense must be committed by a “person.”²⁷⁷ As discussed in the “Definitions” portion, this includes corporations and other types of business associations.²⁷⁸

Second, the person must “directly or indirectly give[], offer[] or agree[] to give or offer a loan, reward, advantage or benefit of any kind.”²⁷⁹ This includes bribes

270. CAN. DEP’T OF JUSTICE, THE CORRUPTION OF FOREIGN PUBLIC OFFICIALS ACT: A GUIDE 2 (May 1999) [hereinafter CANADIAN FPOA GUIDE], available at <http://www.justice.gc.ca/eng/dept-min/pub/cfpoa-lcape/guide.pdf>; Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (Can.).

271. EILEEN SKINNIDER, CORRUPTION IN CANADA: REVIEWING PRACTICES FROM ABROAD TO IMPROVE OUR RESPONSE, INT’L CTR. FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY 4 (2012), available at <http://www.icclr.law.ubc.ca/files/2012/Final%20Paper%20Corruption-09%20May%202012.pdf>.

272. CONVENTION ON COMBATING BRIBERY, *supra* note 269, at Preamble.

273. *Id.* at art. 1.1.

274. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, s. 3(1) (Can.).

275. CANADIAN FPOA GUIDE, *supra* note 270, at 3.

276. *Id.*

277. *Id.* at 4.

278. *Id.*

279. *Id.* at 3.

given through a third party.²⁸⁰ It was Parliament's intent to draw the wording of subsection 3(1) from subparagraph 121(1)(a)(i) of the Criminal Code.²⁸¹

Third, the giving, offering, or agreement to give or offer must be "for the purpose of obtain[ing] or retain[ing] an advantage in the course of business."²⁸² The offense of bribery of a foreign public official need not involve the crossing of actual borders; "[f]or example, it would be illegal to bribe a foreign public official in Canada to obtain a business contract to build a new wing of an embassy located in Canada."²⁸³

Fourth, the benefit must be given, offered, or agreed to be given or offered "to a foreign public official . . . or to any person for the benefit of a foreign public official."²⁸⁴ This wording "is intended to cover the situation where a foreign public official might not receive the benefit himself or herself, but instead direct that the benefit be given to a family member, to a political party association or to any other person for the benefit of the official."²⁸⁵

Fifth, this benefit must be the "consideration for an act or omission by that official in connection with the performance of the official's duties or functions."²⁸⁶ Alternatively, this benefit must be given, offered, or agreed to be given or offered in order "to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions."²⁸⁷

D. The Penalties

Article 3.1 of the Convention requires that the punishment for bribing a foreign public official be "effective, proportionate and dissuasive."²⁸⁸ The range of penalties available to a country's courts ought to be "comparable to that applicable to the bribery of the [country's] own public officials."²⁸⁹ Furthermore, the Convention requires that "monetary sanctions of comparable effect are applicable."²⁹⁰

280. *Id.* at 5.

281. *Id.* Criminal Code, R.S.C. 1985, c. C-46, s. 121(1)(a) states:

Every one commits an offence who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be.

282. CANADIAN FPOA GUIDE, *supra* note 270, at 5.

283. *Id.*

284. *Id.* at 6.

285. *Id.*

286. *Id.*

287. *Id.* at 6-7.

288. CONVENTION ON COMBATING BRIBERY, *supra* note 269, at art. 3.1.

289. *Id.*

290. *Id.* at art. 3.3.

“Every person who contravenes subsection [3(1) of the CFPOA] is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.”²⁹¹ The five-year maximum term of imprisonment ensures that violating the CFPOA is an extraditable offense.²⁹²

Another issue is the extent to which the Canadian courts will find a corporation liable. In Canada the courts apply the identification theory developed by the Supreme Court of Canada in *Canadian Dredge*.²⁹³ This theory provides that liability can be attributed to a corporation for the offenses committed by the directing mind of the corporation.²⁹⁴ That means the corporation will be criminally liable if one or more of the officers of that corporation acted intentionally, recklessly, or with willful blindness.²⁹⁵

The concept of willful blindness is an important one in Canadian law. Individuals or corporations can be liable where there is a reason to know or suspect that payments have been made, including payments by third parties, where no remedial action is taken.²⁹⁶

Corporations and other organizations that cannot be imprisoned may be fined under the CFPOA.²⁹⁷ The amount of the fine, which is unlimited, is left to a particular judge’s discretion, per section 735 of the Criminal Code, which states:

- (1) An organization that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,
- (a) that is in the discretion of the court, where the offence is an indictable offence. . . .²⁹⁸

E. The Defenses

There are three statutory defenses found in the CFPOA—(1) acts permitted under law, (2) reasonable expenses, and (3) facilitation payments.²⁹⁹

No person is guilty of an offence under [the CFPOA] if the loan, reward, advantage or benefit [given, offered or agreed to be given or offered] is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions.³⁰⁰

No person is guilty of an offence under [the CFPOA] if the loan, reward, advantage or benefit [is given, offered or agreed to be given or offered in order] to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public

291. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, s. 3(2) (Can.).

292. CANADIAN FPOA GUIDE, *supra* note 270, at 7.

293. *Canadian Dredge and Dock Co. v. The Queen* [1985] 1 S.C.R. 662 (Can.).

294. *Id.* at P 85.

295. *Id.* at P 84.

296. Kenneth Jull, *Canada’s Anti-Corruption Enforcement Enters New Era: Niko and Beyond*, INSIDE THE FCPA: THE CORRUPTION & COMPLIANCE Q. (Baker & McKenzie), Spring 2012, at 2-3, http://www.bakermckenzie.com/files/Uploads/Documents/Dallas/nl_corporatecompliance_insidefcpa_spring12.pdf (discussing knowledge and willful blindness as they relate to CFPOA section 3(1)).

297. CANADIAN FPOA GUIDE, *supra* note 270, at 7.

298. Criminal Code, R.S.C. 1985, c. C-46, s. 735 (Can.).

299. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, s. 3(3), (4) (Can.).

300. *Id.* at s. 3(3)(a).

official. [The reasonable expenses must be] related to the promotion, demonstration or explanation of the person's products and services, or to the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.³⁰¹

The defense of reasonable expenses is not found in the Convention, but may be found in the United States' FCPA.³⁰²

The third defense found in the CFPOA relates to how a loan, reward, advantage, or benefit is defined.³⁰³ If such consideration is given, offered, or agreed to be given or offered in order "to expedite or secure the performance by a foreign public official of any act of a routine nature³⁰⁴ that is part of the foreign public official's duties or functions," then no violation of the CFPOA has occurred.³⁰⁵ The CFPOA includes four examples of such routine duties or functions.

No violation occurs if the consideration is for "the issuance of a permit, license or other document to qualify a person to do business" in the foreign state.³⁰⁶

No violation occurs if the consideration is for "the processing of official documents, such as visas and work permits."³⁰⁷

No violation occurs if the consideration is for "the provision of services normally offered to the public of the foreign state, such as mail pick-up and delivery, telecommunication services and power and water supply."³⁰⁸

No violation occurs if the consideration is for "the provision of services normally provided as required, including police protection, [the] loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods."³⁰⁹

F. Statute of Limitations

Unlike the United States, there is no statute of limitations in Canada with respect to bribery offenses under the statute.³¹⁰

G. Territorial Jurisdiction

Unlike other OECD member states and Convention signatories, Canada has not accepted the principle of assuming jurisdiction over the actions of nationals outside of the country in its anti-bribery legislation,³¹¹ although recently

301. *Id.* at s. 3(3)(b).

302. 15 U.S.C. § 78dd-1(c)(2) (2012).

303. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34, s. 3(4) (Can.).

304. Subsection 3(5) of the CFPOA expressly narrows the scope of an "act of a routine nature" to exclude "a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision." *Id.* at s. 3(5).

305. *Id.* at s. 3(4).

306. *Id.* at s. 3(4)(a).

307. *Id.* at s. 3(4)(b).

308. *Id.* at s. 3(4)(c).

309. *Id.* at s. 3(4)(d).

310. CANADIAN FPOA GUIDE, *supra* note 270, at 7.

311. *Id.*

proposed amendments may change this.³¹² In order for Canadian courts to exercise jurisdiction to try the offense of bribery of a foreign public official, that offense must be committed in whole or in part in Canada.³¹³ In the seminal case of *R. v. Libman*, Judge La Forest, speaking for the Supreme Court, enunciated the test for jurisdiction:

[A]ll that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a ‘real and substantial link’ between an offence and this country, a test well known in public and private international law.³¹⁴

In determining whether a Canadian court ought to exercise jurisdiction over a particular offense, Judge La Forest further stated that the court would “take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offense. [The court] must then consider whether there is anything in those facts that offends international comity.”³¹⁵ Indeed, Canada “has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here.”³¹⁶

The *Libman* principle was applied by the Ontario Court of Appeal in *R. v. Stucky*.³¹⁷ The respondent “operated a direct mail business in Ontario that sold lottery tickets and merchandise only to persons outside Canada. He was charged with sixteen counts of making false or misleading representations ‘to the public’ between 1995 and 2002,” contrary to the Competition Act.³¹⁸ The charges pertained to four direct mail promotions sent outside Canada.³¹⁹ “The trial judge acquitted the respondent because he held that the phrase ‘to the public’ meant ‘to the Canadian public,’ and none of the mailings were made to persons in Canada.”³²⁰

The Court of Appeal reversed the on the basis of *Chapman*³²¹ and *Libman*,³²² noting that while the victims were outside Canada, the scheme was devised in Canada, the directing minds were in Canada, and the benefits of the crime flowed back to Canada, stating:

La Forest J., on behalf of the court, began by noting that the presumption against extraterritoriality in criminal law was codified in s. 5(2) (now s. 6(2)) of the *Criminal Code*, R.S.C. 1970, c. C.34, which states that no person ‘shall be convicted in Canada for an offence committed outside of Canada.’ However, he concluded that the offences in question had taken place in Canada. The commission of the offences

312. S-14, An Act to Amend the Corruption of Foreign Public Officials Act, 41st Parliament, 1st Sess. (Can. 2013); see also Drew Hasselback, *Amendments Would Toughen Canada’s Anti-Bribery Law*, *Lawyers Believe*, FINANCIAL POST (Feb. 12, 2013), <http://business.financialpost.com/2013/02/12/amendments-would-toughen-canadas-anti-bribery-law-lawyers-believe/>.

313. CANADIAN FPOA GUIDE, *supra* note 270, at 7.

314. *R. v. Libman*, [1985] 2 S.C.R. 178, para. 74 (Can.).

315. *Id.* at para. 71.

316. *Id.* at para. 67.

317. [2009] O.J. No. 600, 303 D.L.R. 4th 1 (Can. Ont. C.A.).

318. *Id.* at para. 1 (citing R.S.C. 1985, c. C-34, s. 52(1)).

319. *Id.*

320. *Id.* at Summary.

321. [1970] O.J. No. 1540, [1970] 3 O.R. 344 (Can. Ont. C.A.).

322. [1985] 2 S.C.R. 178 (Can.).

had a real and substantial connection to Canada, in that the scheme was devised in Canada, and the operation and directing minds were situated in Canada. In coming to this conclusion, La Forest J. discussed and approved the holding in the *Chapman* decision.³²³

The reasoning La Forest J. followed is equally applicable to this case and may be summarized along these lines: Canada has a legitimate interest in prosecuting persons for unlawful activities that take place abroad when the activities have a 'real and substantial link' or connection to Canada. The fact that the only victims are outside of Canada does not make the activity any the less unlawful or mean that no crime has been committed in Canada when there exists 'a real and substantial link' or connection to this country. The court must take into consideration all the facts that give Canada an interest in prosecuting the offence and then consider whether international comity would be offended in the circumstances. The principle of extraterritoriality has not prevented courts from taking jurisdiction over transnational offences whose impact is felt within the country. The purpose of criminal law is to protect the public from harm. That purpose is not achieved only by direct means, but also by underlining the fundamental values of our society and, in so doing, reinforcing the law-abiding sentiments of our society. La Forest J. reflected at p. 212 that utilizing a 'real and substantial link' approach is necessary in order to reinforce the fundamental values of society:

It would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making. What would be underlined in the public's mind by allowing criminals to go free simply because their operations have grown to international proportions, I shall not attempt to expound.³²⁴

It is also significant that Canadian liability can result from the party liability sections of the Criminal Code, particularly sections 21 and 22, which involve both aiding and abetting and counseling.³²⁵ These sections have been used by Canadian authorities in the past to establish liability for corporations that do not sell or distribute in Canada but nonetheless participated in global market cartels that had an impact on the country.³²⁶

"When more than one [Convention signatory] has jurisdiction over an alleged offence," the Convention requires that representatives of the signatories, "at the request of one of them, consult with each other with a view to determining the most appropriate jurisdiction for prosecution."³²⁷

H. Enforcement Issues

The RCMP is responsible for investigating the corruption of foreign public officials. The authority is specifically referenced in the RCMP Commercial Crime Program's mandate.³²⁸

323. *Stucky*, [2009] O.J. No. 600, at para. 26.

324. *Id.* at para. 27 (quoting *Libman*, [1985] 2 S.C.R. 178, para. 212).

325. Criminal Code, R.S.C. 1985, c. C-46, ss. 21 and 22.

326. *See, e.g.*, *R. v. Mitsubishi Corp.*, [2005] O.J. No. 2394, 65 W.C.B. (2d) 679 (Can. Ont. S.C.J.).

327. CONVENTION ON COMBATING BRIBERY, *supra* note 269, at art. 4.3.

328. *International Corruption*, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/ccb-sdde/international-corrup-eng.htm> (last visited Mar. 7, 2013).

The RCMP has established two International Anti-Corruption units based in Ottawa and Calgary.³²⁹ These units are charged with investigating allegations of bribery of foreign public officials, bribery by foreign persons of Canadian public officials, and money laundering by foreign public officials.³³⁰

I. Extradition

In the case of natural persons, the Convention requires that Canada's penalty "include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition."³³¹ The Convention states that the "[b]ribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the [signatories] and the extradition treaties between them."³³²

If Canada requests extradition of an individual from a signatory state with which Canada has no extradition treaty, and that foreign state "makes extradition conditional on the existence of an extradition treaty," the Convention may be considered as "the legal basis for extradition in respect of the offence of bribery of a foreign public official."³³³

J. Mutual Assistance

The Convention requires that signatories "provide prompt and effective legal assistance to [other signatories] for the purpose of criminal investigations and proceedings."³³⁴ If one signatory "makes mutual legal assistance [to another signatory] conditional upon dual criminality," then dual criminality is deemed to exist.³³⁵

Canada, and other signatories, cannot "decline to render mutual legal assistance for criminal matters within the scope of [the] Convention on the basis of bank secrecy."³³⁶

K. Disgorgement

In the United States, disgorgement is an important factor in many cases. To date no actions have been taken along these lines in Canadian cases although the Crown has indicated in the *Griffiths* case that they will seek to recover the low

329. *Corporate Social Responsibility—Bribery and Corruption: Eleventh Report to Parliament*, FOREIGN AFFAIRS AND INT'L TRADE CANADA (Oct. 7, 2010) [hereinafter *11th Report to Parliament*], <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/11-report-rapport.aspx?view=d>.

330. *Id.*

331. CONVENTION ON COMBATING BRIBERY, *supra* note 269, at art. 3.1. The penalty imposed under the CFPOA is comparable to the maximum penalty for domestic bribery in sections 121 and 123 of the Criminal Code, R.S.C. 1985, c. C-46, ss. 121 & 123.

332. CONVENTION ON COMBATING BRIBERY, *supra* note 269, at art.10.1.

333. *Id.* at art. 10.2.

334. *Id.* at art. 9.1. The RCMP's Commercial Crime Branch offers this assistance. According to its website, "[t]he Commercial Crime Program has developed strategic partnerships with the financial and banking communities, computer professionals, credit card manufacturers, government agencies and departments, and law enforcement agencies, both nationally and internationally." Royal Canadian Mounted Police, *Commercial Crime*, RCMP, <http://www.rcmp-grc.gc.ca/ccb-sddc/index-eng.htm> (last visited Mar. 26, 2013).

335. CONVENTION ON COMBATING BRIBERY, *supra* note 269, at art. 9.2.

336. *Id.* at art. 9.3.

cost shares awarded to the foreign party.³³⁷ When the Canadian legislation was originally enacted it provided for recovery of proceeds derived from the bribery of public officials.³³⁸ That was removed in 2001 and replaced with authority under sections 354, 355, and 462 of the Criminal Code.³³⁹

A related issue is the question of restitution. Section 732 of the Criminal Code provides that the court may order restitution to a person for any loss or damage caused by an indictable offense.³⁴⁰ This provision is being used in the Canadian Competition Act³⁴¹ and there is no reason why it would not be used under the CFPOA.

L. Probation Orders

Section 732.1 of the Criminal Code provides that the court may order policy standards and procedures to prevent subsequent offenses.³⁴² This provision was used in the *Niko* case, which contained an extensive probation order that was apparently drafted in cooperation with American authorities.³⁴³ In that respect it looked very much like a deferred prosecution agreement from the Department of Justice. Probation orders are also very common in the competition and antitrust cases in Canada.

The *Griffith* case, unlike *Niko*, did not have a probation order.³⁴⁴ The court explained that it was not necessary given the extensive procedures the company had already enacted to guard against any further breaches of the statute.³⁴⁵ Those include the creation of a special committee of the independent members of the company's board of directors and the retention of a special committee of independent specialized external legal counsel.³⁴⁶ The court noted that the legal and accounting costs incurred in the committee's investigation had exceeded \$5 million.³⁴⁷

337. See, e.g., Kelly Cryderman, *Judge Approves \$10.35-million Fine for Griffiths Energy in Bribery Case*, THE GLOBE & MAIL (Jan. 25, 2013, 5:34 PM), <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/judge-approves-1035-million-fine-for-griffiths-energy-in-bribery-case/article7858675/>.

338. Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (noting that sections 4-7 were repealed by 2001, c. 32, s. 58).

339. Criminal Code, R.S.C. 1985, c. C-46, ss. 354-55, 462.

340. *Id.* at s. 732(1).

341. Competition Act, R.S.C. 1985, c. C-34, s. 74.1(5)(k).

342. Criminal Code, R.S.C. 1985, c. C-46, s. 732.1(2)-(3).

343. John W. Boscariol, *A Deeper Dive into Canada's First Significant Foreign Bribery Case: Niko Resources*, 16 GLOBETROTTER, no. 1 (Dec. 2011), available at http://www.oba.org/en/pdf/sec_news_int_dec11_nik_bos.pdf (publication of the Ontario Bar Association); see also Agreed Statement of Facts, *The Queen v. Niko Resources, Ltd.* (2011) (Can. Alta. Q.B.), available at <http://www.osler.com/uploadedFiles/Agreed%20statement%20of%20facts.pdf>.

344. Paul Michael Blyschak & John W. Boscariol, *A Closer Look at the Griffiths Energy Case: Lessons and Insights on Canadian Anti-Corruption Enforcement*, MCCARTHY TÉTRAULT (Feb. 14, 2013), http://www.mccarthy.ca/article_detail.aspx?id=6176.

345. *Id.*

346. *Id.*

347. *Id.*

M. The Enforcement Record

“The guilty plea of Calgary-based Niko Resources Ltd. [in 2011] represents the most significant development . . . since the 1999 implementation of [the CFPOA].”³⁴⁸ The RCMP is currently involved in thirty anti-bribery investigations, including those against Blackfire Exploration and SNC-Lavalin.³⁴⁹

Hydro-Kleen Group Inc. (a [corporation] based in Red Deer, Alberta), its president and an employee, were charged under the CFPOA with, among other things, two counts of bribing Hector Ramirez Garcia, a U.S. immigration officer who worked at the Calgary International Airport. Hydro-Kleen entered a plea of guilty in the Court of Queen’s Bench in Red Deer, Alberta on January 10, 2005. The corporation admitted to one count under paragraph 3(1)(a) of the CFPOA and was ordered to pay a fine of \$25,000. Two other charges against a director and an officer of the company were stayed. Garcia pleaded guilty in July 2002 to accepting secret commissions under subparagraph 426(1)(a)(ii) of the Criminal Code. He received a six-month sentence and was subsequently deported to the United States.³⁵⁰

On May 28, 2010, the RCMP laid the second set of charges under the CFPOA against Nazir Karigar “for allegedly making a payment to an Indian government official to facilitate the execution of a multi-million dollar contract for the supply of a security system for the Canadian high-tech firm, Cryptometrics.”³⁵¹ The conduct was alleged to violate subsection 3(1)(b) of the CFPOA.³⁵² “The matter is currently before a Canadian court.”³⁵³

After “a six-year investigation conducted by the Calgary RCMP International Anti-Corruption Unit,” Niko Resources Ltd., a Calgary-based oil and gas exploration and production company, was charged with one count under section 3(1)(b) of the CFPOA.³⁵⁴ The allegations against Niko Resources Ltd. centered on the provision, in 2005, of a vehicle and the payment of certain travel expenses to a former Bangladeshi State Minister for Energy and Mineral Resources.³⁵⁵

On June 24, 2011, Niko Resources entered a guilty plea before the Alberta Court of Queen’s Bench.³⁵⁶ In a joint submission found in an agreed statement of facts, both Niko Resources and the Crown recommended to the court a total fine of \$9,499,000 (a base \$8,260,000 fine together with a 15% Victim Fine Surcharge),³⁵⁷ which Justice Brooker “imposed as the appropriate sentence.”³⁵⁸ Additionally, Niko Resources has been placed under a prohibition order, which

348. Boscariol, *supra* note 343.

349. *Id.*

350. *11th Report to Parliament, supra* note 329.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Corruption Charge Laid Against NIKO Resources*, ROYAL CANADIAN MOUNTED POLICE (June 24, 2011), <http://www.rcmp-grc.gc.ca/ab/news-nouvelles/2011/110624-niko-eng.htm>.

355. *Id.*

356. *Id.*

357. Agreed Statement of Facts at para. 57, *The Queen v. Niko Resources, Ltd.* (2011) (Can. Alta. Q.B.), available at <http://www.osler.com/uploadedFiles/Agreed%20statement%20of%20facts.pdf>.

358. *Corruption Charge Laid Against NIKO Resources, supra* note 354.

allows the court to supervise Niko Resources for three years in order to ensure that the company conducts audits to examine and ensure its compliance with the CFPOA.³⁵⁹

In April 2012, two executives from SNC-Lavalin were charged for bribing officials in Bangladesh contrary to the CFPOA.³⁶⁰ The charges relate to an investigation of bidding practices for the \$1.2 billion Padma bridge project in Bangladesh.³⁶¹ The World Bank, which was funding the project, alerted Canadian authorities to potential corruption by bidders.³⁶²

The latest development on the Canadian scene concerns Griffiths Energy International, a Calgary-based company that is being investigated by the Canadian authorities regarding improper payments in the acquisition of production sharing contracts from the government of the Republic of Chad.³⁶³ The company self-reported the matter to the RCMP after an internal investigation and was charged with one count under Canada's Corruption of Foreign Public Officials Act.³⁶⁴ The company subsequently paid a fine of \$10.35 million.³⁶⁵

N. Civil Liability

Civil proceedings in Canada tend to follow criminal proceedings. To date, there has only been one successful prosecution.³⁶⁶ However, given the success of private litigants in competition law with class actions following closely on the heels of government prosecutions, we can expect this type of litigation in the bribery area. The cause of action will be similar to those that have been instituted in the United States. The proceedings are based on a breach of fiduciary duty by officers and directors in failing to maintain adequate compliance programs to prevent bribery.³⁶⁷

Both the Ontario³⁶⁸ and Quebec³⁶⁹ Superior Courts have certified actions as class proceedings on behalf of SNC-Lavalin shareholders.³⁷⁰ The Ontario case

359. *Id.*

360. *Canada's Fight Against Foreign Bribery: Thirteenth Annual Report to Parliament*, FOREIGN AFFAIRS AND INT'L TRADE CANADA (Dec. 17, 2012), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/13-report-rapport.aspx?view=d>.

361. *Id.*

362. Greg McArthur, *SNC_Lavalin in Bangladesh: World Bank Sees 'Conspiracy'*, THE GLOBE AND MAIL, <http://m.theglobeandmail.com/report-on-business/snc-lavalin-in-bangladesh-world-bank-sees-conspiracy/article8963225/?service=mobile> (last updated Feb. 22, 2013).

363. *Griffiths Energy International Announces Settlement*, GRIFFITHS ENERGY (Jan. 25, 2013), <http://www.griffithsenergy.com/s/news.asp?ReportID=567642>.

364. *Id.*

365. *Id.*

366. ORG. FOR ECON. CO-OPERATION AND DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN CANADA 9 (2011), available at <http://www.oecd.org/canada/Canadaphase3reportEN.pdf>.

367. *See, e.g., The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc. (Drywall)*, 2012 ONSC 5288 (Can. Ont. Sup. Ct. J.).

368. *Id.*

369. *Delaire v. SNC-Lavalin Group Inc.*, 2013 QCCS 400 (Can.).

370. Public Notice, SNC-Lavalin Group Inc. Securities Class Actions: Notice of Certification and Authorization and the Granting of Leave to Proceed with Statutory Secondary Market Misrepresentation

alleges specifically that SNC issued disclosure documents which “contained misrepresentations relating to, among other things: (a) the adequacy of SNC’s internal controls; (b) the compliance of certain of SNC’s financial statements with generally accepted accounting principles; and (c) the compliance of members of SNC’s management with [the company’s Code of Ethics and Business Conduct].”³⁷¹ As a result of these alleged misrepresentations, class members contend that the price of SNC’s securities became inflated, and that the class members suffered damage when the truth was publicly revealed.³⁷² The Ontario action claims \$1 billion in damages.³⁷³

Both the Ontario and Quebec courts granted the plaintiffs leave to commence actions under the secondary market liability provisions of both the Ontario and Quebec Security Acts as well as the analogous provisions of the securities legislation of the other Canadian provinces.³⁷⁴

O. New Legislation

On February 5, 2013, the Canadian government tabled Bill S-14, which introduces amendments to the CFPOA.³⁷⁵ The proposed amendments strengthen Canada’s anti-corruption law, expanding the CFPOA’s scope and increasing the maximum penalty for convicted individuals from five to fourteen years imprisonment.³⁷⁶

Among the amendments’ most significant developments is their introduction of “nationality jurisdiction” for foreign bribery offenses.³⁷⁷ Under the new CFPOA, the Crown will no longer have to show a “real and substantial connection” between the impugned activities and Canada.³⁷⁸ Instead, the RCMP may assert jurisdiction over the conduct of Canadian companies and individuals based on their nationality, regardless of where the alleged bribery took place.³⁷⁹ The amendments also create a new “books and records” offense, making it a crime to conceal the bribery of foreign officials through financial record-keeping, and remove the exception for facilitation payments.³⁸⁰ Finally, the amendments remove the requirement that business activities be “for profit” in order to be caught by the CFPOA and give the RCMP exclusive authority to lay charges for offenses under the CFPOA.³⁸¹

Claims [hereinafter SNC-Lavalin Class Action Notice], available at http://snclavalinclassaction.com/Files/snclavalin/v5-SNC_Notice__English_.pdf (last visited Mar. 9, 2013).

371. *Drywall*, 2012 ONSC 5288, at para. 24.

372. *Id.* at paras. 28-29.

373. *Id.* at para. 30.

374. See generally SNC-Lavalin Class Action Notice, *supra* note 370.

375. S-14, An Act to Amend the Corruption of Foreign Public Officials Act, 41st Parliament, 1st Sess. (Can. 2013); see also Peter E. Kirby & Guy W. Giorno, *Canada: Bill S-14: Canada Strengthens Its Anti-Bribery Law*, MONDAQ (Feb. 12, 2013), <http://www.mondaq.com/canada/x/221222/White+Collar+Crime+Fraud/Bill+S14+Canada+Strengthens+Its+AntiBribery+Law>.

376. *Kirby & Giorno*, *supra* note 375.

377. Milos Barutciski, et al., *Canada Moves to Strengthen Anti-Bribery Legislation*, in INT’L TRADE UPDATE (Feb. 2013), <http://www.bennettjones.com/uploadedFiles/Publications/Updates/InternationalTradeUpdate-Canada%20MovestoStrengthenAnti-BriberyLegislation-Feb2013.pdf>.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

IV. THE U.K. LEGISLATION

The U.K. Bribery Act of 2010³⁸² came into force on July 1, 2011,³⁸³ thirteen years after the United Kingdom ratified the OECD Convention. The delay was the subject of considerable criticism in the international community. In fact, the United Kingdom was literally forced to enact the legislation as a result of the controversy involving allegations of bribery between British defense contractor, BAE Systems, of the government of Saudi Arabia.³⁸⁴ In the mid-80's the two parties had entered into a \$65 billion arms deal with respect to the supply of fighter jets to Saudi Arabia.³⁸⁵ Allegations of bribery arose. The U.K. government took steps to prevent the investigation given the importance of the deal to British industry.³⁸⁶ Ultimately, the prosecution was led by the Americans, and only after that initiative did British Authorities prosecute.³⁸⁷ The new legislation followed that event.³⁸⁸ "The Act has far-reaching territorial scope" and "is more stringent in many ways than the [U.S. legislation]."³⁸⁹ "For example, unlike the FCPA, [it] does not provide a safe harbor for 'facilitation payments.' It also [covers] bribery of private sector employees."³⁹⁰ And, it also includes a unique strict liability offense for corporations that fail to take adequate steps to prevent bribery.³⁹¹

A. *The Offenses*

The Act repeals the current statutory and common law offenses and replaces them with four new offenses:

1. An offense of active bribery—giving, promising or offering a bribe which applies in the public or private sector;³⁹²
2. An offense passive bribery—requesting or agreeing to receive or accepting a bribe which also applies in the public or private sector;³⁹³
3. A specific offense of bribery of foreign public officials;³⁹⁴ and
4. A new corporate offense that applies where a corporate entity or partnership fails to prevent persons performing services on their behalf from paying bribes.³⁹⁵

382. Bribery Act, 2010, c. 23 (U.K.).

383. U.K. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 2 (2011) [hereinafter BRIBERY ACT GUIDANCE], available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

384. See, e.g., Afua Hirsch, *New Bribery Law Puts Overseas Payments Under Scrutiny: Onus is Now On Business to Prevent Dishonesty and Act Seen As Indirect Response to BAE Case*, THE GUARDIAN (Apr. 11, 2010), <http://www.guardian.co.uk/uk/2010/apr/11/law-bribery-bae-overseas>.

385. See generally David Leigh & Rob Evans, *The al-Yamamah Deal*, THE GUARDIAN (June 7, 2007), <http://www.guardian.co.uk/world/2007/jun/07/bae15>.

386. See, e.g., David Leigh & Rob Evans, *UK Tries to Sabotage BAE Bribes Inquiry: Attempt to Oust Legal Expert Heading European Corruption Investigation*, THE GUARDIAN (Apr. 23, 2007), <http://www.guardian.co.uk/world/2007/apr/24/bae.saudi-arabia>.

387. Warin, Falconer & Diamant, *supra* note 268.

388. *Id.* at 4.

389. *Id.*

390. *Id.*

391. Bribery Act, 2010, c. 23, s. 7.

392. BRIBERY ACT GUIDANCE, *supra* note 383, at 8 (section 1 of the Act).

393. *Id.* (section 2 of the Act).

394. *Id.* (section 6 of the Act).

“The Serious Fraud Office (SFO) is the lead agency in England, Wales and Northern Ireland for investigating and prosecuting cases of domestic and overseas corruption.”³⁹⁶

In England and Wales, prosecution for offences under the Act require the personal consent of the Director of Public Prosecutions or the Director of the Serious Fraud Office. They will make their decision in accordance with the *Code for Crown Prosecutors* applying the two stage test of whether there is sufficient evidence to provide a realistic prospect of conviction and, if so, whether a prosecution is in the public interest.³⁹⁷

The offenses of active and passive bribery that existed previously in English statute and common law apply to both public and private sectors.

The offense of bribing a foreign public official is a new discrete offense.³⁹⁸ The bribery must intend to influence the foreign public official in his or her capacity as a foreign public official.³⁹⁹ The briber must “intend to obtain or retain business or an advantage.”⁴⁰⁰ The briber must directly, or through a third-party, offer, promise, or give a financial or other advantage to the foreign official or to another person at the official’s request.⁴⁰¹ An offense is not committed if the foreign official is permitted or required under applicable written local law to be influenced in his or her capacity as a foreign public official by the offer promise or gift.⁴⁰² However, the belief that local law permits a payment is no defense.⁴⁰³ The local law defense will only apply where local written law actually permits or requires officials to be influenced by the payment.⁴⁰⁴

As well as being applicable to all acts committed by individuals or corporate entities within the United Kingdom, the bribery offense also applies to acts committed overseas.⁴⁰⁵ The offenses of bribing another person, being bribed, and bribing foreign public officials applies to British citizens, bodies incorporated under the law of any part of the United Kingdom, and individuals ordinarily resident in any part of the United Kingdom.⁴⁰⁶

Under the new corporate offense, those with U.K. operations or branches are caught by this offense “even in relation to non-U.K. business, irrespective of

395. *Id.* (section 7 of the Act).

396. *Bribery: UK Law Enforcement*, FIN. CRIME RISK MGMT. (2008), <http://fcrm.co.uk/view/corruptionlea>.

397. SERIOUS FRAUD OFFICE, BRIBERY ACT 2010: JOINT PROSECUTION GUIDANCE OF THE DIRECTOR OF THE SERIOUS FRAUD OFFICE AND THE DIRECTOR OF PUBLIC PROSECUTIONS 2 (U.K.) (n.d.) [hereinafter SFO JOINT PROSECUTION GUIDANCE], available at http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf.

398. *Id.* at 3.

399. BRIBERY ACT GUIDANCE, *supra* note 383, at 3.

400. *Id.*

401. STEVEN CORNEY ET AL., OLSWANG, THE BRIBERY ACT 2010: PRACTICE NOTE 7 (2011) [hereinafter CORNEY PRACTICE NOTE], available at http://www.olswang.com/pdfs/briberyact_may11.pdf.

402. BRIBERY ACT GUIDANCE, *supra* note 383, at 11.

403. *Id.* at 12.

404. *Id.* at 10-11.

405. *Id.* at 9.

406. *Id.* (noting that these three categories qualify as having a “close connection with the U.K.,” which would allow the U.K. courts to exert jurisdiction over the section 1, 2, and 6 offenses).

their place of incorporation.”⁴⁰⁷ This is a strict liability offense of failing to prevent a bribe being paid on the company’s behalf subject to showing that there were adequate procedures in place designed to prevent persons from acting corruptly.⁴⁰⁸ This offense now covers the acts of its employees and representatives, and will in some circumstances cover subsidiary companies.⁴⁰⁹

Specifically, that Act enforces that “a company’s criminal liability extends to bribes made by its associated persons. An associated person is anyone who performs services for or on behalf of the company. It could be an individual or a corporate body. It could be [a] Canadian subsidiary, supplier, contractor or joint venture partner.”⁴¹⁰ The guidance statement issued by the government does indicate that “corporate ownership will not automatically attract liability for the parent of a subsidiary involved in bribery. An individual or company committing bribery must intend the parent company to benefit, even where the parent company indirectly benefits” regardless of intent.⁴¹¹ “Liability will not extend up and down an entire contractual chain. A contractor or supplier will generally only be an associated person of the entity with which it has a direct contractual relationship.”⁴¹²

“For joint ventures, the [g]uidance distinguishes between joint ventures conducted through separate companies and those conducted through contractual arrangements. A joint venture company will not automatically be an associated person of its shareholders.”⁴¹³ However, “the joint venture company may be an associated person if it is performing services for the shareholders. Where the joint venture is established by way of a contract it will depend on how much control the participant has over the arrangement.”⁴¹⁴

As indicated, “the Act does . . . provide a defence to ‘failing to prevent bribery’ where commercial organizations can show they had ‘adequate procedures’ in place to prevent an act of bribery being committed ‘associated persons.’”⁴¹⁵

407. James MacArthur et al., *The Bribery Act—The New Offences and Their Impact on Private Equity*, LEXOLOGY (July 28, 2010), <http://www.lexology.com/library/detail.aspx?g=5a8e1b06-b187-49d7-bed9-bedfacb5a1fd>; see also BRIBERY ACT GUIDANCE, *supra* note 383, at 9 (noting that the “close connection” requirement does not apply to section 7 offenses).

408. Bill Jamieson & Lee Howes, *United Kingdom: UK Bribery Act 2010: Facts and Implications for Businesses*, MONDAQ (Feb. 6, 2012), <http://www.mondaq.com/x/162966/White+Collar+Crime+Fraud/UK+Bribery+Act+2010+Facts+and+Implications+for+Businesses>. See also BRIBERY ACT GUIDANCE, *supra* note 383, at 15.

409. BRIBERY ACT GUIDANCE, *supra* note 383, at 16-18 (discussing the liability of a commercial organization of acts of “associated” parties including various employees, contractors, contractual joint ventures, subsidiaries, and other agents).

410. Eric Morgan & David Morrill, *The New U.K. Bribery Act and its Implications for Canadian Companies*, OSLER (July 25, 2011), <http://www.osler.com/newsresources/details.aspx?id=3648&langtype=4105>.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. Jeff Lane, *The UK Bribery Act of 2010 Will Have Widespread Implications for Global Companies*, CHINA LAW INSIGHT (Apr. 20, 2011), <http://www.chinalawinsight.com/2011/04/articles/dispute-resolution/the-uk-bribery-act-of-2010-will-have-widespread-implications-for-global-companies/>.

An organization's board of directors must design, implement and regularly review policies for preventing bribery within that organization.⁴¹⁶ An effective policy must:

- Recognize the importance of “the board of directors taking responsibility for anti-corruption programs and appointing a senior officer accountable for oversight;”⁴¹⁷
- Assess the “risks specific to the [organization], including risks linked to the nature or location of the organization's activities;”⁴¹⁸
- Establish “clear [employment] policies and procedures and train[] new and existing staff in anti-bribery procedures;”⁴¹⁹
- Have “robust internal financial controls and record keeping to minimize the risk of bribery;”⁴²⁰ and
- Establish “whistle-blowing [or speak-up] procedures so that employees can report corruption safely and confidentially.”⁴²¹

B. The Penalties

The Act provides for maximum penalties of ten years' imprisonment and/or an unlimited fine for individuals, and an unlimited fine for corporations that commit bribery offenses or corporate offenses.⁴²² Directors and officers of companies who conspire with respect to the bribery also face liability.⁴²³ As in the United States, the law provides for confiscation or disgorgement of profits.⁴²⁴ The government states that “[i]t is a matter for the court to determine the benefit derived from an offence in an individual case.”⁴²⁵ Also, as in the United States, an offending corporation can be debarred from competing for public contracts where convicted of a corruption offence.⁴²⁶ Under the regulations, this applies automatically and perpetually.⁴²⁷

C. The Defenses

The defenses in the United Kingdom are more limited than in Canada and the United States. Canada and the United States have three defenses.⁴²⁸ First, “the

416. BRIBERY ACT GUIDANCE, *supra* note 383, at 20-31 (laying out six principles for commercial organizations wishing to satisfy the “adequate procedures” standard).

417. DLA Piper U.K. LLP, *Bribery Act 2010: A Guide for In-House Lawyers*, LEGAL500 (June 2010), <http://www.legal500.com/c/laos/developments/11300>.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 10.

423. *Id.*

424. TARUN 2D, *supra* note 8, at 250.

425. COMMAND OF HER MAJESTY, BRIBERY: GOVERNMENT RESPONSE TO THE CONCLUSIONS AND RECOMMENDATIONS OF THE JOINT COMMITTEE REPORT ON THE DRAFT BRIBERY BILL, 2009, Cm. 7748, at 16 (U.K.), available at <http://www.official-documents.gov.uk/document/cm77/7748/7748.pdf>.

426. BRIAN BASSINGTON, EPPING FOREST DIST. COUNCIL, CORPORATE BRIBERY ACT POLICY 3 (2011), available at [http://rds.eppingforestdc.gov.uk/Published/C00000565/M00006745/AI00030735/\\$BriberyActAppI.doc.pdf](http://rds.eppingforestdc.gov.uk/Published/C00000565/M00006745/AI00030735/$BriberyActAppI.doc.pdf).

427. *Id.*

428. Morgan & Morritt, *supra* note 410.

payments are lawful under local law.”⁴²⁹ Second, “the payments are reasonable business expenditures,” and third, “the payments are facilitation payments.”⁴³⁰ The U.K. legislation has no exemption for facilitation payments.⁴³¹

The guidance provides valuable insight into the U.K. government’s view of how certain provisions of the Act should be interpreted concerning such matters as corporate hospitality, the meaning of associated persons, facilitation payments, and the jurisdictional reach of the Act. However, it is not clear to what extent the courts will share the same view on the Act’s interpretation as they set out in the Ministry of Justice guidance.

D. Territorial Jurisdiction

The U.K. law has much greater extraterritorial reach than the U.S. or Canadian law. As long as a company is incorporated in the United Kingdom, or carries on business in the United Kingdom, there is no requirement for the bribery, or any of the individuals involved, to have any connection to the United Kingdom.⁴³²

E. Enforcement Issues

1. SFO Whistleblower Service

On November 1, 2011, the U.K. SFO launched a new whistleblowing service known as SFO Confidential for anonymous reporting of suspected fraud and corporate corruption.⁴³³ A whistleblower may choose to remain anonymous when submitting the report.⁴³⁴ The SFO has indicated it would reveal the whistleblower’s identity only on a strictly need to know basis or where required to do so by a judge.⁴³⁵ While the SFO information may be shared with other law enforcement agencies, the SFO has said that in that process it would not reveal the identity of the information source.⁴³⁶

While the new service bears some resemblance to the SEC whistleblowing program there are significant differences. First, the U.K. service does not offer any financial incentive to whistleblowers.⁴³⁷ By comparison, in the United States whistleblowers may receive a reward between 10% and 30% of the total sanction in those cases where the sanction is more than \$1 million.⁴³⁸ In the

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 9.

433. *The UK’s Serious Fraud Office Announces New Whistleblowing Service*, SIDLEY AUSTIN LLP (Nov. 15, 2011) [hereinafter SIDLEY AUSTIN UPDATE], http://www.sidley.com/files/News/f974bd05-60c7-4196-8b46-008ee924e71d/Presentation/NewsAttachment/88781575-cf8b-4e62-8273-0d52db030f0a/FCPA%20Anti-Corruption%20Update_15.11.2011.pdf.

434. *SFO Confidential—Giving Us Information in Confidence*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/fraud/sfo-confidential--giving-us-information-in-confidence.aspx> (last visited Mar. 7, 2013).

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*; 15 U.S.C. § 78u-6 (2012).

United States, whistleblowers are protected from retaliation by their employer.⁴³⁹ The extent of that protection is not clear in the U.K. legislation.

2. Self Reporting

On October 9, 2012, “the SFO published updated statements of policy on certain key issues arising under the Act. These statements of policy deal with the topics of facilitation payments and business expenditures. . . . In addition, the SFO has updated its general policy on corporate self-reporting of offences.”⁴⁴⁰

The SFO confirms that the fact that a corporate body has reported itself will be a relevant consideration in determining whether the SFO will prosecute.⁴⁴¹ However, the SFO indicates that “self-reporting is no guarantee that a prosecution will not follow and each case will turn on its own facts.”⁴⁴² Even “[i]n cases where the SFO does not prosecute a self-reporting corporate body, the SFO reserves the right (i) to prosecute it for any unreported violations of law, and (ii) to lawfully provide information on the reported violations to other bodies (such as foreign police forces).”⁴⁴³

“The SFO has reiterated that it will only prosecute if on the evidence there is a realistic prospect of conviction and it is in the public interest to do so.”⁴⁴⁴ Public statements by SFO officials indicate that between 2009 and 2012 some twenty companies self-reported.⁴⁴⁵ “Of these only four have to date been subjected to civil recovery or prosecution.”⁴⁴⁶ Under the new guidance the SFO emphasized that “a company’s decision to self-report is [only] one of a number of factors to be taken into consideration in deciding whether to prosecute.”⁴⁴⁷ Previously it was thought that self-reporting would lead the SFO to opt for civil as opposed to criminal proceedings whenever possible.⁴⁴⁸ The latest guidance appears to take a step back stating instead that “self-reporting is no guarantee that a prosecution will not follow.”⁴⁴⁹

439. 15 U.S.C. § 78u-6(h).

440. Kevin Roberts & Keily Blair, *Client Alert: The Serious Fraud Office Releases Updated Guidance on Key Aspects of the UK Bribery Act 2010 and Self-Reporting* at 1, MORRISON FORRESTER (Oct. 11, 2012), <http://www.mofo.com/files/Uploads/Images/121011-UK-Bribery-Act-2010.pdf>; see also *Revised Policies*, U.K. SERIOUS FRAUD OFFICE (Oct. 9, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>.

441. Roberts & Blair, *supra* note 440, at 2.

442. *Id.*

443. *Corporate Self-Reporting*, U.K. SERIOUS FRAUD OFFICE (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx>.

444. Roberts & Blair, *supra* note 429, at 2.

445. GIBSON DUNN, UK SERIOUS FRAUD OFFICE REVISES GUIDANCE ON FACILITATION PAYMENTS AND CORPORATE HOSPITALITY UNDER THE BRIBERY ACT, AND ON SELF-REPORTING OF MISCONDUCT 3 (Oct. 11, 2012) [hereinafter GIBSON DUNN FACILITATION AND HOSPITALITY], available at <http://www.gibsondunn.com/publications/Documents/UKSeriousFraudOffice-RevisesGuidance-FacilitationPayments-CorporateHospitality-BriberyAct.pdf> (referencing a speech by former SFO Director, Richard Alderman).

446. *Id.*

447. *Id.*

448. *Id.*

449. *Corporate Self-Reporting*, *supra* note 443.

3. Facilitation Payments

The U.K. legislation, unlike the American and Canadian legislation, has no exemption for facilitation payments.⁴⁵⁰ The new guidance does not change this position but suggests that relatively small payments will, depending on the circumstances, not likely attract prosecution.⁴⁵¹ “[T]he only individual yet to be convicted under the [Act] is currently serving three years in jail for accepting £500 in return for removing minor driving offenses from official records.”⁴⁵² The joint prosecution guidance of the Director of Serious Fraud Office and the Director of Public Prosecution now states that “large or repeated payments are more likely to attract a significant sentence . . . [while] a single small payment will likely result in a nominal penalty.”⁴⁵³

4. Hospitality Payments

Hospitality payments have attracted prosecutions in the United States and Canada. The new guidance offers some clarity. The SFO has indicated they “are not interested in ordinary corporate entertaining.”⁴⁵⁴ The Director General, David Greene, has stated that “the sort of bribery we would be investigating would not be tickets to Wimbledon or bottles of champagne. We are not the serious champagne office.”⁴⁵⁵ However “companies should continue to ensure that any hospitality or promotional expenditure[s] [are] proportionate and properly documented.”⁴⁵⁶

F. The Enforcement Record

Convictions for foreign bribery are relatively recent in the United Kingdom. One of the first was the conviction of Balfour Beatty, which took place in 2008 and resulted in a £2.5 million penalty.⁴⁵⁷ The company was part of a joint venture to build a library in Alexandria, Egypt.⁴⁵⁸ The investigation resulted in a civil consent order under the Proceeds of Crime Act of 2002.⁴⁵⁹

In 2009, the SFO secured fines of £6.5 million from Mabey and Johnson and £5 million from AMEC plc.⁴⁶⁰ On February 23, 2011, former executives of Mabey and Johnson were sentenced in the United Kingdom to prison terms for making illegal payments to the Iraqi government.⁴⁶¹ Richard Forsyth, the former managing director, was sentenced to twenty-one months in prison and ordered to

450. Morgan & Morrit, *supra* note 410.

451. GIBSON DUNN FACILITATION AND HOSPITALITY, *supra* note 445, at 1.

452. *Id.* at 1-2.

453. SFO JOINT PROSECUTION GUIDANCE, *supra* note 397, at 9.

454. GIBSON DUNN FACILITATION AND HOSPITALITY, *supra* note 445, at 2 (quoting SFO Director, David Green).

455. *Id.* (quoting SFO Director, David Green).

456. *Id.* at 3.

457. TARUN 2D, *supra* note 8, at 427.

458. *Id.*

459. *Id.*; Proceeds of Crime Act, 2002, c. 29 (U.K.).

460. TARUN 2D, *supra* note 8, at 428.

461. Press Release, Serious Fraud Office, Mabey & Johnson Ltd: Former Executives Jailed for Helping Finance Saddam Hussein's Government (Feb. 23, 2011), <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/mabey--johnson-ltd-former-executives-jailed-for-helping-finance-saddam-hussein's-government.aspx>.

pay £75,000 in prosecution costs.⁴⁶² David Mabey was sentenced to eight months in prison and ordered to pay £125,000 in prosecution costs.⁴⁶³ Both were disqualified from acting as a company director for a number of years.⁴⁶⁴

In March 2010, Innospec Inc., a manufacturer of chemicals, pleaded guilty in the United States to bribery charges⁴⁶⁵ at the same time as its U.K. subsidiary, Innospec Ltd., pleaded guilty under the U.K. legislation relating to bribes to Indonesian officials. In the United Kingdom, Innospec Ltd. agreed to pay a criminal penalty of £9 million.⁴⁶⁶ The fine in the United States was \$16.3 million.⁴⁶⁷ The U.K. case resulted from a U.S. referral in October 2007.⁴⁶⁸

In 2010, the U.K. SFO also obtained a £30 million fine from BAE Systems, Britain's largest defense contractor, in a Tanzania bribery case for accounting irregularities.⁴⁶⁹ The SFO took into account BAE's implementation of substantial ethical and compliance reforms and the company's agreement with the U.S. DOJ, which involved a \$400 million fine with respect to the same incident.⁴⁷⁰

In 2011, MW Kellogg Ltd. pleaded guilty and received a \$400 million fine from the United States and £7 million fine from the United Kingdom.⁴⁷¹ In the same year, Johnson & Johnson pleaded guilty in the United States and paid \$70 million in fines compared to a £5 million fine in the United Kingdom.⁴⁷² In 2011, the Weir Group also paid £17 million, and Macmillan Publishers Ltd. paid £11.2 million in a civil consent order⁴⁷³ as set out below:

On July 22, 2011, the Serious Fraud Office (SFO) announced that it had taken action resulting in a civil recovery order requiring Macmillan Publishers Limited (Macmillan) to pay approximately £11.3 million to resolve an investigation regarding unlawful payments to secure contracts in relation to business in Africa. In addition to the disgorgement order, Macmillan will be subject to a review by an independent monitor who will report to the SFO and World Bank within 12 months.

The investigation of Macmillan, which focused on the company's Education Division, was initiated by the World Bank as a result of an agent's attempt to improperly influence the award of a tender in Southern Sudan. The City of London Police executed search warrants in December 2009, and Macmillan subsequently made a report regarding the matter to the SFO. In relation to the SFO investigation, the SFO required Macmillan to follow the SFO's published guidance regarding

462. *Id.*

463. *Id.*

464. *Id.*

465. Press Release, U.S. Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-278.html>.

466. TARUN 2D, *supra* note 8, at 428.

467. Press Release, U.S. Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), <http://www.justice.gov/opa/pr/2010/March/10-crm-278.html>.

468. *Id.*

469. *BAE Systems to Pay \$400 Million Fine, Plead Guilty in Conspiracy*, INT'L BUS. TIMES (Feb. 5, 2010), <http://www.ibtimes.com/bae-systems-pay-400-million-fine-plead-guilty-conspiracy-369935>.

470. Press Release, Serious Fraud Office, BAE Systems PLC (Feb. 5, 2010), <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/bae-systems-plc.aspx>; *see also BAE Systems to Pay \$400 Million Fine, Plead Guilty in Conspiracy*, *supra* note 469.

471. TARUN 2D, *supra* note 8, at 428.

472. *Id.*

473. *Id.*

cooperation in corruption investigations. Pursuant to that guidance, Macmillan conducted a series of internal reviews and investigations, reported the results to the SFO, and continued to cooperate with the City of London Police and the World Bank.⁴⁷⁴

The SFO announced on January 13, 2012, that it had won a civil recovery order from the High Court requiring Mabey and Johnson's parent company to forfeit approximately £130,000 in share dividends funded by unlawfully obtained contracts to build bridges in Iraq. This action stems from the September 2009 prosecution of Mabey and Johnson and the February 2011 prosecution of several of its former officers for breaching United Nations sanctions against Iraq. This is the first time that a civil recovery order has been used to recover corruptly derived dividends paid to shareholders. . . .

[O]n July 3, 2012, the SFO entered into a £1.9 million settlement of civil recovery proceedings with Oxford Publishing Ltd. relating to allegedly unlawful payments by certain of the company's East African subsidiaries in connection with government contracts won between 2007 and 2010. As part of the settlement, Oxford Publishing will retain an independent compliance monitor to assess its compliance procedures and report to the SFO within 12 months. The settlement follows the company's voluntary disclosure to both the SFO and the World Bank, which funded two of the tenders at issue.⁴⁷⁵

Oxford Publishing Ltd. is owned by Oxford University Press which is owned by Oxford University.⁴⁷⁶

[Oxford University Press] discovered that its subsidiaries in Kenya and Tanzania had used illegal means to win contracts to sell its educational publications in these two countries. Some of these contracts are funded by the World Bank. [Oxford University Press] acted immediately to investigate the matter, instructing independent lawyers and forensic accountants to undertake a detailed investigation. Subsequently [Oxford University Press] self-reported some concerns which it had to the SFO.⁴⁷⁷

In 2012, the owner of VIS Securities Solutions Ltd., James Daniel McGeown, admitted to paying bribes to the defense ministry to obtain £16 million in contracts.⁴⁷⁸ He pleaded guilty to sixteen counts of corruption for paying various officials, including William Marks.⁴⁷⁹ Marks pleaded guilty to eleven counts of corruption for taking £66,500 in bribes from McGeown.⁴⁸⁰

474. *U.K. Regulators Announce Significant Anti-Corruption Settlements*, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM LLP & AFFILIATES (July 27, 2011), <http://www.skadden.com/insights/uk-regulators-announce-significant-anti-corruption-settlements>.

475. GIBSON DUNN, 2012 MID-YEAR FCPA UPDATE 21 (July 9, 2012) [hereinafter 2012 MID-YEAR FCPA UPDATE], available at <http://www.gibsondunn.com/publications/Pages/2012MidYearFCPAUpdate.aspx>.

476. Adam Greaves, *Oxford University Press Pays Substantial Civil Settlement Fine for Corrupt Overseas Contracts and is Debarred from World Bank Tenders*, BRIBERY LIBRARY (July 16, 2012), <http://www.briberylibrary.com/compliance-programmes/oxford-university-press-pays-substantial-civil-settlement-fine-for-corrupt-overseas-contracts-and-is-d/>.

477. *Id.*

478. Press Release, Serious Fraud Office, *Guilty Pleas in £16 Million Corruption Trial* (Feb. 21, 2012), <http://cymraeg.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/guilty-pleas-in-16-million-corruption-trial.aspx>.

479. *Id.*

480. *Id.*

Another ministry official, John Symington, pleaded to four counts of corruption and admitted to taking £18,000 in bribes from McGeown.⁴⁸¹

G. Civil Liability

Civil liability in the United Kingdom is not driven by private actions to the same degree as in Canada and the United States. This is largely because class actions are not a well-developed concept in the United Kingdom. While private plaintiffs have limited rights in the United Kingdom, the SFO has a civil remedy under the Bribery Act and the Proceeds of Crime Act of 2002 (POCA).⁴⁸² The first use of this provision occurred in the Macmillan case in July 2011 referred to above.⁴⁸³ Macmillan was required to pay 11.2 pounds representing the profits made from bribing government officials in a number of African countries.⁴⁸⁴ The second civil recovery order the SFO obtained under the POCA was against the sole shareholder of Mabey and Johnson, also referred to above.⁴⁸⁵ That order, obtained in January 2012, related to the dividends the shareholder received from contracts obtained through unlawful conduct.⁴⁸⁶ As in the United States, the U.K. authorities generally use civil procedures where parties have self-reported and fully cooperate.⁴⁸⁷

H. Other Remedies

There are remedies available to the SFO other than criminal and civil fines. As in the United States, parties found liable under the anti-bribery statute can be debarred from public contracting. This provision is contained in the Public Contracts Regulations of 2006.⁴⁸⁸ The SFO has the ability under the POCA to require disgorgement of profits in a manner similar to the United States provision.⁴⁸⁹ In addition, the U.K. legislation provides that on conviction under the Bribery Act individuals can be prohibited from acting as a director under the Company Directors Disqualification Act of 1986.⁴⁹⁰ Finally, settlements in the United Kingdom can provide for the appointment of independent corporate monitors who report to the SFO, a provision that was included in the settlement with Macmillan Publishers in July 2011.⁴⁹¹

481. *Id.*

482. Proceeds of Crime Act, 2002, c. 29 (U.K.).

483. *See supra* text accompanying note 475.

484. GIBSON DUNN, 2012 MID-YEAR FCPA UPDATE 21 (July 9, 2012), *available at* <http://www.gibsondunn.com/publications/Pages/2012MidYearFCPAUpdate.aspx>.

485. *See supra* text accompanying note 475.

486. *See generally* ROBERT AMAEE, JOHN RUPP & ALEXANDRA MELIA, COVINGTON & BURLING LLP, VOLUNTARY DISCLOSURE AND THE UK PROCEEDS OF CRIME ACT: THE FINAL ACT IN THE MABEY & JOHNSON CASE (Jan. 18, 2012).

487. TARUN 2D, *supra* note 8, at 452-54.

488. Public Contracts Regulations, 2006, S.I. 2006/5, art. 23, ¶ 1(c) (U.K.).

489. Proceeds of Crime Act, 2002, c. 29, §§ 240-242 (U.K.).

490. TARUN 2D, *supra* note 8, at 427.

491. *See, e.g.*, Richard L. Cassin, *Macmillan in £11 Million U.K. Civil Settlement*, FCPA BLOG (July 22, 2011, 7:28 AM), <http://www.fcpablog.com/blog/2011/7/22/macmillan-in-11-million-uk-civil-settlement.html>.

V. THE MAJOR DIFFERENCES

It is important to compare the legislation in all three countries because most multinationals will face liabilities under all three statutes. The major differences are set out below.

A. *Extraterritoriality*

The Canadian legislation has the least extraterritorial application. The CFPOA applies only if a bribery offense has a “real and substantial link” to Canada, meaning that a significant portion of the activities took place in Canada and impacted Canadians.⁴⁹² The FCPA has greater territorial application than the CFPOA, but the U.K. Bribery Act of 2010 has the greatest extraterritorial application.⁴⁹³ The U.K. Act applies to U.K. individuals or organizations regardless of where the conduct occurs.⁴⁹⁴ However, unlike the U.S. and Canadian laws, the U.K. Act also applies to non-U.K. individuals or organizations that carry out a business or part of the business in any part of the United Kingdom.⁴⁹⁵ What constitutes part of the business is not defined but is potentially very broad.⁴⁹⁶ Furthermore, no part of the offense must take place in the United Kingdom as long as the person committing the offense has a close connection to the United Kingdom.⁴⁹⁷ In fact, some commentators question whether the jurisdictional liability under the U.K. Bribery Act is contrary to international law.⁴⁹⁸

The FPCA is applicable to any U.S. company, citizen, or legal resident who commits a violation in the United States or its territories, as well as to foreign companies with securities registered in the United States.⁴⁹⁹ In addition, the FPCA applies to any company that has payments made directly, or via third parties, through U.S. institutions.⁵⁰⁰ This provision could catch, for example, a Canadian private company that makes improper payments through a U.S. bank account, or a Canadian company with a U.S. officer that offers an improper payment to a government official.

Unlike Canadian legislation the American and British legislation permits courts to take jurisdiction under a nationality principle. This means that regardless of where the offense was committed, if the accused is American or British, or in the case of a corporation, the company is incorporated in America or Britain (or the company is a reporting issuer or carries on part of its business

492. CANADIAN FPOA GUIDE, *supra* note 270, at 7.

493. PWC CFPOA REPORT, *supra* note 38, at 2 (comparison chart of CFPOA, FCPA, and the Bribery Act).

494. *Id.*

495. *The Bribery Act*, TRANSPARENCY INT’L U.K., <http://www.transparency.org.uk/our-work/bribery-act> (last visited Mar. 5, 2013).

496. *Id.*

497. *Id.*

498. Jessica Lordi, Note, *The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violators*, 44 CASE W. RES. L. REV. 955 (2012).

499. FCPA RESOURCE GUIDE, *supra* note 74, at 10-11.

500. *Id.* at 11.

in the country), then American or British courts have jurisdiction.⁵⁰¹ The American authorities have exercised the extraterritorial reach of FCPA extensively. In 2011, 72% of the financial penalties assessed under the statute were against non-U.S. companies.⁵⁰² The Canadian government has recently indicated that it intends to move to a nationality principle.⁵⁰³

B. Commercial Bribery

The Canadian and U.S. legislations are restricted to bribery of foreign officials.⁵⁰⁴ The U.K. legislation, on the other hand, covers private or commercial bribery.⁵⁰⁵ However, in the United States, “commercial bribery payments that are mischaracterized . . . on the books and records of a public company may constitute an FCPA books-and-records or internal controls violation.”⁵⁰⁶ The DOJ has charged parties for improper payments or kickbacks to private parties along with public official bribes in FCPA cases under the general conspiracy statute.⁵⁰⁷

C. Passive Bribery

In the United Kingdom, it is an offense to take a bribe, that is, requesting or accepting an advantage.⁵⁰⁸ In the United States and Canada on the other hand, the offense is limited to active bribery, the offering of an advantage to another person.⁵⁰⁹

D. Defenses

Both Canada and the United States accept as a defense the granting of facilitation payments.⁵¹⁰ These payments are not allowed under U.K. law,⁵¹¹ although the SFO has indicated that it will be somewhat lenient in enforcement of this area and will pursue only large, repeated payments.⁵¹² The Canadian government has indicated, however, that it intends to remove the facilitation defense.⁵¹³

501. See generally MICHAEL FINE, LRN CORP., COORDINATING UK BRIBERY ACT & FCPA COMPLIANCE 9 (2011), available at http://www.lrn.com/sites/default/files/Coordinating%20UK%20Bribery%20Act%20and%20FCPA%20Compliance_0.pdf; see also HARRIS ET AL., *supra* note 43.

502. HARRIS ET AL., *supra* note 43.

503. Susan Hutton, *Canada Sharpens Its Teeth to Take a Bite Out of Bribery*, STIKEMAN ELLIOTT (Feb. 11, 2013), <http://www.canadiansecuritieslaw.com/2013/02/articles/securities-law-compliance/canada-sharpens-its-teeth-to-take-a-bite-out-of-bribery/>.

504. PWC CFPOA REPORT, *supra* note 39, at 2.

505. *Id.*

506. TARUN 2D, *supra* note 8, at 13.

507. *Id.*

508. See generally PWC CFPOA REPORT, *supra* note 38, at 2.

509. *Id.*

510. *Id.* (noting that both the CFPOA and the FCPA allow an “exemption where the payment was lawful under the written laws of the foreign country”).

511. *Id.*

512. SFO JOINT PROSECUTION GUIDANCE, *supra* note 397, at 8-9.

513. Hutton, *supra* note 503.

E. Penalties

Penalties under the U.K. Act are significant, with potentially unlimited fines for both organizations and individuals, as well as a maximum of ten years' imprisonment for individuals.⁵¹⁴ Individuals convicted under the FPCA anti-bribery provisions only face a maximum fine of \$250,000 and/or five years imprisonment.⁵¹⁵ Individuals convicted under the FPCA accounting provisions face maximum fines of \$5 million and imprisonment for up to twenty years.⁵¹⁶ Corporations in the United States may be fined up to \$25 million under the accounting provisions and \$2 million under the anti-bribery provisions.⁵¹⁷

F. Failing to Prevent Bribery

Section 7 of the U.K. Act introduces a new corporate offense where a commercial organization fails to prevent bribery by associated persons.⁵¹⁸ This is a strict liability offense.⁵¹⁹ Associated persons are defined broadly and can include employees, agents, and contractors.⁵²⁰ There is, however, an affirmative due diligence defense if the company can prove it had an adequate compliance program in place to prevent such misconduct.⁵²¹

This offense does not exist under Canadian or American law.⁵²² However, although the CFPOA does not have an expressed due diligence defense, the Crown, in order to prove bribery under the act, must prove intent (*mens rea*).⁵²³ Accordingly, the due diligence of a company may be essential to counter a charge that a company, through the actions of an agency or rogue employee, had the requisite intent to bribe a public official.

G. Limitation Periods

There is no statute of limitations under either the Canadian or U.K. laws.⁵²⁴ The U.S. law has a five-year limitation period.⁵²⁵ However, the DOJ will generally lay a charge within that limitation, unless the parties under investigation grant the government a waiver.⁵²⁶ In addition, FCPA prosecutions often include charges under the general federal conspiracy laws. Because conspiracy is a continuing crime, its five-year statute of limitations does not

514. *U.S. FCPA v. UK Bribery Act*, VISTALAW, <http://www.transparency-usa.org/documents/FCPAvsBriberyAct.pdf> (last visited Mar. 5, 2013).

515. *Id.*

516. *Id.*

517. *Id.*

518. Bribery Act, 2010, c. 23, s. 7 (U.K.).

519. CORNEY PRACTICE NOTE, *supra* note 401, at 8-9.

520. BRIBERY ACT GUIDANCE, *supra* note 383, at 16-18.

521. Bribery Act, 2010, c. 23, s. 7(2) (U.K.); CORNEY PRACTICE NOTE, *supra* note 401, at 8-9.

522. Morgan & Morritt, *supra* note 410.

523. CANADIAN FPOA GUIDE, *supra* note 270, at 3.

524. *Global Anti-Bribery Compliance: Statutes of Limitations*, DEMING, PLLC (Nov. 23, 2011), www.deminggroup.com/blog/2011/11/anti-bribery-compliance-critical-statutes-of-limitations-issues.shtml.

525. BRIBERY ACT GUIDANCE, *supra* note 383, at 34-35.

526. TARUN 2D, *supra* note 8, at 21-22.

begin to run until completion of the last act in furtherance of the conspiracy or the conspiracy is abandoned.⁵²⁷

H. Civil Proceedings

The U.K. Act has an alternative civil track. The government will pursue the civil track as opposed to the criminal track in those circumstances where the parties co-operate.⁵²⁸ There are, however, substantial fines or administrative monetary penalties under the civil track. The Canadian legislation has no civil process.

I. Remedies

In addition to the fines referred to above, the U.K. legislation provides for the confiscation of property or disgorgement under POCA,⁵²⁹ as well as the disqualification of directors under the Company Directors Disqualification Act 1986.⁵³⁰ Companies can also be disbarred or prevented from bidding on public contracts in the future.⁵³¹ While these remedies exist under American law,⁵³² the U.K. provisions are stricter and provide for permanent disbarment from public contracting.⁵³³ In Canada disgorgement can be obtained under sections 354 and 462 of the Criminal Code,⁵³⁴ while restitution is available under section 732 of the Code.⁵³⁵ Debarment from public contracting is now available under the Federal Accountability Act and the Code of Conduct for Procurement administered by Public Works Canada (PWGSC).⁵³⁶

J. Corporate Officers and Directors

The Canadian and American legislation covers officers and directors through the common law principles as well as the general criminal conspiracy laws.⁵³⁷ The U.K. legislation, however, has a specific provision that may create greater liability. Section 14 of the Bribery Act of 2010 provides that, where an offense is committed under sections 1, 2, or 6 by a company, a senior officer of the company will be personally liable for those offenses if they are found to have connived in or consented to the offense and they have a close connection to the U.K.⁵³⁸ The U.S. legislation, however, is unique in the potential liability created

527. BRIBERY ACT GUIDANCE, *supra* note 383, at 34-35.

528. *See generally* TARUN 2D, *supra* note 8, at 452-58.

529. Proceeds of Crime Act, 2002, c. 29, s. 6 (U.K.).

530. Company Directors Disqualification Act, 1986, c. 46, s. 2 (U.K.).

531. The Public Contracts Regulations, 2006, S.I. 2006/5, art. 23, ¶¶ 1(c), 2 (U.K.).

532. FCPA RESOURCE GUIDE, *supra* note 74, at 69-70.

533. *The Bribery Act*, GOODMAN DERRICK LLP (Jan. 2011), <http://www.gdlaw.co.uk/news-and-articles/Articles/employment-news/the-bribery-act> (noting that permanent disbarment is a sanction for a bribery offense under the EU Public Sector Procurement Directive 2004).

534. Criminal Code, R.S.C. 1985, c. C-46, ss. 354, 462 (Can.).

535. *Id.* at s. 732.

536. *See generally Integrity Provisions*, PUB. WORKS AND GOV. SERVS. CANADA, <https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107> (last updated Dec. 17, 2012).

537. Florian Stamm, *The Foreign Corrupt Practices Act*, SGR TRUST THE LEADERS, Spring 2006, at 4, 4-5 (discussing application of U.S. legislation); Corruption of Foreign Public Officials Act, R.S.C. 1998, c. 34, art. 3(1) (Can.).

538. Bribery Act, 2010, c. 23, s. 14 (U.K.).

by the whistleblower provisions of the Dodd-Frank Act.⁵³⁹ The U.K. authorities, however, have recently added a confidential hotline.⁵⁴⁰ The Canadian legislation does not have a whistleblower provision.

K. *International Double Jeopardy*

The rule against double jeopardy states that an individual cannot be prosecuted and tried for the same crime twice. In Canada and the United Kingdom, this rule also applies internationally.⁵⁴¹ As a result, individuals tried and convicted in one country cannot be re-prosecuted in Canada or the United Kingdom. The rule however does not apply in all countries, most notably the United States and Germany.⁵⁴²

L. *Opinions*

The U.S. legislation provides that parties may obtain opinions from the DOJ with respect to certain arrangements that may involve potential liability under the FPCA.⁵⁴³ That process does not exist under the Canadian or U.K. legislation.

VI. CIVIL ACTIONS

The FCPA does not expressly provide a private cause of action, and most federal court decisions hold that the FCPA does not imply a private action.⁵⁴⁴ However, plaintiffs routinely file follow-on derivative lawsuits, security fraud actions, tort and contract claims, employment lawsuits, and private actions under the Racketeer Influenced and Corrupt Organizations Act (RICO).⁵⁴⁵

Plaintiffs include shareholders, competitors, employees, sovereigns, and pension plans. Three types of civil actions are often filed. First, securities class actions against company directors alleging inaccurate disclosure in violation of section 10(b) of the U.S. Exchange Act.⁵⁴⁶ Second, shareholder derivative actions brought on behalf of companies against directors and officers for breach of fiduciary duties.⁵⁴⁷ Tidewater, Inc., Halliburton Co., Siemens AG, and BAE Systems, among multiple other corporations, have all experienced such shareholder suits.⁵⁴⁸ Third, class-actions may also be brought under the

539. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010).

540. SIDLEY AUSTIN UPDATE, *supra* note 433.

541. Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 817-18 (2009).

542. *Id.*

543. *See supra* Section ILM.

544. Aryeh S. Portnoy & John L. Murino, *Private Actions Under the U.S. Foreign Corrupt Practices Act: An Imminent Front?*, INT'L LITIG. NEWS (Int'l Bar Ass'n: Legal Practice Div., London, U.K.), Apr. 2009, at 31 (citing *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029-30 (6th Cir. 1990)).

545. *Id.* at 32; Racketeer Influenced & Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (2012).

546. Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1226 (2012).

547. *Id.*

548. *Id.* at 1227-28.

Employee Retirement Income Act (ERISA)⁵⁴⁹ on behalf of participants and beneficiaries of qualified ERISA plans against companies and directors for breach of fiduciary duties.⁵⁵⁰

In 2002 Cardinal Health discovered that foreign subsidiaries of its acquisition target, Syncor International Corp., had made improper payments of \$600,000 to employees of government-operated hospitals in Taiwan, Mexico, Belgium, Luxembourg, and France. This discovery ultimately cost Syncor \$2 million as a criminal penalty to [the] DOJ and \$500,000 to the SEC. [Shortly] after, participants in the Syncor/ Cardinal 401(k) brought [an] action for securities fraud but they also sued under ERISA § 502 for breach of fiduciary duty.⁵⁵¹

In the end Syncor settled for \$4 million plus legal fees of \$1.3 million.⁵⁵² The story was repeated more recently in the Wal-Mart case. Federal investigators accused Wal-Mart of bribery in Mexico.⁵⁵³ A group of New York pension funds brought a derivative action against the company's officers and directors alleging they breached their fiduciary duty.⁵⁵⁴ Nearly thirty defendants are named the lawsuit.⁵⁵⁵

Settlements in private cases often exceed the fines in government prosecutions. "In 2007 Immucor paid the SEC a \$30,000 civil penalty to resolve an investigation involving about \$19,000 in alleged bribes the company had paid to a medical supply company."⁵⁵⁶ A shareholder class-action resulted, accusing the company of securities fraud based on "misrepresentations regarding the investigation."⁵⁵⁷ "After the court denied its motion to dismiss, Immucor settled for \$2.5 million."⁵⁵⁸

Faro Technologies was charged by the DOJ and the SEC "with paying \$444,492 in bribes to employees of Chinese state-owned companies and with improperly recording and reporting those payments. Faro resolved the federal case for \$1.85 million in disgorgement . . . and a \$1.1 million criminal penalty."⁵⁵⁹ Additionally, the Faro shareholders filed "a class-action complaint alleging that Faro had failed to disclose information about its finances and inventory."⁵⁶⁰ When the court denied the Faro motion to dismiss, "Faro settled the case for \$6.875 million."⁵⁶¹

549. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. & 29 U.S.C.).

550. Portnoy & Murino, *supra* note 544, at 32.

551. Sean Griffin, *Double Jeopardy: Plaintiffs' Attorneys Discover Means to Sue Companies for FCPA Violations*, 1 INVESTIGATIONS Q., no. 10 (Navigant Consulting), 2011, at 7.

552. *Id.* at 7-8.

553. Sari Horwitz & Jia Lynn Yang, *Wal-Mart Faces Federal Criminal Probe Tied to Allegations of Bribery in Mexico*, WASH. POST (Apr. 23, 2012), http://articles.washingtonpost.com/2012-04-23/business/35452534_1_wal-mart-chief-executive-wal-mart-executives-michael-duke.

554. Daniel Massey, *City Pension Funds Sue Wal-Mart Executives*, CRAIN'S N.Y. BUS. (June 11, 2012), <http://www.crainsnewyork.com/article/20120611/POLITICS/120619987> (discussing New York Pension Fund lawsuit, among eleven others).

555. *Id.*

556. Griffin, *supra* note 551, at 7.

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.*

A recent shareholder law suit accused the Avon board members with breach of fiduciary duty, unjust enrichment, and waste of corporate assets.⁵⁶² This was based on Avon's apparent failure to maintain internal controls and accounting systems necessary to avoid FCPA violations.⁵⁶³ Class actions against SciClone Pharmaceuticals,⁵⁶⁴ and Johnson & Johnson⁵⁶⁵ followed a similar pattern.

The rising civil liability in the anti-bribery area resembles the experience in antitrust in the United States and competition law in Canada. Private plaintiffs pile on after a party settles with the federal regulator. In many cases the payments in the civil lawsuit exceed those in the government case.

Actions have also been brought by competitors. In March 2010, Innospec Inc. pleaded guilty to violating the FCPA related to the Iraqi Oil-for-Food program and bribes paid in Indonesia.⁵⁶⁶ A competitor, Newmarket Corporation, filed suit in July 2010, alleging conspiracy in restraint of trade under federal and state antitrust laws, and commercial bribery.⁵⁶⁷

One notable action regarding a foreign sovereign resulted from the criminal investigation of Alcoa for possible violations of the FCPA. The lawsuit brought by a state-owned company, Aluminum Bahrain B.S.C., alleged that Alcoa paid tens of millions of dollars in bribes through an agent to officials of the state-owned companies in return for inflated contracts.⁵⁶⁸ Aluminum Bahrain, in the 2008 lawsuit filed in the Pittsburgh federal court, "alleg[ed] that Alcoa reaped \$400 million in illegal profits [for] the scheme and [sought] more than \$1 billion in damages."⁵⁶⁹

The liability of directors is often prominent in these lawsuits, relying in part on the 1996 decision of the Delaware Chancery Court in *In re Caremark International Inc.*⁵⁷⁰ That decision held that the failure of the board of directors to ensure that the company had adequate corporate compliance programs and reporting systems in place could render a director liable for losses caused by non-compliance.⁵⁷¹

VII. ARBITRATION AND CORRUPTION

Arbitrations are essential in the energy sector. International oil companies operate around the world, and when disputes occur it is important to find neutral

562. Verified Shareholder Derivative Complaint at 1, *White v. Jung*, No. 1:10-cv-05560-RMB (S.D.N.Y. July 21, 2010).

563. *Id.* at 2.

564. Class Action Complaint for Violations of Federal Securities Laws, *Lewis v. SciClone Pharmaceuticals, Inc.*, No. 5:10-cv-03584-LW (N.D. Cal. Aug. 13, 2010).

565. Stipulation and Agreement of Settlement, *In re Johnson & Johnson FCPA Shareholder Derivative Litigation*, No. 11-2511 (FLW) (D.N.J. July 11, 2012).

566. TARUN 2D, *supra* note 8, at 362-63 (citing *United States v. Innospec Inc.*, No. 10-CR-00061 (D.D.C. Mar. 17, 2010); *SEC v. Innospec*, No. 1:10-CV-00448 (D.D.C. Mar. 17, 2010)).

567. Complaint at 29-30, *Newmarket Corp. v. Innospec Inc.*, No. 3:10-cv-503-HEH (E.D. Va. July 23, 2010).

568. Complaint at 1, *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 08-cv-00299 (W.D. Pa. Feb. 27, 2008), 2008 WL 934600.

569. Joe Palazzolo, *Alco Says RICO Lawsuit is Too Foreign*, WSJ LAW BLOG (Jan. 27, 2012, 5:21 PM), <http://blogs.wsj.com/law/2012/01/27/alcoa-says-rico-lawsuit-is-too-foreign/>.

570. *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

571. *Id.* at 971.

jurisdictions with neutral adjudicators. Arbitrations offer that. Additionally, it is important to be able to enforce an award in courts around the world. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)⁵⁷² offers that. An arbitration award under the New York Convention is enforceable in more than 140 countries.⁵⁷³

The New York Convention and the Model Law,⁵⁷⁴ which incorporates most of the Convention's features, have found their way into the arbitration acts of most countries.⁵⁷⁵ The laws of the United States, Canada, and the United Kingdom are only three examples.⁵⁷⁶ However, in every one of these laws there are grounds on which local courts are entitled not to enforce arbitration awards.⁵⁷⁷

Parties seeking to derail enforcement must fit their case into one of these narrow categories. There is, however, a general principle that is often raised. This principle, which flows from the New York Convention, and is contained in virtually every domestic arbitration statute, is the principle that the courts will not enforce arbitration awards where enforcement would be contrary to public policy.⁵⁷⁸

While this appears to be a broad exception most national courts interpret it very narrowly. They recognize that a broad interpretation would defeat another public policy goal—that the arbitrations should represent final decisions.⁵⁷⁹ Accordingly, the courts place a high burden of proof on the party opposing enforcement⁵⁸⁰ and clear evidence that a specific public policy goal would be

572. New York Convention, *supra* note 54.

573. *New York Convention Countries*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states> (last visited Mar. 11, 2013).

574. UN Model Law, *supra* note 55.

575. *New York Convention Countries*, *supra* note 573 (showing 148 states as signatories to the New York Convention); *Status: UNCITRAL Model Law on International Commercial Arbitration*, UNITED NATIONS COMM'N ON INT'L TRADE LAW [hereinafter *UNCITRAL Model Law Update*], http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Mar. 7, 2013) (showing that legislation based on the Model Law has been enacted in all or part of sixty-six countries).

576. *New York Convention Countries*, *supra* note 573 (all three countries are signatories); *UNCITRAL Model Law Update*, *supra* note 575 (Canada and certain states within the United States have adopted the Model Law).

577. *See, e.g.*, UN Model Law, *supra* note 55, at art. 36 (grounds for refusing recognition or enforcement).

578. New York Convention, *supra* note 54, at art. V(2)(b).

579. *See, e.g.*, *Thyssen Canada v. Mariana Maritime S.A.*, [2005] EWHC 219 (Comm) ¶ 55 (Eng.).

580. Case No. 6497 of 1994, 24 Y.B. Comm. Arb. 71 (ICC Int'l Ct. Arb.); Case No. 4145 of 1984, 12 Y.B. Comm. Arb. 97 (ICC Int'l Ct. Arb.); *Ottley v. Schwartzberg*, 819 F.2d 373, 376, 377 (2d Cir. 1987).

offended.⁵⁸¹ An “essential morality” must be contravened.⁵⁸² This principle has been upheld by the courts of the United States,⁵⁸³ Canada,⁵⁸⁴ and England.⁵⁸⁵

For years courts were reluctant to grant arbitrators jurisdiction over matters that had significant public interest considerations. The leading examples were antitrust,⁵⁸⁶ intellectual property,⁵⁸⁷ fraud,⁵⁸⁸ securities,⁵⁸⁹ and corruption. That concern has largely disappeared. The attitude can be best summed up by the Supreme Court of the United States in *Mercury Construction*, which enforced that “any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration.”⁵⁹⁰

The one area where public interest continues to rule with force in the arbitration world concerns the enforcement of arbitration awards under the New York Convention. The reason is that non-enforcement requires a ground which represents a clear international public policy interest.⁵⁹¹ Bribery or corruption fits the bill. There is after all an international convention—the OECD Convention,⁵⁹² which has been adopted in forty countries.⁵⁹³

And the evidentiary burden is reduced because countries like the United States, England, and Canada actively enforce the law. In the modern world it is the state that often creates the evidentiary record. Private parties can then use that record in subsequent civil litigation and in arbitration proceedings, particularly when it comes to enforcement. Additionally, this use by private parties is not limited to the public record relating to successful prosecutions. In

581. Hilmarton, Case No. 5622 of 1988 (ICC Int’l Ct. Arb.); Westinghouse, Case No. 6401 of 1991 (ICC Int’l Ct. Arb.); EDF Services v. Romania, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009); Dadras Int’l v. Iran, Iran–U.S. Cl. Tribunal, RLA – 132 (Nov. 7, 1995); African Holdings v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21 (July 29, 2008) (French).

582. Boardwalk Regency Corp. v. Maalouf (1992) 6 O.R. 3d 737, para. 9 (Can. Ont. C.A.); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

583. Parson & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (*Rakta*), 508 F.2d 969, 977 (2d Cir. 1976); United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 43 (1987).

584. Boardwalk Regency Corp. v. Maalouf (1992), 6 O.R. 3d 737, para. 9 (Can. Ont. C.A.); United Mexican States v. Karpa (2003) 74 O.R. 3d 180, paras. 67-68 (Can. Ont. C.A.); Corporacion Transnacional de Inversiones S.A. v. STET Int’l, S.p.A. (2000) 45 O.R. 3d 183, paras. 65, 73-74 (Can. Ont. Sup. Ct. J.); Schreter v. Gasmac Inc. (1992) 7 O.R. 3d 608, paras. 50-52 (Can. Ont. Ct. J.).

585. Lemenda Trading v. African Middle East Petroleum Co., [1988] Q.B. 448, 461 (Eng.); Vervaeke v. Smith [1983] 1 A.C. 145, 164 (Eng.).

586. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636-38 (1985); JLM Indus., Inc. v. Stolt-Nielsen S.A., 387 F.3d 163, 182-83 (2d Cir. 2004); Case No. 7097 of 1993 (ICC Int’l Ct. Arb.); Case No. 6709 of 1992 (ICC Int’l Ct. Arb.); ICC Case No. 7081 of 1992 (ICC Int’l Ct. Arb.).

587. Desputeaux v. Éditions Chouette, [2003] 1 S.C.R. 178, para. 72 (Can.).

588. Inceysa Vallisoletana v. Republic of El Salvador, ICSID Case No. ARB/03/26 (Aug. 2, 2006); Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Aug. 27, 2008).

589. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 241-42 (1987).

590. Moses H. Cone Mem’l Hosp. v. Mercury Constr., 460 U.S. 1, 25 (1983).

591. New York Convention, *supra* note 54, at art. V(2)(b).

592. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 17, 1997, 37 I.L.M. 1 (entered into force February 15, 1999).

593. *Bribery & Corruption*, ORGANISATION FOR ECON. CO-OPERATION & DEV., www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited Mar. 8, 2013).

January of this year one reporting service identified by name eighty-eight companies that were subject to FCPA investigations by the DOJ.⁵⁹⁴

Before drawing any conclusions on the significance of bribery in the enforcement of awards, it is useful to look at some of the early cases.

A. *ICC Case No. 1110*⁵⁹⁵

This decision by Judge Gunnar Lagergren in 1963 was one of the first cases to deal with bribery or corruption in an arbitration. A British company seeking to sell electrical equipment to power plants owned by the Argentine government had entered into a commission agreement with an agent. The agreement provided for a commission of 10% of the order value, part of which could be transferred to unnamed third parties.⁵⁹⁶ For a number of years the agent sold nothing. The British company retained another agent who sold electrical equipment to the Argentine government. The original agent claimed a 10% commission on those sales based on the original agreement.⁵⁹⁷

During a hearing it became clear that the reason the claimant was retained was his substantial influence with the Peron government. There was also evidence that the claimant believed that he would likely retain only 2% of the commission with the remainder going to others assisting him.⁵⁹⁸ Neither of the parties argued that the original agent contract was invalid or illegal. The British company simply said that the subsequent agency agreement was totally different from the original one.

Without any argument from the parties Judge Lagergren on his own motion questioned his jurisdiction over a contract that was contrary to public policy.⁵⁹⁹ He referred to the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards which provided that a competent authority may refuse the recognition or enforcement of an award contrary to public policy. He referred to both the law in France, the seat of the arbitration, and to Argentine law, the place where the contract would be performed, and concluded that both French and Argentine law would not allow this contract. He concluded that in a case where gross violation of good morals and international public policy exists, no court in a civilized country would recognize the award. As a result he declined jurisdiction.⁶⁰⁰

594. *The Corporate Investigations List (January 2013)*, THE FCPA BLOG (Jan. 3, 2013), <http://www.fcpablog.com/blog/2013/1/3/the-corporate-investigations-list-january-2013.html>. The list included such household names as 3M, Alcoa, Archer-Daniels-Midland, Avon Products, Baker Hughes, Barclays, Bristol-Myers Squibb, John Deere & Company, DreamWorks Animation SKG, Dun & Bradstreet, GlaxoSmithKline, Hewlett-Packard, KKR, Kraft Foods, Las Vegas Sands, Marathon Oil, Merck & Co., Motorola, NCR, News Corporation, Oracle, Viacom, Qualcomm, Raytheon, Smith & Wesson, Sony, Time Warner, Total SA, Wal-Mart, Walt Disney, and Wynn Resorts.

595. The award is reproduced in J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 ARBITRATION INT'L 277 (1994).

596. *Id.* at 282-83.

597. *Id.* at 285.

598. *Id.* at 288.

599. *Id.* at 291.

600. *Id.* at 291-94. For an overview of Judge Lagergren's discussion, see ABDULHAY SAYED, *Corruption and the Validity of the Arbitration Agreement*, in CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 43, 59-69 (2004).

Since 1963 there have been a number of tribunal decisions dealing with corruption. Nearly all of them have adopted the basic principle set out in Judge Lagergren's decision, namely that contracts obtained through corruption are unenforceable as a matter of international public policy.⁶⁰¹ However, virtually all the subsequent decisions have refused to accept Judge Lagergren's finding that there is no jurisdiction. Instead they have accepted jurisdiction on the basis of the principal of the separability of arbitration clauses, which is to say that the arbitral tribunal retains jurisdiction to resolve the dispute over defective contract because that defect does not nullify arbitration clause in the contract.⁶⁰² This requires arbitrators to examine the evidence of corruption in detail as the panel did in in the following case of World Duty Free.

B. World Duty Free v. Republic of Kenya

In *World Duty Free*, the claimant was a U.K. corporation that operated duty-free stores in airports in Nairobi and Mombasa.⁶⁰³ In 1989, the claimant entered into a ten-year concession agreement to construct and operate the stores in exchange for payment of \$1 million per year.⁶⁰⁴

World Duty Free was subsequently implicated in a scandal involving an export scheme to raise funds for the reelection of the then president of Kenya.⁶⁰⁵ The Kenyan government placed World Duty Free into receivership, terminated the license to operate at the airports, and deported the owner.⁶⁰⁶

The claimant brought an ICSID arbitration alleging that the Kenyan government had expropriated its property.⁶⁰⁷ During the hearing it was revealed that the claimant had engaged in bribery in order to acquire the ten-year concession agreement.⁶⁰⁸ In order to obtain the concession he was required to make a \$2 million donation to the then president of the country.⁶⁰⁹ The claimant described depositing a briefcase full of money at a meeting.⁶¹⁰ When he returned to pick up the briefcase the money was gone but the briefcase was full of corn⁶¹¹ which apparently, according to local custom, indicated that the payment had been accepted.⁶¹²

In the arbitration the Kenyan government argued that the ten-year concession agreement was unenforceable as a matter of both Kenyan and English law, as well as international public policy, citing Judge Lagergren's 1963 decision in ICC Case No. 1110.⁶¹³ The tribunal accepted jurisdiction and

601. Yackee, *supra* note 56, at 727-29.

602. *Id.*

603. Award, *World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 62 (Oct. 4, 2006), available at <http://italaw.com/documents/WDFv.KenyaAward.pdf>.

604. *Id.*

605. *Id.* ¶ 68.

606. *Id.* ¶¶ 70, 72.

607. *Id.* ¶ 74.

608. *Id.* ¶ 135.

609. *Id.*

610. *Id.*

611. *Id.*

612. *Id.* ¶ 131.

613. *Id.* ¶¶ 106-07.

concluded that the contract was contrary to international public policy and the claimant was not entitled to maintain any of its claims.⁶¹⁴

One of the more interesting aspects of this case is the unjust enrichment argument that the government promoted the bribery.⁶¹⁵ However, the tribunal declined to attribute the actions of the President, the beneficiary of the bribe, to the Kenyan government, the responding party in the arbitration.⁶¹⁶ The tribunal concluded that because the bribe was covert and received by a head of state acting outside of his official capacity, the bribe could not be imputed to the government.⁶¹⁷

C. *Siemens AG v. Argentina*

In 2007, Siemens AG, a large German multinational electronics and engineering firm, obtained a large arbitration award against Argentina.⁶¹⁸ “The tribunal formed under the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) awarded [Siemens] over \$200 million for Argentina’s unlawful expropriation of the company’s investment in the design and construction of an information technology system [that had been] commissioned by the government.”⁶¹⁹

“Five months after the award was rendered Argentina filed a petition for annulment . . . under the ICSID Convention.”⁶²⁰ The basis for the petition was that the “American and German anticorruption agencies had uncovered evidence that Siemens” had been engaged in worldwide bribery of public officials.⁶²¹ The DOJ claimed that over \$1 billion in bribes had been paid, including \$30 million in improper payments relating to the IT contract at issue in the Siemens arbitration.⁶²² Ultimately Siemens ended up paying the American authorities a fine of \$1.3 billion, the largest under the FCPA to date.⁶²³

In July 2008, Argentina requested a revision of the award based on this new evidence under article 51 of the ICSID Convention, on the basis that the facts were not known at the time of the hearing and that bribery of this magnitude would render the contract unenforceable on public policy grounds.⁶²⁴ A year later, after Siemens settled with the U.S. government, Argentina and Siemens

614. *Id.* ¶ 179.

615. *Id.* ¶ 77.

616. *Id.* ¶ 169.

617. *Id.*

618. Yackee, *supra* note 56, at 723-24 (citing *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007)).

619. *Id.*

620. *Id.* at 724.

621. *Id.*

622. *Id.* at 724-25 (citing *Information, United States v. Siemens AG*, No. 1:08-CR-367 (D.D.C. Dec. 12, 2008); *Information at P 32(a), United States v. Siemens S.A. (Argentina)*, No. 1:08-CR-368 (D.D.C. Dec. 12, 2008)).

623. *Id.* at 725 (citing Jack Ewing, *Siemens Settlement: Relief But Is It Over?*, *BUS. WK.*, Dec. 15, 2008, available at <http://www.businessweek.com/stories/2008-12-15/siemens-settlement-relief-but-is-it-over-businessweek-business-news-stock-market-and-financial-advice>). Siemens agreed to pay fines of \$800 million in the United States and \$540 million in Germany. Ewing, *supra*.

624. Yackee, *supra* note 56, at 725.

announced that they were discontinuing the ICSID arbitration, and “Siemens agreed to walk away from its \$218 million award.”⁶²⁵

D. Burden of Proof

In arbitrations, each party bears the burden of proving the facts relied upon in support of their claims.⁶²⁶ The standard of proof is generally stated to be a balance of probabilities.⁶²⁷ The question arises—where corruption is claimed, is there a higher standard of proof? In corruption cases the burden of proof is on the party alleging corruption.⁶²⁸ The accusations are serious and border on criminal.

As the Tribunal stated in *Westinghouse*, the standard for fraud is “clear and convincing evidence.”⁶²⁹ Or as the tribunal said in ICC Case No. 6497, the relevant evidence must be “conclusive.”⁶³⁰ Arbitrators are generally not prepared to speculate about the existence of bribery.

There are cases where tribunals have suggested that where there is some evidence of bribery, (although not conclusive), the burden may shift to the party accused of bribery to call evidence that would explain away the accusation.⁶³¹ While that may happen as an evidentiary matter, tribunals have not endorsed the concept of a reverse burden of proof.⁶³²

E. The Duty to Investigate

An arbitrator, unlike a judge in a national court, is appointed by the parties at their request pursuant to a contract. As a result, some arbitrators assume they need only address the particular interests of the parties and the issues raised by the parties. Specifically, they assume they do not need to consider public policy issues and, in particular, they do not need to raise them on their own motion. This is what happened in the famous Judge Lagergren case, where none of the parties raised the issue although both parties recognized that the contract involved payments to third parties that would arrange the sale.⁶³³

Since the 1963 decision by Lagergren, over seventy-five arbitrations have considered corruption claims. This is one area where the international public policy is clear. Not only is there an OECD Convention and various other Conventions, over sixty countries have implemented statutes outlawing bribery

625. *Id.*

626. UNCITRAL Arbitration Rules, G.A. Res. 65/22, Art. 27(1), U.N. Doc. No. A/RES/65/22 (as revised Dec. 6, 2010).

627. George M. von Mehren & Claudia T. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer's Guide*, 20(3) J. INT'L ARB. 285, 291 (2003).

628. SAYED, *supra* note 600, at 103 (noting that bribery requires a heightened standard of proof on the part of the party seeking to prove the proposition due to the vulnerable nature of the cases).

629. *Id.* at 103-04 (quoting *Westinghouse v. Republic of the Philippines*, Case No. 6401 of 1992 (ICC Int'l Ct. Arb.)).

630. ICC Case No. 6497 of 1999 (ICC Int'l Ct. Arb.).

631. SAYED, *supra* note 600, at 105-06 (discussing Case No. 6497 of 1999 (ICC Int'l Ct. Arb.)).

632. *Id.* at 105 (quoting ICC Case No. 6497's statement that “such change in the burden of the proof is only to be made in special circumstances and for very good reasons”).

633. *Id.* at 66 (discussing Judge Lagergren's conclusion that the contract in the case was immoral following statements by the defendant's witnesses that “more or less asserted that the contractual relationship served to channel bribery”).

of public officials, particularly foreign officials. As detailed above, it is clear that this can be a ground for not enforcing arbitration awards under the New York Convention.

It is now convincingly argued that one of the important obligations of an arbitrator is to ensure that the award will be enforceable.⁶³⁴ It follows that if the evidence contains “red flags” that corruption or bribery may exist, the arbitrator has a duty to ask questions and determine if bribery is taking place.

There are cases such as *Westacre* that suggest this is not the responsibility of the arbitrator, but that is no longer the prevailing view.⁶³⁵ Admittedly it is a fine line. An arbitrator should not become an overzealous public prosecutor. But where there are red flags, it is incumbent on the panel to act.⁶³⁶ At the same time, however, the burden of proof on those alleging bribery is a high one. These are serious accusations with serious civil and criminal consequences. As discussed above, most tribunals require clear and convincing evidence.⁶³⁷

F. *Is There a Duty to Report?*

An even more difficult question for an arbitration panel is the following: If there is evidence of bribery is it the responsibility of the arbitrator to report it to the authorities? Most arbitrations are confidential and the matter would not be disclosed to authorities without some form of reporting. There are cases that question the extent of the confidentiality requirement on arbitrators, particularly where there are third party or public policy issues,⁶³⁸ and the standard is reduced in enforcement proceedings.⁶³⁹ However, an arbitrator is not a judge and is certainly not a law enforcement officer. The general wisdom now is that where it is an institutional arbitration, the arbitrator has an obligation to report to the institution. What the institution should do with information is another matter.

While these issues have concerned arbitrators over the last forty years, they may be less troublesome today. In the last five years we have seen a much higher degree of enforcement by anticorruption agencies, particularly the United States’ DOJ and SEC. These agencies co-operate with agencies around the world. They have highly developed investigative techniques including whistleblower provisions and immunity arrangements that encourage the disclosure of bribery. In this new world if there is bribery involved in major international transactions there is good reason to believe there will be public disclosure in some form.

634. INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION & ADR RULES, art. 41 (2012).

635. See generally Gary Born, *Bribery and an Arbitrator’s Task*, KLUWER ARBITRATION BLOG (Oct. 11, 2011), <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/> (discussing Judge Lagergren’s case, *Westinghouse, World Duty Free, and Westacre*); Case No. 7047 of 1994 (ICC Int’l Ct. Arb.).

636. SAYED, *supra* note 600, at 126 (discussing Case No. 8891 of 2000 (ICC Int’l Ct. Arb.), and the tribunals request for further information following “indication[s] of corruption”); Case No. 4145 of 1984, 12 Y.B. Comm. Arb. 97 (ICC Int’l Ct. Arb.).

637. von Mehren & Salomon, *supra* note 627, at 291 & n.25.

638. See, e.g., *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 W.L.R. 314 at 315-16 (Eng.).

639. *Associated Elec. & Gas Ins. Servs. v. European Reinsurance Co. of Zurich*, [2003] UKPC 11, ¶ 20, [2003] 1 W.L.R. 1041.

In addition, many of these companies are public and are required to disclose investigations initiated by law enforcement agencies.⁶⁴⁰ And most companies now have detailed internal compliance programs that encourage reporting to boards of directors and the regulatory agencies.

VIII. WHAT'S DOWN THE ROAD?

There is little indication that the enforcement of anti-bribery statutes will decline. If anything it will increase. This is particularly important for the petroleum industry. There is a reason why the RCMP in Canada has their main investigative office in Calgary—that is where the energy industry is located. The corporations that dominate this industry are constantly involved in foreign transactions and the resulting agreements have arbitration clauses in virtually all cases.

While the level of fines in the United States were down in 2012, the figure is misleading. It does not include a \$400 million settlement the Justice Department has negotiated with Total SA, the French oil giant, in connection with its operations in Iran relating to payments to win the rights to gas fields, which amounts to the fourth largest FCPA enforcement action of all time.⁶⁴¹ On December 20th, the SEC charged Eli Lilly with FCPA violations alleging that the company's Russian subsidiary "used offshore marketing agreements to pay millions of dollars to third parties" to encourage pharmaceutical distributors to purchase Lilly drugs.⁶⁴² The case, which also involved subsidiaries in China, Brazil, and Poland, reinforces the importance of monitoring the actions of subsidiaries in foreign countries.⁶⁴³

Lilly agreed to pay a disgorgement of \$14 million plus prejudgment interest and a fine of \$9 million.⁶⁴⁴ Here, the disgorgement was more than twice the fine.⁶⁴⁵ This underscores the fact that while disgorgement is a relatively new feature of American enforcement, it is one of growing importance.

Another development in the United States is the increased reliance on the whistleblower provisions. The SEC can now pay up to 30% of recovery to anyone providing actionable information about FCPA offenses.⁶⁴⁶ The agency logged 115 FCPA related whistleblower complaints during the past year.⁶⁴⁷

640. Press Release, U.S. Sec. & Exch. Comm'n, Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending the Exchange's Timely Alert Policy, at 2 (Apr. 27, 2009), <http://www.sec.gov/rules/sro/nyse/2009/34-59823.pdf> (discussing new New York Stock Exchange rule 202.05, which requires public companies to disclose material news in a timely manner).

641. Richard L. Cassin, *Total SA Heads for the Top Ten*, THE FCPA BLOG (Nov. 7, 2012, 8:50 AM), www.fcablog.com/blog/2012/11/7/total-sa-heads-for-the-top-ten.html.

642. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), <http://www.sec.gov/news/press/2012/2012-273.htm>.

643. *Id.*

644. *Id.*

645. *Id.* (when one includes the \$6.8 million in prejudgment interest, the disgorgement totals \$20.7 million).

646. 15 U.S.C. § 78u-6(b)(1)(B) (2012).

647. ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2012, U.S. SEC. & EXCH. COMM'N App. A (2012), available at <http://www.sec.gov/about/offices/owb/annual-report-2012.pdf>.

The level of investigation in this area will, if anything, increase. While the United States DOJ is clearly the leader, other countries are escalating their initiatives. Canada and the United Kingdom are most important, but new laws are being introduced by Mexico and Brazil—all with serious penalties.

The Mexican Senate passed legislation in April 2012,⁶⁴⁸ and the European Union is drafting corruption laws that will make it illegal for oil, gas, and mining companies to bribe officials in resource rich countries.⁶⁴⁹ The Brazilian Congress is currently considering new anti-bribery legislation that will include civil penalties for companies engaged in bribery of both domestic or foreign officials.⁶⁵⁰ Unlike U.S. legislation, the Brazilian draft bill does not require prosecutors to prove that the payments were made with the corrupt intent, but rather imposes strict liability on corporations once it is proven that the bribe was paid.⁶⁵¹ Fines under the legislation will be high—up to 20% of the defendant corporation's prior-year gross revenues.⁶⁵² In 2012, the French government successfully prosecuted its first anti-bribery case,⁶⁵³ and Total, S.A., which is about to settle with U.S. authorities, will go on trial in France in the first part of 2013.⁶⁵⁴

The United Kingdom is of particular interest. Unlike the United States, the United Kingdom also prohibits domestic bribery and it sanctions those that accept bribes, not just those who hand them out.⁶⁵⁵ Additionally, in the United Kingdom there is a strict liability offense for corporations that do not have satisfactory compliance programs.⁶⁵⁶ Even more important is the extraterritorial reach of the English Bribery Act.⁶⁵⁷

One significant development in the United Kingdom is the announced intention to pass new legislation that will allow U.K. authorities to negotiate DPA's with companies under investigation.⁶⁵⁸ This form of negotiation has

648. LUIS E. GRAHAM & OLIVER J. ARMAS, CHADBOURNE & PARKE LLP, CLIENT ALERT: MEXICO TO ADOPT NEW FEDERAL LAW AGAINST CORRUPTION IN PUBLIC PROCUREMENT (2012), available at [http://www.chadbourne.com/files/Publication/0304d027-72f7-41a6-aea9-7e61236fddc6/Presentation/PublicationAttachment/7f98c730-69c9-4229-a856-86209c5edfe7/MC_MexicoToAdoptNewFederalLaw_ca\(Graham\).pdf](http://www.chadbourne.com/files/Publication/0304d027-72f7-41a6-aea9-7e61236fddc6/Presentation/PublicationAttachment/7f98c730-69c9-4229-a856-86209c5edfe7/MC_MexicoToAdoptNewFederalLaw_ca(Graham).pdf).

649. Barbara Lewis, *EU Politicians Vote for Tough Oil, Gas Anti-Corruption Law*, REUTERS UK (Sept. 18, 2012), <http://uk.reuters.com/article/2012/09/18/uk-eu-transparency-idUKBRE88H12020120918>.

650. Mark Friedman, *Brazil's Powerful New Anti-Bribery Law Stalled in Legislature*, THE FCPA BLOG (Dec. 6, 2012), www.fcpablog.com/blog/2012/12/6/brazils-powerful-new-anti-bribery-law-stalled-in-legislature.html.

651. *Id.*

652. *Id.*

653. Samuel Rubinfeld, *OECD Rebukes France for Lack of Bribery Prosecutions*, WALL ST. J. CORRUPTION CURRENTS BLOG (Oct. 23, 2012, 5:00 AM), <http://blogs.wsj.com/corruption-currents/2012/10/23/oecd-rebukes-france-for-lack-of-bribery-prosecutions/> (Safran SA was convicted in September 2012).

654. Heather Smith, *Total, CEO Fight Charges as Oil-for-Food Trial Opens in Paris*, BUS. WK., Jan. 20, 2013, available at www.businessweek.com/news/2013-01-20/total-ceo-fight-charges-as-oil-for-food-trial-opens-in-paris.

655. TARUN 2D, *supra* note 8, at 450.

656. Bribery Act, 2010, c. 23, § 7 (U.K.).

657. PwC CFPOA REPORT, *supra* note 38, at 2.

658. Samuel Rubinfeld, *UK to Move Forward with Deferred-Prosecution Agreements*, WALL ST. J. CORRUPTION CURRENTS BLOG (Oct. 23, 2012, 3:14 PM), <http://blogs.wsj.com/corruption-currents/2012/10/23/uk-to-move-forward-with-deferred-prosecution-agreements/>.

proved proven highly successful in the United States, and is behind the majority of settlements.⁶⁵⁹ It is based on the very successful immunity program the Americans and Canadians have used in the antitrust and competition law area.⁶⁶⁰ Parties are able to negotiate a settlement without admitting liability, but generally pay a very substantial fine.⁶⁶¹ One difference between the proposed U.K. legislation and the existing American legislation is a much greater involvement of the courts.⁶⁶² This follows a U.K. court decision in 2010 with respect to the Innospec settlement where the court almost rejected the settlement on the grounds of the lack of judicial involvement.⁶⁶³ Under the proposed U.K. regime, after the prosecutor and the company agree in principle to a DPA the prosecutor must initiate proceedings in Crown Court, which take place in private, and receive preliminary approval to continue negotiations.⁶⁶⁴ After the parties finalize the DPA a judge must approve it in open court.⁶⁶⁵ The court must find it to be “in the interest of justice” and the terms must be “fair, reasonable, and proportionate.”⁶⁶⁶

The Canadian government has also announced its intention to significantly expand the scope of the country’s anti-bribery legislation with a move towards a nationality principle and a broad financial records provision.⁶⁶⁷ The penalty for individuals will also increase from a maximum of five years to fourteen years.⁶⁶⁸

At the end of 2012, the United Kingdom had eleven active investigations underway, including accusations of payments made by Rolls Royce to executives of Air China and China Eastern Airlines.⁶⁶⁹ The DOJ, on the other hand, had 140 open FPCA cases at the end of the year,⁶⁷⁰ compared to thirty-five in Canada.⁶⁷¹

One development is clear—major energy corporations now treat compliance programs as an essential element of their corporate governance.

659. See, e.g., *United States v. Kellogg Brown & Root LLC*, No. 4:09-cr-00071 (S.D. Tex. 2009); U.S. Sec. & Exch. Comm’n v. *Halliburton Co.*, No. 4:09-cv-00399 (S.D. Tex. 2009); U.S. Sec. & Exch. Comm’n v. *Technip, S.A.*, No. 4:10-cv-02289 (S.D. Tex. 2010); U.S. Sec. & Exch. Comm’n v. *ENI, S.p.A.*, No. 4:10-cv-02414 (S.D. Tex. 2010); *United States v. JGC Corp.*, No. 11-cr-00260 (S.D. Tex. 2011).

660. Rubinfeld, *supra* note 658.

661. *Id.*

662. *Id.*

663. *Innospec: Latest Bribery Case Raises Key Questions for SFO’s Plea Bargain Approach to Corruption*, CORRUPTION WATCH, <http://www.corruptionwatch-uk.org/cases/innospec/index.html> (last visited Mar. 9, 2013).

664. Matthew Stone, *UK Government Unveils Deferred Prosecution Agreements as a New Enforcement Tool*, LEXOLOGY (Nov. 6, 2012), www.lexology.com/library/detail.aspx?g=27533667-d819-4058-abcd-b606107b14bf.

665. *Id.*

666. *Id.*

667. Hutton, *supra* note 503.

668. Mark Morrison, et al., *Canada Toughens Anti-Corruption Laws*, BLAKES (Feb. 6, 2013), <http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1578>; S-14, An Act to Amend the Corruption of Foreign Public Officials Act, 41st Parliament, 1st Sess. (Can. 2013).

669. Dan Milmo, *Rolls-Royce Accused of Bribing a Chinese Airline Executive*, THE GUARDIAN (London) (Jan. 6, 2013), <http://www.guardian.co.uk/business/2013/jan/06/rolls-royce-accused-bribing-chinese>.

670. WILMERHALE, FCPA YEAR-IN-REVIEW: DEVELOPMENTS OF 2012 AND PREDICTIONS FOR 2013, at 1 (Jan. 31, 2013), available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/FCPA_Year_End_Letter_2012.pdf.

671. Blyschak & Boscarior, *supra* note 344.

These compliance programs will likely grow in complexity and scope. Most corporations now have chief compliance officers that report directly to the board of directors.⁶⁷² These compliance programs cover more than employees. They also include agents and third-party contractors. The United States cases also indicate that companies have to be very mindful of successor liability. Where companies acquire another company, they can become liable for FCPA violations incurred by the target company.⁶⁷³

The increased importance of anti-bribery legislation can be traced to a number of factors. First, the legislation is being implemented in more countries around the world. Second, the penalties are being increased in existing legislation to include such things as disgorgement and banning of public contracting. Third, there are increased detection procedures such as whistleblowing and the use of deferred prosecution agreements which have now spread to the United Kingdom and Canada. Fourth, there is an increase in civil actions, including class actions, which often have a very substantial impact on corporate share prices. Finally, the territorial reach of this legislation is increasing as we see in the United Kingdom and Canada. And there is greater use of strict liability provisions such as the new U.K. legislation and the proposed Brazilian legislation.

672. See generally Erica Salmon-Byrne & Jodie Frederickson, *The Business Case for Creating a Standalone Chief Compliance Officer Position*, ETHISPHERE INSTITUTE (May 25, 2010), <http://ethisphere.com/the-business-case-for-creating-a-standalone-chief-compliance-officer-position/>.

673. Obiamaka P. Madubuko, *United States: Corporate Buyers Beware: FCPA Successor Liability—A Growing Threat*, MCDERMOTT, WILL & EMERY (Nov. 21, 2012), www.mondaq.com/unitedstates/x/207726/Healthcare/Corporate+Buyers+Beware+FCPA+Successor+Liability+A+Growing+Threat.