

## CHAPTER 6

# INVESTIGATION AND PROSECUTION OF CORRUPTION

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### 1. INTRODUCTION

The economic and social costs of corruption are huge. They provide major motivation for global anti-corruption measures, exemplified by the widespread adoption of UNCAC and the earlier adoption of the OECD Anti-Bribery Convention. Anti-corruption enforcement is a vital part of the fight against global corruption. Prevention of corruption before it occurs is the ideal goal. When prevention fails and corruption occurs, investigation and punishment of corrupt offenders is essential; it instills public confidence that States will not sit idly by while corporations and individuals pursue illicit profits at the expense of the global citizenry. Effective detection, prosecution and sanctioning of corrupt offenders are crucial to corruption prevention. The strongest disincentive to corruption is a high likelihood of being caught and brought to justice.<sup>1</sup>

Very significant advances have been made in anti-corruption enforcement globally, and an era of increased investigation and prosecution of corruption offences has begun in many countries including the US, UK and Canada. But is enough being done? Even in countries with highly active enforcement regimes, it is probable that only a very small proportion of corrupt behaviour is actually discovered and prosecuted.

This chapter discusses the international provisions that mandate effective methods for investigation, prosecution and sanctioning of corruption offences and the implementation of

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<sup>1</sup> Because “[s]uccessful detection of corruption depends upon insiders to report wrongdoing,” Rose-Ackerman points out the tension between the need to deter and detect corruption offences: “One conundrum for anti-corruption efforts is the possible tension between the goals of signaling credible expected punishments and using the law to induce perpetrators to provide evidence.” See Susan Rose-Ackerman, “The Law and Economics of Bribery and Extortion” (2010) 6 Annual Rev Law Soc Sci 217 at 221-22.

these enforcement provisions in the US, UK and Canada. The different structural approaches to anti-corruption enforcement around the globe are also examined, followed by a brief examination of the powers and techniques necessary for enforcement and some of the difficult issues associated with overlapping enforcement jurisdictions for many corruption offences.

This chapter also deals with some of the costs of enforcement. Although significant, the costs involved in fighting corruption are not at the forefront of the global discussion. Anti-corruption enforcement takes financial and human resources, intelligence and technology, as well as perseverance in the face of political risk. Corruption investigations involve corporations and public officials in positions of power who can oppose and retaliate against those who investigate and prosecute their crimes.

Successful anti-corruption enforcement can sometimes come at a great cost to the enforcing State Party. In the case of BAE, discussed in Section 11 of Chapter 1, the UK would have paid a high price to prosecute BAE's bribery of Saudi officials. According to newspaper reports on the case, Prince Bandar of Saudi Arabia threatened to withdraw security and intelligence support for UK soldiers in Iraq and to cancel an \$80 billion aircraft contract with BAE. Faced with the loss of strategic support that would endanger British lives in Iraq and the loss of a contract which would cost British jobs at home, UK Prime Minister Tony Blair pressured the UK Serious Fraud Office (SFO) to drop their investigation of BAE's alleged bribery of Saudi officials, which the SFO reluctantly did. This case illustrates an important point: political will is essential to effective enforcement of anti-corruption measures. It is impossible to summon this political will by narrowly focusing on domestic concerns. Faced with the cost to Britain, Tony Blair effectively stopped the prosecution, but he may have decided differently if he took a wider view of the global cost of corruption and considered the negative effect of corruption on millions of the world's poorest people.<sup>2</sup>

Some worry that a similar story is unfolding in relation to the SFO's investigation of GPT Special Project Management Ltd.<sup>3</sup> Once again, the alleged bribery involved defence contracts in Saudi Arabia. Although the SFO made arrests in 2014, no one has been charged and the investigation could be terminated on the basis of national security. In an October 2014 letter to Britain's Attorney General, Global Witness, TI UK and Corruption Watch urged independence for the SFO and stated that "[t]he UK cannot afford a re-run of the BAE/Al-Yamanah scandal."<sup>4</sup> The three NGOs maintain that the handling of the BAE case was inconsistent with Article 5 of the OECD Convention, which prohibits national economic

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<sup>2</sup> It should be noted that BAE later faced charges related to corruption in Germany and the US and also paid fines in the UK for bribery offences committed in Tanzania. See Chapter 1, Section 11.

<sup>3</sup> Alistair Craig, "Will GPT be the SFO's next BAE?" (15 October 2014), *The FCPA Blog*, online: <<http://www.fcpablog.com/blog/2014/10/15/will-gpt-be-the-sfos-next-bae.html>>.

<sup>4</sup> Global Witness, Transparency International UK and Corruption Watch, online: <[https://issuu.com/transparencyuk/docs/joint\\_letter\\_to\\_attorney\\_general](https://issuu.com/transparencyuk/docs/joint_letter_to_attorney_general)>.

concerns and relations with other states from being taken into account when making prosecutorial decisions.

The BAE case illustrates the reality that high-level state and political interests can hamper and even quash investigation or prosecution of corruption. It has been suggested that making corruption an international crime to be prosecuted in an international court would prevent States from improperly interfering with the prosecution of corruption. However, world leaders are unlikely to be persuaded to add corruption to the small list of international crimes any time soon.

## **2. INTERNATIONAL OBLIGATIONS TO INVESTIGATE AND PROSECUTE CORRUPTION**

### **2.1 Overview**

Criminalization of corrupt behaviour is meaningless without robust law enforcement. As discussed in Chapter 1, the most effective deterrent to corrupt behaviour is an increased likelihood of being caught and prosecuted for the offence. To support the overall anti-corruption scheme of UNCAC, chapters III and IV of the convention include provisions that facilitate the effective investigation and prosecution of corruption offences. While narrower in scope than UNCAC, the OECD Anti-Bribery Convention also contains provisions to promote effective law enforcement.

Broadly speaking, law enforcement provisions in the conventions cover the following areas:

- (1) Immunities and Pre-Trial Release of Defendants;
- (2) Specialized Anti-Corruption Enforcement Bodies;
- (3) Discretionary Power to Investigate and Prosecute Corruption;
- (4) Investigatory Power to Search Financial Records;
- (5) Protection of Witnesses, Victims, Whistleblowers and Participants;
- (6) International Cooperation in Investigation and Cooperation;
- (7) Jurisdiction for Prosecution and Transfer of Criminal Proceedings;
- (8) Extradition;
- (9) Use of Special Investigative Techniques.

As ratifiers of UNCAC and the OECD Convention, the US, UK and Canada are required to implement the provisions of the conventions in their domestic statutes and law enforcement practices. In the sections that follow, the convention requirements and the manner in which the US, UK and Canada have responded to those requirements will be described for each of the nine enforcement topics listed above. Each country's implementation of the convention requirements is monitored through the respective reviewing mechanisms adopted by the UN and the OECD.

### 2.1.1 Peer Review Process

Peer Country Review Reports (in the case of UNCAC) and Phase 3 Reports (in the case of the OECD Convention) hold State Parties accountable to implement the anti-corruption measures of the conventions. These reviews also allow State Parties to respond to the reviewing group's recommendations regarding more effective ways to implement provisions of the anti-corruption conventions and to offer feedback in respect to the fight against corruption in their country.

There has been criticism of UNCAC's implementation review mechanism. Although the country review reports are completed by expert teams from randomly selected peer countries, the reports are largely "desk reviews" of the self-assessments done by the countries being reviewed. Country visits by the expert teams are optional and only possible upon the agreement of the country being reviewed. In addition, despite the fact that the UN resolution adopting the review mechanism encouraged governments to include civil society and private sector input during the review process, a country being reviewed can decide whether or not to include input from these sources. With the above criticisms of the UNCAC review mechanism in mind, the peer country review reports do provide good summaries of the apparent implementation of anti-corruption law enforcement provisions in the US, UK and Canada.

The OECD's review mechanism is regarded by many as more rigorous than the UNCAC review. The Phase 3 Reports are written by two peer countries that act as lead examiners. The country being reviewed responds to a detailed questionnaire designed to elicit information concerning the country's implementation of the OECD Convention and previous recommendations of the OECD Working Group on Bribery. Each Phase 3 Report involves a mandatory on-site visit led by the two peer countries to determine the veracity of the information on the questionnaire. The peer country reports are assessed by the entire Working Group on Bribery, made up of representatives from all Parties to the Anti-Bribery Convention, who evaluate each country's performance and adopt conclusions. Excerpts from Phase 3 reports will be relied upon later in this Chapter.

## 2.2 UNCAC and OECD Provisions and Their Implementation by the US, UK and Canada

In this section, the relevant UNCAC provisions are not quoted verbatim. Instead, the content of these provisions is summarized based on the *Legislative Guide for the Implementation of the United Nations Convention against Corruption (Legislative Guide)*.<sup>5</sup> Likewise, the OECD

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<sup>5</sup> United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption [Legislative Guide]*, 2nd ed [Legislative Guide (2012)] (United Nations, 2012), online: <[https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC\\_Legislative\\_Guide\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf)>.

Convention provisions are summarized rather than quoted.<sup>6</sup> Summaries of the US,<sup>7</sup> UK<sup>8</sup> and Canadian<sup>9</sup> provisions are largely from Executive Summaries produced by the UNODC's Implementation Review Group of the United Nations Convention against Corruption.

### 2.2.1 Immunities and Pre-Trial Release of Accused Persons

#### UNCAC

Article 30 (mandatory) requires State Parties to:

- Maintain a balance between immunities provided to their public officials and their ability to effectively investigate and prosecute offences established under the Convention (para 2);
- Ensure that pre-trial and pre-appeal release conditions take into account the need for the defendants' presence at criminal proceedings, consistent with domestic law and the rights of the defence (para 4).

#### OECD Convention

No mention of immunities or pre-trial release/detention.

#### US Law

Public officials are not immune from criminal and civil prosecution. However, US prosecutors have the power to grant public officials immunity from prosecution for corruption or other crimes, if those officials agree to provide information and assistance in the investigation and prosecution of others involved in corruption.

Measures to ensure that an accused person does not flee or leave the country pending trial are within the purview of the judicial authorities as set out in well-established federal and state laws governing bail and pre-trial release.

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<sup>6</sup> OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2011), online: <[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)>.

<sup>7</sup> UNODC, 3rd Session of the Implementation Review Group (Vienna, June 2012) at 11–21. Reviewing countries: Sweden and the Republic of Macedonia, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1251970e.pdf>>.

<sup>8</sup> UNODC, 4th Session of the Implementation Review Group (Vienna, May 2013) at 27–31. Reviewing countries: Greece and Israel, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1382015e.pdf>>.

<sup>9</sup> UNODC, 5th Session of Implementation Review Group (Vienna, June 2014) at 2–6. Reviewing countries: Switzerland and Iraq, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>>.

**UK Law**

There are no automatic immunities or jurisdictional privileges accorded to UK public officials, including Members of Parliament, as regards investigation, prosecution or adjudication of UNCAC offences. Prosecutors have the power to enter into immunity agreements in exchange for assistance in investigating others. However, it is more common to reduce an informant's sentence by two-thirds (one-third for the guilty plea and an additional one-third for the information and cooperation in investigation and prosecution of others).

Measures to ensure that an accused person does not flee or leave the country pending trial are within the purview of well-established laws governing bail and pre-trial release.

**Canadian Law**

There are no general immunities for Canadian political, executive or civil service officials engaged in criminal conduct (unless authorized by law for a specific and unique circumstance). Prosecutors have the power to enter into immunity agreements in exchange for information or assistance in investigating others.

The *Criminal Code* sets out measures to be taken with regard to the pre-trial detention and conditional release of persons being prosecuted, taking into account the need to ensure public safety and the accused's appearance at subsequent proceedings.

**Autocratic and Kleptocratic Countries**

It is worth noting that some of the most kleptocratic regimes in the world have enacted immunity laws which protect the President and/or other senior officials from prosecution for accepting bribes and robbing their nations' wealth. An example is provided by Teodoro Obiang, a member of the notoriously corrupt Obiang family in Equatorial Guinea. He was appointed as vice-president of Equatorial Guinea and given immunity from corruption charges even though the position of vice-president is not mentioned in the country's Constitution, indicating that the appointment was solely for the purposes of providing immunity.<sup>10</sup> In Nigeria, the Constitution provides immunity to the president, vice-president, and state and deputy state governors of all 36 states. According to the Economic and Financial Crimes Commission in Nigeria, this immunity was exploited by an estimated 31 out of the 36 state governors, such as the corrupt Ibori of Delta State.<sup>11</sup> In Cameroon, President Paul Biya has been in power since 1982 and is immune from prosecution. Amendments to the constitution since his presidency began have removed presidential term limits, meaning Biya can be president for life, and also created immunity for presidents after

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<sup>10</sup> John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar, 2014) at 82.

<sup>11</sup> *Ibid* at 83.

leaving office, meaning he is protected even after his presidency ends.<sup>12</sup> In Romania, the National Anti-Corruption Directorate is facing hurdles in charging the prime minister, Victor Ponta, for conflict of interest, money laundering, forgery, and tax evasion. Ponta's majority in Parliament blocked attempts to lift Ponta's immunity in June 2015, and his party is trying to pass laws making the prosecution of graft more difficult.<sup>13</sup> Presidential pardons can also be used to protect corrupt officials from the law, as demonstrated by the former Nigerian president Goodluck Jonathan's pardon of former state governor Diepreye Alamieyeseigha, who had been convicted of corruption offences.<sup>14</sup>

## 2.2.2 Specialized Anti-Corruption Enforcement Bodies

### UNCAC

Article 36 (mandatory) requires State Parties, in accordance with the fundamental principles of their legal system:

- To ensure they have a body or persons specializing in combating corruption through law enforcement and that such body or persons is sufficiently independent and free from undue influence;
- To provide sufficient training and resources to such body or persons.

Article 38 (mandatory) requires that State Parties take measures to encourage cooperation between their public authorities and law enforcement. Such cooperation may include:

- Informing law enforcement authorities when there are reasonable grounds to believe that offences established in accordance with Articles 15 (bribery of national public officials), 21 (bribery in the private sector) and 23 (laundering of proceeds of crime) have been committed; or
- Providing such authorities all necessary information, upon request.

Article 39 (mandatory) requires State Parties:

- To take measures consistent with their laws encouraging cooperation between private sector authorities (financial institutions, in particular) and law enforcement authorities regarding the commission of offences established in accordance with the Convention (para 1);
- To consider encouraging its nationals and habitual residents to report the commission of such offences to its law enforcement authorities (para 2).

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<sup>12</sup> *Ibid* at 81.

<sup>13</sup> "Corruption in Romania: Immune system", *The Economist* (13 June 2015), online: <http://www.economist.com/news/europe/21654081-law-change-may-help-victor-ponta-prime-minister-dodge-prosecution-immune-system>.

<sup>14</sup> Hatchard, (2014) at 84.

**OECD Convention**

Article 5 provides that:

Investigation and prosecution of bribery shall not be influenced by consideration of national economic or political issues, nor by the identity of persons involved.

Annex I: Good Practice Guidelines on Implementing Specific Articles of the Convention states:

- Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.
- Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions, taking into consideration Commentary 27 to the OECD Anti-Bribery Convention.

Recommendation IX: Reporting Foreign Bribery provides that member countries should ensure that:

- Easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with the member country's legal principles.
- Appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with the member country's legal principles.
- Appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

**US Law**

Section 3.3.1 describes the US enforcement bodies that deal with allegations of corruption.

**UK Law**

Section 3.3.2 describes the UK enforcement bodies that deal with allegations of corruption.

**Canadian Law**

Section 3.3.3 describes the Canadian enforcement bodies that deal with allegations of corruption.

### **Commentary**

While the US, UK and Canadian law enforcement bodies are generally recognized as independent and honest, that is not the case in many other countries, which makes enforcement of anti-corruption laws in those countries infrequent and arbitrary.

On the other hand, both Conventions call for adequate resources for law enforcement. Considering the size and impact of corruption committed by businesses from the US, UK and Canada, it seems that the UK and Canada are seriously under-resourced, certainly in comparison to the US. For example, in 2013 the Royal Canadian Mounted Police (RCMP) announced that they had approximately 35 active investigations underway into alleged Canadian bribery of foreign officials, but how can a staff of 14 officers adequately investigate that many cases of large-scale, multinational foreign corruption?

### **2.2.3 Discretionary Power to Investigate and Prosecute Corruption Offences**

#### **UNCAC**

Article 30 (non-mandatory) mandates that State Parties consider or endeavour:

To ensure that any discretionary legal powers relating to the prosecution of offences established in accordance with the Convention maximize the effectiveness of law enforcement in respect of those offences and act as a deterrent (para 3).

Article 36 (mandatory) requires State Parties, in accordance with the fundamental principles of their legal system, to grant law enforcement the necessary independence to carry out its functions effectively without undue influence.

#### **OECD Convention**

Article 5 provides that:

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

#### **US Law**

Prosecutors in common law systems have traditionally had very broad and independent discretionary powers to prosecute or decline to pursue allegations of violations of criminal law. Those discretionary powers are based on considerations such as strength of the evidence, deterrent impact, adequacy of other remedies and collateral consequences, and in general are not supposed to include political or economic factors. At the federal level, prosecutorial discretion over criminal law is vested solely in the Department of Justice and

the Attorney General. Allegations of prosecutorial misconduct can be brought before the courts at any time, including allegations of selective prosecution based on a number of prohibited factors.

In terms of prosecuting foreign and transnational bribery, the UNCAC Implementation Review Group noted that US law enforcement was effective in combating and deterring corruption and, within the framework of prosecutorial discretion and other aspects of the US legal system, had developed a number of good practices demonstrating a significant enforcement level in the US.

### **UK Law**

The Crown Prosecution Service (CPS) exercises very broad and independent discretion over the prosecution of criminal offences under the general supervision of the Director of Public Prosecutions, whose office helps ensure that prosecutions do not involve political interference. In spite of this independence, as mentioned in the introduction to this chapter, the investigation of bribery allegations against Prince Bandar of Saudi Arabia and BAE was halted by the Prime Minister for economic and military purposes despite the SFO's intention to pursue charges, but at least that influence was openly exercised in public.

The Serious Fraud Office (SFO) investigates and prosecutes domestic and foreign corruption cases. The SFO is an independent department, headed by a Director, under the general supervision of the Attorney General. SFO prosecutors are subject to the CPS's Code for Crown Prosecutors. (In Scotland, investigation and prosecution of crimes are under the direction of the Lord Advocate.)

The SFO receives a core budget from Her Majesty's Treasury, which can be supplemented as necessary to enable the office to take on large cases. In 2015-16 the budget was £62.6m. Until 2013-14, the SFO received a portion of money recovered from investigations. However, as this was infrequent and highly unpredictable, the SFO agreed all proceeds would go to the Treasury with a fixed sum added to the SFO's funding.<sup>15</sup>

### **Canadian Law**

In carrying out their duties in the public interest, Canadian prosecutors exercise a wide range of discretion over which criminal charges are pursued and they are obliged to exercise fair, impartial and independent judgement in those decisions. Guidance is provided in the Public Prosecution Service of Canada Deskbook, as well as in confidential practice directives. In general, the provincial ministries of justice are delegated authority to prosecute *Criminal Code* offences (including domestic corruption cases), while the Public Prosecution Service of Canada prosecutes *CFPOA* offences (although sometimes in cooperation with provincial prosecutors, as in the *Niko Resources* and *Griffiths Energy* cases).

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<sup>15</sup> Serious Fraud Office, "About Us", online: <<https://www.sfo.gov.uk/about-us/>>.

## 2.2.4 Investigatory Power to Search Financial Records

(This topic is also covered in Chapter 5 on asset recovery).

### UNCAC

In accordance with Article 31 (mandatory), State Parties must, to the greatest extent possible under their domestic system, have the necessary legal framework to enable:

- The identification, tracing and freezing or seizure of the proceeds and instrumentalities of crime covered by the Convention, for the purpose of eventual confiscation (para 2);
- The empowerment of courts or other competent authorities to order that bank, financial or commercial records be made available or seized. Bank secrecy shall not be a legitimate reason for failure to comply (para 7).

Article 40 (mandatory) requires State Parties to ensure that, in cases of domestic criminal investigations of offences established in accordance with the Convention, their legal system has appropriate mechanisms to overcome obstacles arising out of bank secrecy laws.

### OECD Convention

Article 9 dealing with Mutual Legal Assistance provides:

A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy (para 3).

Recommendation III also states:

- Each Member country should take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:
  - (iv) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation.

### US Law

The peer review of US legislation by the UNCAC Implementation Review Group concluded that US law was in compliance with Article 40 of UNCAC on bank secrecy. The Review Report noted that the US authorities may wish to have in mind that, in terms of implementation, bank secrecy may also apply to the activities of professional advisors that could be linked to those of their clients under investigation (for example, the activities of lawyers acting as financial intermediaries).

The Review Report noted that assistance is not denied on the grounds of bank secrecy or solely on the ground that the related offense involves fiscal matters.

### **UK Law**

The UK is generally compliant with UNCAC Article 40. The provision of information by financial institutions is generally governed by old case law (*Tournier v National Provincial and Union Bank of England* (1924), 1 KB 461), which still holds as good practice addressing how and why confidentiality may be breached. Bank records are also available by search warrant and through mandatory bank reporting of suspicious transactions.

The UK has a value-based confiscation system. Confiscation, as well as the detection, freezing, seizing and administration of property, are mainly covered in a comprehensive manner by the *Proceeds of Crime Act 2002* and the *Powers of Criminal Courts (Sentencing) Act 2000*. The basic regulations in England and Wales, Scotland and Northern Ireland are identical.

### **Canadian Law**

Bank secrecy does not prevent the prosecutor from requesting, and upon a court order, obtaining financial records relating to the proceeds of crime.

The mechanisms for identification and freezing criminal assets are set forth in the *Criminal Code* under section 462.3 — Part XII.2 — Proceeds Of Crime. Related provisions require banks and other financial institutions to report all transactions over \$10 000.

## **2.2.5 Protection of Witnesses, Victims, Whistleblowers and Participants**

(Protection of whistleblowers is examined in detail in Chapter 12.)

### **UNCAC**

In accordance with Article 32 (mandatory), and bearing in mind that some victims may also be witnesses (Article 32, para 4), State Parties are required:

- To provide effective protection for witnesses, within available means (para 1). This may include:
  - Physical protection (para 2 (a));
  - Domestic or foreign relocation (para 2 (a));
  - Special arrangements for giving evidence (para 2 (b));
- To consider entering into foreign relocation agreements (para 3);
- To provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law (para 5).

Article 33 (non-mandatory) requires State Parties to consider providing measures to protect persons who report offences established in accordance with the Convention to competent authorities.

Article 37 (mandatory) provides that State Parties must:

- Take appropriate measures to encourage persons who participate or who have participated in Convention offences:
  - To supply information for investigative and evidentiary purposes;
  - To provide concrete assistance towards depriving offenders of the proceeds of crime and recovering such proceeds (para 1);
  - To provide to such persons the same protection as provided to witnesses (para 4; see also Article 32).

### OECD Convention

Recommendation IX: Reporting Foreign Bribery

Member countries should ensure that:

Appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

### US Law

The United States relies on a wide range of protection measures for witnesses and victims. Protection is provided not only to persons that actually testify in criminal proceedings, but also to potential witnesses, as well as the immediate and extended family members of the witnesses and the persons closely associated with them, if an analysis of the threat determines that such protection is necessary.

From an operational point of view, the protection of witnesses' and victims' physical security can be secured through the Federal Witness Security Program,<sup>16</sup> if these persons meet the requirements for participation in that program. Other procedures are also in place to provide limited protection through financial assistance for relocation.

With regard to the protection of reporting persons, the *Federal Whistleblower Protection Act* of 1989 makes the Office of the Special Counsel (OSC) responsible for, *inter alia*, protecting employees, former employees and applicants for employment from twelve statutory

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<sup>16</sup>For more information, see Witness Security Program, online <<http://www.usmarshals.gov/witsec/>>.

prohibited personnel practices, as well as receiving, investigating and litigating allegations of such practices. Whistleblower protection laws in the US are fully described in Chapter 12.

The protection of witnesses may also be extended to cooperating informants and defendants who agree to become government trial witnesses. The discretionary powers of the prosecution services are of relevance. In addition to granting immunity, prosecutors often negotiate a plea agreement with a defendant to induce that defendant's cooperation by dismissing one or more of the charges, and/or by recommending that the defendant receive a lower sentence in exchange for his/her cooperation.

### **UK Law**

UK chief officers of police and heads of law enforcement agencies have access to an extensive range of measures to protect witnesses, based on the provisions of *SOCPA*, including full witness protection programmes involving witness relocation, a change of identity and a high degree of confidentiality. These measures fully cover the requirements of Article 32.

The same can be said about the protection of reporting persons. The *Public Interest Disclosure Act 1998* amending the *Employment Rights Act 1996* added whistleblowers to the list of those given special protection against dismissal or other detrimental treatment, and Northern Ireland has enacted similar legislation. Whistleblower protection laws in the UK are fully described in Chapter 12.

The protection and safety of persons who cooperate is the same in the UK as for witnesses under Article 32. Additionally, in England and Wales, section 82 of *SOCPA* makes special provision for the protection of witnesses and certain other persons involved in investigations or legal proceedings. Other implementing laws (including for Scotland and Northern Ireland) are referenced in the UN Report on the UK's compliance with UNCAC.

### **Canadian Law**

Mechanisms exist to protect witnesses, including measures that may be used in court to protect witnesses during their testimony. The federal Witness Protection Program of Canada is administered by the RCMP and offers assistance to persons who are providing evidence or information, or otherwise participating in an inquiry, investigation or prosecution of an offence. Protection measures may include relocation inside or outside of Canada, accommodation, change of identity, counselling and financial support to ensure the witness's security or facilitate the witness's re-establishment to become self-sufficient.

With regard to persons reporting corruption, section 425.1 of the *Criminal Code* makes it a criminal offence for an employer to demote, terminate, or otherwise affect or take disciplinary action against an employee who reports a possible offence under any federal or provincial Act or regulation, either before a report takes place or in retaliation after a report is made. In addition, the *Public Servants Disclosure Protection Act (PSDPA)* provides a mechanism for public servants to make disclosures of wrongdoing, and established the office of the Public Sector Integrity Commissioner to investigate those alleged wrongdoings and

investigate complaints of reprisals. The *PSDPA* also provides members of the public with protection from reprisal by their employers for having provided, in good faith, information to the Public Sector Integrity Commissioner concerning alleged wrongdoing in the federal public sector. Other protections are available at the provincial level. Whistleblower protection laws in Canada are described in Chapter 12.

## **2.2.6 International Cooperation in Investigation and Prosecution**

(Mutual Legal Assistance is dealt with in Chapter 5, Section 6)

### **UNCAC**

Article 43 (mandatory) provides:

State Parties shall cooperate in criminal matters in accordance with Articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, State Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

Article 46 (mandatory) provides:

State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention (para 1).

Article 48 (mandatory) on law enforcement cooperation:

Fleshes out the requirements of Articles 43 and 46 by requiring State Parties to cooperate with the law enforcement bodies of other State Parties through communicating, coordinating investigations, providing support, exchanging information, etc. It is recommended that in order to give effect to the requirements of Article 48, bilateral or multilateral agreements should be entered into by law enforcement bodies.

Article 49 (non-mandatory) on joint investigations provides:

State Parties should consider conducting joint investigations and forming joint investigative bodies to that effect.

### **OECD Convention**

Article 9 (mandatory) on Mutual Legal Assistance states:

- Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal

proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance (para 1).

- Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention (para 2).

Article 11 (mandatory) provides:

For the purposes of Article 4, paragraph 3 on consultation, Article 9 on mutual legal assistance and Article 10 on extradition, each Party shall identify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as a channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

### **US Law**

The US considers the UNCAC provisions as a sufficient legal basis for law enforcement cooperation in respect of the offenses covered by UNCAC. Additionally, the country has entered into bilateral or multilateral agreements or arrangements on direct cooperation with many foreign law enforcement agencies.

The presence of law enforcement attachés abroad and the extensive use of the informal law enforcement channels in appropriate instances is commended by the UN Review Committee as good practice. The Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury, which is the US financial intelligence unit (FIU) and part of the Egmont Group, also plays a significant role in promoting information sharing with foreign counterparts in money laundering cases.

The US has concluded bilateral and multilateral agreements that allow for the establishment of joint investigative bodies. Joint investigations can also take place on a case-by-case basis, at the level of informal law enforcement cooperation, and entail information sharing and cooperation on developing effective investigative strategies.

### **UK Law**

UK law enforcement authorities engage in broad, consistent and effective cooperation with international counterparts to combat transnational crime, including UNCAC offences. This cooperation relates, *inter alia*, to exchanges of information, liaising, law enforcement coordination and the tracing of offenders and of criminal proceeds. A particularly prominent role in such activities is played by the Serious Organised Crime Agency (SOCA), and examples of SOCA's activities were provided during the UNCAC Review of UK laws. Important roles are also played by the SFO, the City of London Police, the specialized units

of the Metropolitan Police and other law enforcement authorities. The level and effectiveness of these activities indicates effective compliance with UNCAC Article 48.

Investigating authorities in the UK make use of the mechanism of joint investigation teams (JITs), in particular with civil law jurisdictions in Europe, when their use will mitigate problems in receiving intelligence and investigative cooperation from those jurisdictions.

The UK has, and utilizes, the ability to cooperate with foreign law enforcement authorities, often through regular MLA procedures, in the use of special investigation techniques, including covert surveillance and controlled deliveries.

The UNCAC Review of UK laws also indicates that the UK handles a high volume of MLA and international cooperation requests with an impressive level of execution. The efficient operations of the UK in this sphere are not only carried out by regular law enforcement authorities, such as the Home Office and the Metropolitan Police, but also through the effective use of specialized agencies, such as the SFO and SOCA, to deal with requests involving particularly complex and serious offences, including offences covered by UNCAC. The effective use of this unique organizational structure merits recognition as a success and good practice under the Convention. In addition, the operations of aid-funded police units directed at illicit flows and bribery related to developing countries constitute a good practice in promoting the international cooperation goals of UNCAC. Similarly, the UK's efforts to assist in building the capacity of law enforcement authorities in developing nations, with the goal of enabling them to investigate and prosecute corruption offences, also constitutes a good practice.

### **Canadian Law**

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) has a mandate to exchange financial intelligence with other State Parties in relation to money laundering and terrorist financing. Information received by FINTRAC is shared as appropriate with Canadian police and other designated agencies. Such information can also relate to corruption offences: from April 1, 2010 to March 31, 2011, 34 money laundering cases, suspected to be related to corruption according to the voluntary information received from law enforcement, were disclosed by FINTRAC to relevant authorities.

To further enhance cooperation in law enforcement, the RCMP has 37 liaison officers deployed worldwide, with this number soon to be expanded. Combined with the establishment of the International Anti-Corruption Team at the RCMP, this provides a strong institutional framework for international cooperation in investigations. Furthermore, the RCMP recently concluded a memorandum of understanding with Australia, the UK and US on the establishment of an International Foreign Bribery Task Force, which will strengthen existing cooperative networks between the participants and outline the conditions under which relevant information can be shared.

The potential for joint investigations is evaluated on a case-by-case basis. They are most often conducted on the basis of a memorandum of understanding or exchange of letters between

the RCMP and a foreign agency partner. Such joint investigations can, however, also be conducted without a formal agreement.

### **2.2.7 Jurisdiction for Prosecution and Transfer of Criminal Proceedings**

#### **UNCAC**

Article 42 (mandatory) states:

If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other State Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those State Parties shall, as appropriate, consult one another with a view to coordinating their actions (para 5).

Article 47 (mandatory) on transfer of criminal proceedings provides:

State Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

#### **OECD Convention**

Article 4 (mandatory) states:

When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (para 3).

#### **US Law**

The US authorities reported no cases of transfer of criminal proceedings involving US citizens to foreign fora, due partly to the national policy of seeking extradition of US citizens alleged to have committed offenses under US jurisdiction.

US authorities will sometimes decline to prosecute foreign offenders under *FCPA* jurisdiction when these offenders are facing prosecution for the same acts of corruption in a foreign jurisdiction. For example, there was no US prosecution under the *FCPA* of Griffiths Energy Inc. on the grounds that the company's bribery was adequately prosecuted and punished in Canada.

## UK Law

Although UK authorities indicated that it is possible for them to transfer proceedings to other jurisdictions and to accept such transfers, it also appears that they do not have any specific legislative or treaty mechanisms to effectuate such transfers. The transfer of proceedings under current UK practice involves simply accepting a foreign file for examination by UK prosecution authorities. If an independent basis for jurisdiction exists within the UK, the prosecution authorities may exercise discretion to undertake prosecution. In such cases, evidence is obtained via traditional MLA procedures. Domestic procedures and guidelines provide a practical basis under which the UK can entertain requests that cases pending in foreign jurisdictions be prosecuted in the UK. The UNCAC Implementation Review Group concluded that the UK complies with Article 47 of the Convention.

## Canadian Law

While the transfer of criminal proceedings is not specifically addressed in the domestic legislation of Canada, the UNCAC review indicated that the discretion available to Canadian prosecution services is exercised so as to facilitate the processing of cases in the most appropriate jurisdiction.

### 2.2.8 Extradition<sup>17</sup>

## UNCAC

Article 44 (mandatory) recommends that:

State Parties streamline the extradition of accused persons to the territory of the requesting State Party so that they may stand trial for corruption offences.

## OECD Convention

Article 10 (mandatory) states:

Each Party shall take any measures necessary to ensure that it can extradite its nationals or prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution (para 3).

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<sup>17</sup> Sometimes politics play a role in extradition proceedings. For example, in 2015, an Austrian court refused to extradite Dmytro Firtash, a Ukrainian national, to the US after the DOJ laid charges for violations of the *FCPA* committed in India. Firtash is a pro-Russian Ukrainian and argued that the DOJ was motivated by political concerns. The court agreed with Firtash and criticized the DOJ. See Richard L Cassin, "The FCPA Blog goes 'Above the Law'" (20 June 2015), *The FCPA Blog*, online: <<http://www.fcpablog.com/blog/2015/6/20/the-fcpa-blog-goes-above-the-law.html>>.

## US Law

The US extradition regime, based on a network of treaties supplemented by conventions, is underpinned by a solid legal framework allowing for an efficient and active use of the extradition process. The shift from rigid list-based treaties to agreements primarily based on the minimum penalty definition of extraditable offenses (in most cases deprivation of liberty for a maximum period of at least one year, or a more severe penalty) for establishing double criminality has given the extradition system much more flexibility, and should be highlighted as a good practice.

The US policy of extraditing its own nationals constitutes a good practice since it can assist in dealing with issues of double jeopardy, jurisdiction and coordination.

The US authorities indicated that no implementing legislation was required for the implementation of Article 44 of the UNCAC. It was further reported that the US may only seek extradition or grant an extradition request on the basis of a bilateral extradition treaty, and therefore UNCAC alone cannot be used as the basis for extradition. It can, however, expand the scope of the extraditable offense when a bilateral treaty is already in place.

The US does not refuse extradition requests solely on the ground that the offense for which extradition is sought involves fiscal matters.

The US has bilateral extradition treaties with 133 States or multilateral organizations, such as the European Union. All incoming and outgoing extradition requests are reviewed and evaluated by the Office of International Affairs, Department of Justice and the Office of the Legal Adviser, Department of State.<sup>18</sup>

## UK Law

The UK has a complex but comprehensive legislative framework for enabling the extradition of fugitives. The complexity of the framework derives in part from the fact that the procedures and requirements for extradition may vary depending on the legislative category that the requesting State falls into, as well as which region of the UK (England and Wales, Northern Ireland or Scotland) is involved.

The UNCAC Review for the UK makes clear, however, that the UK is able to extradite to all States, even those which are included in neither Category 1 (EU Member States) nor Category 2 (designated non-EU Member States) of the *Extradition Act 2003*. Under section 193 of the *Extradition Act 2003*, if a State is a party to an international convention to which the UK is also a party, the UK may designate the State under section 193 and thereby allow extradition to that State. No designations have been made under section 193 regarding UNCAC. Nevertheless, where an extradition request is received from a State that is not a

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<sup>18</sup> For detailed information on US extradition law, see M Cherif Bassiouni, *International Extradition United States Law and Practice*, 6th ed (Oxford University Press, 2014).

designated extradition partner and the person sought is wanted for conduct covered by a convention that the UK has ratified, the UK will consider whether to enter into a “special extradition arrangement” under section 194. In this manner, the UK may comply with the extradition requirements of UNCAC.

While UNCAC could seemingly be a legal basis for extradition under section 193 of the *Extradition Act 2003*, the UK did not indicate whether the necessary designation under this section was made with respect to State Parties to UNCAC. It was observed that UNCAC has never served as the basis for an extradition from the UK.

It is nevertheless clear that the UK’s extradition framework satisfies the requirements of the Convention regarding offences subject to extradition and the procedures and requirements governing extradition. The fact that the UK has criminalized UNCAC offences as “equivalent conduct offences” would seem to reduce any concerns regarding requirements for double criminality, one of the primary issues of concern in Chapter IV of UNCAC. Similarly, the UK’s willingness and ability to extradite its own nationals was favourably noted.

While the UK would appear to require the provision of prima facie evidence to enable extradition to UNCAC partners who would not qualify as Category 1 or Category 2 territories under UK legislation, the UNCAC Review Group indicated that these evidentiary requirements are applied in a flexible and reasonable manner.

Similarly, the review indicates that the differences between extradition procedures in Scotland and other parts of the UK are of more technical than substantive significance and do not affect the review’s conclusion that the UK complies with the requirements of the Convention.<sup>19</sup>

### **Canadian Law**

In Canada, extradition is provided for under bilateral and multilateral agreements to which Canada is party and, in limited circumstances, through a specific agreement under the *Extradition Act*. Canada has signed 51 bilateral extradition conventions and is also a party to four multilateral treaties. Canada also accepts UNCAC as the legal basis for extradition where it does not have an existing agreement in place with a requesting State Party and has informed the Secretary-General of the UN accordingly. UNCAC has been used as the legal basis for extradition on a number of occasions.

Dual criminality is a prerequisite to grant extradition, but a flexible, conduct-based test is applied to this requirement under section 3 of the *Extradition Act*. In addition, the offence in relation to which extradition is sought must be subject to a punishment of no less than two years, meaning that all acts covered by UNCAC (with the exception of illicit enrichment, in

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<sup>19</sup> For detailed information on UK extradition law see, Clive Nicholls QC et al, *Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance*, 3rd ed (Oxford University Press, 2013) and Edward Grange & Rebecca Niblock, *Extradition Law: A Practitioner’s Guide* (Legal Action Group, 2013).

relation to which Canada made a reservation upon ratification of the Convention) are extraditable offences. Canada permits the extradition of its nationals.

In accordance with Article 44, paragraph 4 of the Convention, none of the offences established in accordance with UNCAC are considered political offences. Canada also meets the requirements of Article 44, paragraph 16 of the Convention by not denying extradition requests for the sole reason that they are based on fiscal matters.

Canada has taken effective steps to simplify the evidentiary requirements and procedures in relation to extradition proceedings which has resulted in more efficient processing of extradition cases. Under the *Extradition Act*, Canada is able to provisionally arrest an individual in anticipation of a request for extradition.

The Supreme Court of Canada in *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at paras 21-22, explained that the process of extradition from Canada has two stages, a judicial and executive one. As the Court states:

The first stage consists of a committal hearing at which a committal judge assesses the evidence and determines (1) whether it discloses a *prima facie* case that the alleged conduct constitutes a crime both in the requesting state and in Canada and that the crime is the type of crime contemplated in the bilateral treaty; and (2) whether it establishes on a balance of probabilities that the person before the court is in fact the person whose extradition is sought. In addition, s. 25 of the *Extradition Act*, S.C. 1999, c. 18 (formerly s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23), empowers the committal judge to grant a remedy for any infringement of the fugitive's *Charter* rights that may occur at the committal stage: *Kwok*, at para. 57.

After an individual has been committed for extradition, the Minister reviews the case to determine whether the individual should be surrendered to the requesting state. This stage of the process has been characterized as falling "at the extreme legislative end of the *continuum* of administrative decision-making" and is viewed as being largely political in nature: *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631, at p. 659. Nevertheless, the Minister's discretion is not absolute. It must be exercised in accordance with the restrictions.

Under the *Canadian Charter of Rights and Freedoms* and the *Extradition Act*, those subject to an extradition request benefit from due process and fair treatment throughout relevant proceedings. Furthermore, under both existing international agreements and the domestic provisions of the *Extradition Act*, Canada is required to refuse an extradition request when it

is based on motives of a discriminatory nature, such as the race, sex, language, religion or nationality of the person.<sup>20</sup>

### 2.2.9 Use of Special Investigative Techniques

#### UNCAC

Article 50 (mandatory) requires:

State Parties employ special investigative techniques in combating corruption. These techniques include using controlled delivery (i.e., allowing illicit activity to go forward under surveillance to gather evidence for prosecution), electronic surveillance and undercover operations where appropriate.

#### OECD Convention

No mention of investigative techniques.

#### US Law

US laws permit controlled deliveries,<sup>21</sup> electronic surveillance and undercover operations in accordance with legal limits and constitutional protections.<sup>22</sup> For further discussion, see Section 4.

#### UK Law

The UK has cooperated with foreign law enforcement authorities.

UK laws permit controlled deliveries, electronic surveillance and undercover operations in accordance with legal limits, which include reliance on the abuse of process doctrine.<sup>23</sup> For further discussion, see Section 4.

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<sup>20</sup> For detailed information on Canadian extradition law, see Garry Botting, *Canadian Extradition Law Practice*, 5th ed (LexisNexis Canada, 2015) and Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 2nd ed (Irwin Law, 2014) at 478–504.

<sup>21</sup> Controlled deliveries are normally discussed in the context of the law surrounding entrapment. Controlled deliveries do not constitute entrapment and are therefore legal.

<sup>22</sup> *American Jurisprudence*, 2nd ed “Search and Seizures: Electronic Surveillance Generally”, § 338 and “Undercover Activities”, § 2406.

<sup>23</sup> Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 192-200.

## Canadian Law

Canadian law permits the use of controlled deliveries, electronic surveillance and undercover operations, subject to legal and constitutional limits under domestic law and the *Charter of Rights and Freedoms*.<sup>24</sup> For further discussion, see Section 4.

### 3. ENFORCEMENT BODIES

#### 3.1 UNCAC and OECD Provisions

Article 36 of UNCAC, along with other international conventions (e.g., Article 20 of the Council of Europe Criminal Law Convention on Corruption) requires State Parties to empower specialized persons or bodies to fight corruption by investigating and prosecuting corruption offences. Without a standardized institutional blueprint for enforcement bodies, countries vary widely in their structural approaches to enforcement.

Article 36(b) of UNCAC requires State Parties “to grant the body or persons the necessary independence to carry out its or their functions effectively without undue influence.” This “necessary independence” requirement is vital to effective enforcement, but the term is vague and not uniformly implemented. The *Legislative Guide* recommends the creation of entirely new enforcement bodies independent from existing law enforcement organizations to satisfy UNCAC’s requirements. It also suggests that specializing and enlarging the power of an existing enforcement organization may be an appropriate course of action depending on the State Party’s particular circumstances.<sup>25</sup>

Article 5 of the OECD Anti-Bribery Convention instructs that Parties not be influenced by their own economic interests or international strategic concerns when investigating and prosecuting corruption. The article does not, however, specify the means by which Parties should achieve such independence.

The lack of specific guidance on how to ensure independence in anti-corruption enforcement underscores the difficulty of preventing political and economic interests from influencing investigations and prosecutions. Creating an independent enforcement system is easier said than done. Whatever structure the enforcement body takes, it must be sufficiently independent from government to ensure that its decisions to enforce anti-corruption measures are not compromised by national or international governmental concerns or, worse, by corrupt government officials.

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<sup>24</sup> Don Stuart, *Canadian Criminal Law, Student Edition*, 7th ed (Carswell, 2014).

<sup>25</sup> Legislative Guide (2012) at 148.

The OECD publication *Specialised Anti-Corruption Institutions: Review of Models* provides a summary of the criteria for effective enforcement bodies and a good survey of the different types of enforcement bodies in operation around the world:

BEGINNING OF EXCERPT

Both the United Nations and the Council of Europe anti-corruption conventions establish *criteria for effective specialized anti-corruption bodies*, which include independence, specialisation, the need for adequate training and resources [see articles 6 and 36 of UNCAC and article 20 of the *Council of Europe Criminal Law Convention on Corruption*]. In practice, many countries face serious challenges in implementing these broad criteria.

- **Independence** primarily means that the anti-corruption bodies should be shielded from undue political interference. Thus, genuine political will to fight corruption is the key prerequisite for independence. Such political will must be embedded in a comprehensive anti-corruption strategy. The independence level can vary according to specific needs and conditions. Experience suggests that it is structural and operational autonomy that are important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for the director's appointment and removal, proper human resources management, and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability: specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work. Furthermore, no single body can fight corruption alone. Inter-agency co-operation, and co-operation with civil society and businesses are important factors to ensure their effective operations.
- **Specialisation** of anti-corruption bodies implies the availability of specialised staff with special skills and a specific mandate for fighting corruption. The forms and level of specialisation may differ from country to country, as there is no one successful solution that fits all. For instance, the Council of Europe Criminal Law Convention on Corruption clarifies the standard for law enforcement bodies, which can require the creation of a special body or the designation of several specialised persons within existing institutions. International trends indicate that in OECD countries, specialisation is often ensured at the level of existing public agencies and regular law enforcement bodies. Transition, emerging and developing economies often establish separate specialised anti-corruption bodies often due to high corruption-levels in existing agencies. In addition, these

countries often create separate specialised bodies in response to pressure from donors and international organisations.

- **Adequate resources, effective means and training** should be provided to the specialised anti-corruption institutions in order to make their operations effective. Specialised staff, training and adequate financial and material resources are the most important requirements. Concerning specialised law enforcement anti-corruption bodies, an important element to properly orient them is the delineation of substantive jurisdictions among various institutions. Sometimes, it is also useful to limit their jurisdiction to important and high-level cases. In addition to specialised skills and a clear mandate, specialised anti-corruption bodies must have sufficient powers, such as investigative capacities and effective means for gathering evidence. For instance, they must have legal powers to carry out covert surveillance, intercept communications, conduct undercover investigations, access financial data and information systems, monitor financial transactions, freeze bank accounts, and protect witnesses. The power to carry out all these functions should be subject to proper checks and balances. Teamwork between investigators, prosecutors, and other specialists, e.g. financial experts, auditors, information technology specialists, is probably the most effective use of resources.

Considering the multitude of anti-corruption institutions worldwide, their various functions, and performance, it is difficult to identify all main functional and structural patterns. Any new institution needs to adjust to the specific national context taking into account the varying cultural, legal and administrative circumstances. Nonetheless, identifying “good practices” for establishing anti-corruption institutions, as well as trends and main models is possible. A comparative overview of different models of specialised institutions fighting corruption can be summarised, according to their main functions, as follows:

- **Multi-purpose anti-corruption agencies.** This model represents the most prominent example of a single-agency approach based on key pillars of repression and prevention of corruption: policy, analysis and technical assistance in prevention, public outreach and information, monitoring, investigation. Notably, in most cases, prosecution remains a separate function. The model is commonly identified with the Hong Kong Independent Commission against Corruption and the Singapore Corrupt Practices Investigation Bureau. It has inspired the creation of similar agencies on all continents. This model can be found in Australia (in New South Wales), Botswana, Lithuania, Latvia, Poland, Moldova and Uganda. A number of other institutions, for instance, in the Republic of Korea,

Thailand, Argentina and Ecuador, have adopted elements of the Hong Kong and Singapore models, but follow them less rigorously.

- **Specialised institutions in fighting corruption through law enforcement.** The anti-corruption specialisation of law enforcement can be implemented in detection, investigation or prosecution bodies. This model can also result in combining detection, investigation and prosecution of corruption into one law enforcement body/unit. This is perhaps the most common model used in OECD countries. This model is followed by the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime Økokrim, the Central Office for the Repression of Corruption in Belgium, the Special Prosecutors Office for the Repression of Economic Offences Related to Corruption in Spain, but also by the Office for the Prevention and Suppression of Corruption and Organised Crime in Croatia, the Romanian National Anti-Corruption Directorate, and the Central Prosecutorial Investigation Office in Hungary.

This model could also apply to internal investigation bodies with a narrow jurisdiction to detect and investigate corruption within the law enforcement bodies. Good examples of such bodies can be found in Germany, the United Kingdom and Albania. For example, in the UK, investigation of police corruption is handled by the Independent Police Complaints Commission (IPCC).

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*Assessing performance* is a challenging task for anti-corruption agencies, and many agencies lack the skills, expertise, and resources to develop adequate methodologies and monitoring mechanisms. Few agencies have rigorous implementation and monitoring mechanisms in place to trace their performance, and to account for their activities to the public. At the same time, showing results might often be the crucial factor for an anti-corruption institution to gain, or retain public support and fend off politically-motivated attacks. The report recommends that anti-corruption agencies develop their monitoring and evaluation mechanisms to examine and improve their own performance and to improve public accountability and support.

While many anti-corruption bodies created in the past decade have achieved results and gained public trust, the experience in emerging and transition economies shows that establishing a dedicated anti-corruption body alone cannot help to reduce corruption. The role of other public institutions, including various specialised integrity and control bodies, and internal units in various public institutions is increasingly important for preventing and detecting corruption in the public sector. This trend converges with the approach of many OECD countries where specialised anti-corruption units were established in law enforcement agencies, while the task of

preventing corruption in the public sector and in the private sector was ensured by other public institutions as part of their regular work.<sup>26</sup>

END OF EXCERPT

### 3.1.1 Hong Kong's Independent Anti-Corruption Commission

Hong Kong provides a helpful blueprint for effective enforcement bodies. As noted in the executive summary of the OECD publication *Specialised Anti-Corruption Institutions: Review of Models*,<sup>27</sup> Hong Kong's Independent Commission Against Corruption (ICAC) has achieved laudable independence and has been extensively copied by countries with systemic corruption problems:

Inspired by the success story of Hong Kong's anti-corruption commission and its three-pronged approach to fighting corruption and also encouraged by international conventions, many countries around the world, including in Eastern Europe, established specialised bodies to prevent and combat corruption. Creating such bodies was often seen as the only way to reduce widespread corruption, as existing institutions were considered too weak for the task, or were considered to be part of the corruption-problem and could therefore, not be part of the solution for addressing it.<sup>28</sup>

The features of Hong Kong's ICAC are distinctive. As Scott points out:

Hong Kong's Independent Commission Against Corruption (ICAC) is often regarded as a model of the way in which efforts to prevent and control corruption should be organized and implemented. Its achievement in transforming Hong Kong from a place where corrupt practices were accepted to a place in which they are the exception has been widely admired and studied ... [T]he ICAC's success is attributed to its distinctive characteristics, which may be said to form a syndrome in the sense that each of its features is thought to be necessary for the organization to work well.<sup>29</sup>

The characteristics of the ICAC are as follows:

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<sup>26</sup> OECD, *Specialised Anti-Corruption Institutions: Review of Models*, 2nd ed (OECD Publishing, 2013) at 12-15, online: <<http://dx.doi.org/10.1787/9789264187207-en>>.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid* at 11.

<sup>29</sup> Ian Scott, "The Hong Kong ICAC's approach to corruption control" in Adam Graycar and Russell Smith, eds, *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) at 401.

- A unitary body with sole authority over corruption control rather than multiple anti-corruption organizations operating simultaneously;
- Independence from the Hong Kong government;
- Structural divisions that reflect the ICAC's three-pronged approach: Corruption Prevention, Community Relations and Operations Departments;
- Wide policing powers including the right of arrest and detention;
- Secure funding independent from a budget approved by the government;
- Personnel that are not susceptible to corruption;
- The political will to combat corruption; and
- Public support and goodwill towards the ICAC (the organization has been voted the most trusted organization in Hong Kong several times).

There has been some debate as to whether the Hong Kong model should be followed widely or whether the structure of the ICAC works only in the specific cultural context of Hong Kong. Speville provides an in-depth discussion of the merits of Hong Kong's ICAC and an answer to critics who view the ICAC model as impractical for other countries.<sup>30</sup>

### 3.1.2 Quebec's Anti-Corruption Unit

In 2011, Quebec became the first (and so far only) province in Canada to create a permanent anti-corruption enforcement agency. UPAC, the Unité permanente anticorruption (Permanent Anticorruption Unit), is made up of staff seconded from six different governmental agencies: Sûreté du Québec (police); Revenu Québec (tax collection); Ministère des Transports (roads and infrastructure); Commission de la construction du Québec (responsible for labour relations in the construction industry); and Ministère des Affaires municipales (municipal affairs). UPAC started in 2011 with 200 employees and a \$31 million budget. By 2016, UPAC had grown to 320 employees and a budget of \$48 million.<sup>31</sup> UPAC is headed by the Anti-Corruption Commissioner, a role created through the provincial *Anti-Corruption Act*.<sup>32</sup>

From 2011 to October 2016, UPAC has charged 169 individuals and 14 businesses with domestic criminal corruption offences resulting so far in 27 individuals convicted. There have also been penal investigations of regulatory offences leading to charges against 59 individuals and 45 businesses, resulting thus far in convictions of 13 individuals and 9 businesses. In addition, UPAC does significant work in the prevention of corruption. It has

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<sup>30</sup> Bertrand de Speville, "Anticorruption Commissions: The 'Hong Kong Model' Revisited" (2010) 17:1 Asia-Pacific Rev 47.

<sup>31</sup> Robert Lafrenière "Unité permanente anticorruption" (Presentation delivered at the Follow the Money: Corruption, Money Laundering & Organized Crime Conference, Vancouver BC, 28 October 2016).

<sup>32</sup> *Anti-Corruption Act*, SQ c L-6.1.

held 774 sessions on corruption and improper use of public office, which were attended by over 22,000 public office holders and workers.<sup>33</sup>

As set forth in the *Anti-Corruption Act*, the “mission of the Commissioner is to ensure, on behalf of the State, the coordination of actions to prevent and to fight corruption in contractual matters within the public sector. The Commissioner exercises the functions conferred on the Commissioner by this Act, with the independence provided for in this Act.”<sup>34</sup> The Anti-Corruption Commissioner has a mandate to:

- Coordinate investigations in relation to the *Criminal Code*, penal and fiscal law,
- Receive, record and examine disclosures of wrongdoings,
- Make recommendations to governmental and public administrators,
- Play an educative and preventative role in the fight against corruption.<sup>35</sup>

One of the highest profile cases involving UPAC is the arrest and guilty plea of Gilles Vaillancourt, mayor of Laval from 1989 to 2012. Vaillancourt was arrested in 2013 as part of a sweep by UPAC that saw 36 individuals arrested. Following a guilty plea, Brunton J accepted a joint submission for a 6-year prison sentence and restitution of about \$7 million, much of which was hidden in Swiss bank accounts.<sup>36</sup>

### 3.1.3 Guatemala’s Unique External Anti-Corruption Commission

The International Commission against Impunity in Guatemala (CICIG) is a ground-breaking reform, making Guatemala the first country to adopt an external foreign body to help fight corruption. CICIG’s efforts have led to the arrests of hundreds of individuals, including former President Otto Pérez Molina, who resigned from office and is now imprisoned awaiting trial (as of December 2016). The reforms undertaken in Guatemala could serve as a blueprint for combating corruption in countries where corruption has permeated the highest echelons of civil servants and government employees.

With 15.8 million residents, the Republic of Guatemala is Central America’s most populous country. The country endured a civil war from 1960 to 1996 that saw over 200,000 people either killed or “disappeared” at the hands of the government.<sup>37</sup> As Lakhani writes, a “1996

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<sup>33</sup> Lafrenière (28 October 2016).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Paul Cherry, “Ex-Laval mayor Gilles Vaillancourt pleads guilty to fraud, could face six-year prison term”, *National Post* (1 December 2016), online: <<http://news.nationalpost.com/news/canada/canadian-politics/ex-laval-mayor-gilles-vaillancourt-pleads-guilty-to-fraud>>; “Former Laval mayor Gilles Vaillancourt sentenced to 6 years for Fraud”, *Canadian Press* (15 December 2016), online: <<http://www.ctvnews.ca/canada/former-laval-mayor-gilles-vaillancourt-sentenced-to-6-years-for-fraud-1.3205149>>.

<sup>37</sup> “Guatemala ‘Silent Holocaust’: The Mayan Genocide” *The Center for Justice and Accountability*, online: <<http://cja.org/where-we-work/guatemala/>>.

peace deal ended the conflict but not the criminality. Instead, new groups infiltrated politics, security forces and the criminal justice system, operating with almost total impunity.”<sup>38</sup> Approximately 6,000 homicides occur in Guatemala annually (about twenty times more than in Canada) and corruption reaches the highest levels of civil servants and elected officials. In 2015, Transparency International scored Guatemala 23/100, ranking it the 123<sup>rd</sup> worst country based on perceptions of corruption.<sup>39</sup>

Backed by the United Nations, CICIG began operating in Guatemala in 2007. CICIG has a staff of 150 individuals who come from 20 countries and a budget of \$12-15 million per year,<sup>40</sup> close to half of which is funded by the US.<sup>41</sup> CICIG’s mandate must be extended by the Guatemalan congress every two years, with the current mandate ending in September 2017.<sup>42</sup> CICIG works with the Public Prosecutors Office, National Civil Police and other state institutions to combat crimes committed by clandestine security groups and to implement measures aimed at strengthening the justice system.<sup>43</sup>

While CICIG’s efforts are broader than anti-corruption reform, anti-corruption efforts have been prioritized by Iván Velásquez Gómez, CICIG’s commissioner since 2012. Velasquez, a former investigating judge of Columbia’s Supreme Court, set five priorities for CICIG: 1) contraband; 2) administrative corruption, 3) illegal campaign financing; 4) judicial corruption, and 5) drug trafficking and money laundering.<sup>44</sup>

CICIG had a rocky start. In its first five years, two commissioners resigned due to conflict with the government.<sup>45</sup> A major break-through for CICIG came from an investigation into customs officials taking bribes to reduce duties. Dubbed *La Linea* (the line), the case brought down a president and ignited a social movement. Over the course of eight months, CICIG and the prosecutor’s office investigated a network of senior state officials who were alleged to have defrauded customs revenues. The investigation intercepted some 66,000 telephone calls and over 6,000 electronic messages. On April 16, 2015, 21 suspects were arrested.<sup>46</sup> The

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<sup>38</sup> Nina Lakhani, “Guatemalan president’s downfall marks success for corruption investigators”, *The Guardian* (9 September 2016), online <<https://www.theguardian.com/world/2015/sep/09/guatemala-president-otto-perez-molina-cicig-corruption-investigation>>.

<sup>39</sup> Transparency International, “Corruption Perceptions Index 2015”.

<sup>40</sup> Lakhani, (9 September 2016).

<sup>41</sup> Steven Dudley, “Guatemala’s CICIG: An Experiment in Motion Gets a Report Card”, *Insight Crime* (24 March 2016), online: <<http://www.insightcrime.org/news-analysis/guatemala-cicig-an-experiment-in-motion-gets-a-report-card>>.

<sup>42</sup> International Crisis Group, “Crutch to Catalyst? The International Commission Against Impunity in Guatemala” (29 January 2016) at 2, online: <<https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/crutch-catalyst-international-commission-against-impunity-guatemala>>.

<sup>43</sup> International Commission against Impunity in Guatemala, “About Us”, online: <<http://www.cicig.org/index.php?page=about>>.

<sup>44</sup> International Crisis Group (2016) at 6.

<sup>45</sup> *Ibid* at 4-5.

<sup>46</sup> *Ibid* at 7-8.

network is said to have earned some \$328,000 per week. As Mike Allison noted, recouping some or all of this money and preventing reoccurrence of this single scheme would pay for CICIG for several years.<sup>47</sup>

Immediately following *La Línea*, then President Molina asked Congress to extend CICIG's mandate, a move he previously opposed. On September 1, 2015, following months of protests, Congress voted to removed Molina's presidential immunity, a measure that passed 132-0.<sup>48</sup> The following day Molina resigned as president and on September 3, 2015 was arrested and continues to be held awaiting trial.

In the following election, Guatemalan voters demonstrated that they would no longer tolerate corruption in the government. Jimmy Morales, a political outsider and former television comedian, ran for president with a slogan "*Ni corrupto, ni ladrón*" (neither corrupt nor a thief). Morales won the election with 67% of the vote and assumed office in January, 2016.

CICIG serves as both a blueprint for eradicating established practices of corruption and a message of hope that this can be done even where corruption has reached the highest echelons of government. A poll in 2015 found CICIG to be Guatemala's most trusted institution with 66% positive rating, well beyond the trust of the police (26%), judges (25%), Congress (12%) and the Presidency (11%).<sup>49</sup> The success of CICIG has led to calls for similar institutions to be set up in other countries. The Organization of American States and government of Honduras signed an agreement to establish the Support Mission Against Corruption and Impunity in Honduras (MACCIH), which began operating on April 19, 2016.<sup>50</sup> MACCIH has full autonomy and independence to work with government institutions to dismantle corruption and impunity. MACCIH's efforts are focused on: 1) prevention and fighting against corruption, 2) reform of criminal justice, 3) political-electoral reform and 4) public security.<sup>51</sup>

But, on August 27, 2017, the future of CICIG became uncertain when President Jimmy Morales attempted to expel CICIG's highly respected Commissioner, Iván Velásquez. Tensions had arisen between Morales and Velásquez by early 2017 when prosecutors

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<sup>47</sup> Lakhani (9 September 2016).

<sup>48</sup> Twenty-six Congress members were absent and did not vote. International Crisis Group, "Crutch to Catalyst? The International Commission Against Impunity in Guatemala" (29 January 2016) at 10, 22 online: <<https://www.crisisgroup.org/latin-america-caribbean/central-america/guatemala/crutch-catalyst-international-commission-against-impunity-guatemala>>.

<sup>49</sup> *Ibid* at 13.

<sup>50</sup> Honduras scored 31/100 on TI's 2015 corruption index and ranked 112<sup>th</sup> out of 168 countries. See Transparency International, "Corruption Perceptions Index 2015".

<sup>51</sup> Organization of American States, "Mission to Support the Fight against Corruption and Impunity in Honduras - About the Mission", online: <<http://www.oas.org/en/spa/dsds/m/macjih/new/mision.asp>>.

charged the President's brother and son with fraud.<sup>52</sup> In late August, 2017, Velásquez and Attorney General Thelma Aldana asked the court to strip Morales of his political immunity so that charges could be brought against him in regard to alleged illegal campaign funding during the 2015 election. Less than 48 hours later, Morales announced via Twitter that he was expelling Velásquez from his position as Commissioner.<sup>53</sup> Several ministers resigned in protest of Morales' bid to fire Velásquez, and international embassies and organizations quickly came out in support of Velásquez.<sup>54</sup> Later that same day, Guatemala's Constitutional Court blocked Morales' attempt to expel Velásquez.<sup>55</sup> However, on September 11, Congress voted to allow Morales to keep his presidential immunity. This controversy has sparked widespread protest among the Guatemalan public who are calling for the resignation of Morales and most members of Congress. On October 8, 2017, supporters of Morales and former President Arzu held a small protest outside of CICIG calling for the ouster of Commissioner Velásquez from the country.<sup>56</sup> On October 10, 2017, the Ministry of Foreign Affairs announced it had revoked Velásquez's visa.<sup>57</sup> His visa was renewed on October 17<sup>th</sup> for one year although the normal renewal period is two years. It remains to be seen what CICIG's future will be like in the wake of these events.

### 3.2 Varying Levels of Independence in Anti-Corruption Enforcement

A problem in many developing countries is not only the relative lack of independence of enforcement bodies, but a lack of resources and power. Painter argues that "independence" is overstated as an enforcement body ideal. Independence can be symbolic and is largely irrelevant if the enforcement body lacks the power to truly enforce anti-corruption measures.<sup>58</sup> "[I]n the matter of investigation," writes Painter, "it is the raw operational power of the ACA [anti-corruption agency] that seems to matter, as much if not more than its purported political independence."<sup>59</sup> This sentiment seems to be confirmed by the very low

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<sup>52</sup> Rachel Schwartz, "Guatemala's president tried to expel the U.N. commissioner who announced he was under investigation", *The Washington Post* (6 September 2017), online: <[https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/06/guatemalas-president-tried-to-shut-down-a-u-n-commission-that-announced-it-was-investigating-him/?utm\\_term=.8d55cfcbbc4b](https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/06/guatemalas-president-tried-to-shut-down-a-u-n-commission-that-announced-it-was-investigating-him/?utm_term=.8d55cfcbbc4b)>.

<sup>53</sup> Nina Lakhani, "Crisis flares in Guatemala over corruption and organized crime", *The Guardian* (27 August 2017), online: <<https://www.theguardian.com/world/2017/aug/27/guatemalan-president-jimmy-morales-order-expel-head-un-body-suspended>>.

<sup>54</sup> Lakhani (27 August 2017).

<sup>55</sup> Schwartz (6 September 2017).

<sup>56</sup> Maria Martin, "Guatemalans Confront Government over Its Resistance to Fight Corruption", *NBC News* (10 October 2017), online: <<https://www.nbcnews.com/news/latino/guatemalans-confront-government-over-its-resistance-fight-corruption-n805121>>.

<sup>57</sup> "CICIG's head has visa revoked", *Breaking Belize News* (11 October 2017), online: <<https://www.breakingbelizenews.com/2017/10/11/cicigs-head-visa-revoked/>>.

<sup>58</sup> Martin Painter, "Myths of Political Independence, or How Not to Solve the Corruption Problem: Lessons for Vietnam" (May 2014) 1:2 *Asia & the Pacific Policy Studies* 273-286.

<sup>59</sup> *Ibid* at 279.

rates of corruption in certain developed countries like Sweden, for example, where enforcement bodies are powerful, but not independent from government. In 2013, Sweden ranked third on Transparency International's Corruption Perception Index, though it has no specialized anti-corruption agency. Like the US and Canada (except Quebec), Sweden's anti-corruption forces are organized as units within the general police force and prosecution service. Comparing Sweden to under-developed countries with systemic corruption problems may be a fool's errand given the wide cultural and economic divide that separates them.<sup>60</sup>

For anti-corruption enforcement bodies, an organizational framework which gives the appearance of independence is no guarantee of effectiveness. Bangladesh is a prime example. In the executive summary from UNCAC's country review report of Bangladesh, the expert team of reviewers concluded that the Anti-Corruption Commission (ACC) in Bangladesh is sufficiently independent because it is comprised of three commissioners who are appointed by the President, are not eligible for reappointment and cannot be removed from their positions unless strict procedures are followed.<sup>61</sup> But this "independence" is superficial at best. In the ACC's investigation of SNC-Lavalin's alleged bribery of Bangladeshi public officials in the Padma bridge case (discussed in Chapter 1), the independence of the ACC was seemingly compromised by the self-interest of high-ranking Bangladeshi politicians.

Bangladesh Minister of Communications Syed Abul Hossain was the most senior public official allegedly involved in the SNC-Lavalin bribery. Ultimate award of the engineering contract required his approval and he allegedly stood to gain \$2 million as a bribe (4% of the \$50 million contract). In the wake of the bribery allegations, Hossain resigned from his position in the Prime Minister's cabinet, after which the Prime Minister called him a "patriot." Subsequently, Hossain was not charged with bribery as a result of the ACC's investigation. The World Bank convened an external panel of experts to assess the completeness and fairness of the ACC's initial investigation. While agreeing with the ACC's decision to investigate the seven persons who were formally charged, the external panel's final report, issued in February 2013, stated that "there was no legal reason to exclude the name of the former Minister of Communications from the initial list of persons to be investigated.... Thus, as of the date of this report, the Panel cannot conclude that the activity

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<sup>60</sup> For an excellent report on the challenges of effective anti-corruption enforcement in developing countries, see Hannes Hechler et al, *Can UNCAC address grand corruption? A political economy analysis of the UN Convention against Corruption and its implementation in three countries* (Chr. Michelsen Institute, U4 Anti-Corruption Resource Centre, 2011), online: <<http://www.u4.no/publications/can-uncac-address-grand-corruption/>>.

<sup>61</sup> UNCAC Implementation Review Group, *Executive Summary: Bangladesh*, UNODC, 3rd Sess, UN Doc CAC/COSP/IRG/I/1/1/Add.8 (2012), online: <<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1254364e.pdf>>.

of the ACC constitutes a full and fair investigation.”<sup>62</sup> In September 2014, the ACC concluded, however, that no bribery or conspiracy had taken place. It recommended the acquittal of all seven accused persons in spite of what appears to be very convincing evidence collected by the World Bank and Canadian investigators.

According to an article in Bangladesh’s leading newspaper, *The Daily Star*, the ACC’s politically-motivated decision not to charge Hossain and their final conclusion that no bribery had taken place was not surprising. The *Daily Star* claims these actions just provide further proof of the enforcement body’s lack of independence and effectiveness: “[T]he ACC’s credibility is mired in controversy once again. Its failure to gather evidence in the Padma bridge case has again proved that the anti-[corruption] watchdog fails to go ahead with the case against individuals enjoying the blessing of the government higher-ups.”<sup>63</sup>

Some measure of independence from government is necessary at both the investigatory and prosecutorial stages. For example, it may be counter-productive for an enforcement body that has complete investigatory independence to submit its findings to a governmental prosecution agency, especially if the investigation is into the activities of the prosecutors themselves. In the well-documented corruption case of former Pennsylvania Attorney General Ernie Preate,<sup>64</sup> the Pennsylvania Crime Commission, which investigated Preate, had independent power to begin investigations, interview witnesses under oath, gather evidence, and subpoena financial records. They performed a protracted investigation into Preate despite intense political pressure to refrain from doing so. Eventually, the Commission gathered enough evidence for an airtight case against Preate, but having no prosecutorial authority, they were in the awkward position of lobbying the Pennsylvania Attorney General’s office to prosecute the incumbent Attorney General. The Pennsylvania Attorney General’s office did not prosecute, but Preate was eventually prosecuted by the federal government for racketeering and corruption offences. He was convicted and sentenced to two year’s imprisonment, but not before the Pennsylvania Crime Commission was disbanded by Preate’s political allies in the state legislature.

### 3.3 Investigative and Prosecutorial Bodies

Unlike Hong Kong with its ICAC, the US, UK and Canada (except Quebec) do not have unitary anti-corruption bodies with independence from government and monopolies over

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<sup>62</sup> World Bank, *Final Report of the External Panel of Experts Re: The Padma Multipurpose Bridge Project* (2013), (Panel Report), online: <<http://pubdocs.worldbank.org/en/245411449174958015/Padma-Bridge-External-Expert-Panel-Final-Report.pdf>>.

<sup>63</sup> Shakhawat Liton, “The Patriot and His Friends”, *The Daily Star* (13 November 2014), online: <<http://www.thedailystar.net/the-patriot-and-his-friends-48085>>.

<sup>64</sup> See Chapter 7 of Brad Bumstead’s *Keystone Corruption: A Pennsylvania Insider’s View of a State Gone Wrong* (Camino Books, 2013).

law enforcement. Each of these countries has multiple national agencies working together to combat domestic and international corruption.

The following descriptions of the US, UK and Canadian anti-corruption law enforcement structures are derived from the executive summaries of UNCAC's country review reports, which form part of the first cycle of the UNCAC review mechanism. The UNCAC review mechanism was briefly discussed in Chapter 1.

### 3.3.1 US

The following excerpt is from the UNCAC *Country Review Report of the United States of America*:

#### BEGINNING OF EXCERPT

Primary responsibility for enforcement aspects of the UNCAC lies with the U.S. Department of Justice (DOJ).

Regarding corruption of domestic officials, DOJ has a dedicated unit within its Criminal Division in Washington, D.C., the Public Integrity Section, which specializes in enforcing the nation's anti-corruption laws. The promotion and implementation of the prevention provisions of [UNCAC] Chapter II are carried out by a number of government entities through a variety of systems and programs.

DOJ's Public Integrity Section was created in 1976 to consolidate into one unit DOJ's responsibilities for the prosecution of criminal abuses of the public trust by government officials. The Section currently has 29 attorneys working full-time to prosecute selected cases involving federal, state, or local officials, and also to provide advice and assistance to prosecutors and investigators in the 94 United States Attorneys' Offices around the country. The Criminal Division supplements the resources available to the Public Integrity Section with attorneys from other sections within the Criminal Division - including the Fraud, Organized Crime and Racketeering, Computer Crimes and Intellectual Property, and Asset Forfeiture and Money Laundering sections, to name just four - and from the 94 U.S. Attorneys Offices.

The United States federal judicial system is broken into 94 separate districts, 93 of those districts are assigned a senior prosecutor (called the United States Attorney, who is an official of DOJ) and a staff of prosecutors to enforce federal laws in that district. (One U.S. Attorney serves in two districts.) Those offices, in addition to the Public Integrity Section, also enforce the United States anti-corruption laws.

DOJ has also dedicated increased resources to combating domestic public corruption. The Federal Bureau of Investigation, for example, currently has 639 agents dedicated to investigating public corruption matters, compared to 358 in 2002. Using these resources, DOJ aggressively investigates, prosecutes, and punishes corruption of and by public officials at all levels of government (including local, state, and national public officials), in all branches of government (executive, legislative, and judicial), as well as individuals from major United States political parties.

For example, DOJ recently convicted one former Member of Congress of substantial public corruption charges, and has indicted a sitting Member of Congress on significant corruption and other charges. DOJ also recently convicted two former state governors of bribery offences, and conducted a large-scale bribery investigation into the activities of a well-known Washington, D.C. lobbyist. To date, that investigation has netted a total of 11 bribery-related convictions. Those convictions have included a guilty plea by the former Deputy Secretary of the Department of the Interior and the jury conviction of a former official of the United States General Services Administration, among others.

Statistically, DOJ has increased its enforcement efforts against public corruption in recent years. Over the period from 2003 to 2009 (the most recent period for which data is available), the Department charged 8,203 individuals with public corruption offences nationwide and obtained 7,149 convictions. In addition, over the five-year period from 2001 to 2005, the Department charged 5,749 individuals with public corruption offences nationwide and obtained 4,846 convictions. Compared with the preceding five year period from 1996-2000, the 2001-2005 figures represent an increase of 7.5 percent in the number of defendants charged and a 1.5 percent increase in the number of convictions.

Three governmental agencies have primary responsibility for the prosecution of bribery of foreign officials: the DOJ's dedicated foreign bribery unit within the Criminal Division's Fraud Section; the Federal Bureau of Investigations (FBI) International Anti-Corruption Unit; and the Securities and Exchange Commission's (SEC) dedicated foreign bribery unit. The Foreign Corrupt Practices Act (FCPA) Unit of the Fraud Section of the DOJ Criminal Division handles all criminal prosecutions and for civil proceedings against non-issuers, with investigators from the FCPA Squad of the Washington Field Office of the FBI. The Fraud Section formed its dedicated unit in 2006 to handle prosecutions, opinion releases, interagency policy development, and public education on the foreign bribery offense. In total, the Fraud Section has the equivalent of 12-16 attorneys working full-time on FCPA matters. The goal is to increase this figure to 25.

Prosecutors from a local United States Attorney's Office and the Asset Forfeiture and Money Laundering Section often assist in specific cases.

In 2008, the FBI created the International Corruption Unit (ICU) to oversee the increasing number of corruption and fraud investigations emanating overseas. Within the ICU, the FBI further created a national FCPA squad in its Washington, D.C. Field Office to investigate or to support other FBI units investigating FCPA cases. The United States Department of Homeland Security also has a specialized unit dedicated to the investigation and prosecution of foreign corruption.

The SEC Enforcement Division is responsible for civil enforcement of the FCPA with respect to issuers of securities traded in the United States. In January 2010, the Division created a specialized FCPA unit with approximately 30 attorneys. In addition, the SEC has other trained investigative and trial attorneys outside the FCPA Unit who pursue additional FCPA cases. The FCPA Unit also has in-house experts, accountants, and other resources such as specialized training, state-of-the-art technology and travel budgets to meet with foreign regulators and witnesses.

...

Beyond domestic efforts, the United States works internationally to build and strengthen the ability of prosecutors around the world to fight corruption through their overseas prosecutorial and police training programs. Anti-corruption assistance programs are conducted bilaterally and regionally, including at various U.S.-supported International Law Enforcement Academies established in Europe, Africa, Asia and the Americas. Assistance efforts involve the development of specialized prosecutorial and investigative units, anti-corruption task forces, anti-corruption commissions and national strategies, internal integrity programs, and specific training on how to investigate and prosecute corruption.

For example, DOJ, in coordination with the Department of State, sends experienced U.S. prosecutors and senior law enforcement officials to countries throughout the world to provide anti-corruption assistance, both on short term and long term assignments. On a long term basis, DOJ has posted Resident Legal Advisors (RLA's) and Senior Law Enforcement Advisors (SLEA's) throughout the world to work with partner governments on anti-corruption efforts and to assist our partners with building sound and fair justice systems and establishing non-corrupt institutions. They provide specialized anti-corruption assistance, tailored to partner country needs, including pilot programs on asset recovery. They offer expertise on a broad array of anti-corruption measures, such as legislative drafting and institutional development, through consultations, workshops, seminars and training programs. DOJ's international assistance programs are coordinated by the Criminal Division's

Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and International Criminal Training Assistance Program (ICITAP).<sup>65</sup>

END OF EXCERPT

In April, 2016, the DOJ announced an enhanced *FCPA* enforcement strategy. Part of the strategy involved increasing enforcement resources. The Fraud Section of the DOJ increased its *FCPA* unit in excess of 50% by adding 10 more prosecutors, while the FBI established three new squads dedicated to *FCPA* enforcement. The new strategy also emphasized strengthening coordination with foreign counterparts.<sup>66</sup>

### 3.3.2 UK

The following excerpt is from the UNCAC *Country Review Report of the United Kingdom*:

BEGINNING OF EXCERPT

#### **b) Law enforcement agencies which play a role in tackling corruption**

87. The Attorney General for England and Wales (with his deputy known as the Solicitor General) is the Minister of the Crown responsible in law for superintending the main prosecuting authorities, the Crown Prosecution Service (CPS), headed by the Director of Public Prosecutions (DPP), and the Serious Fraud Office (SFO), headed by its Director (previously also the Revenue and Customs Prosecutions Office, which has been merged with the CPS since 1 January 2010). A protocol was published in July 2009 which sets out the relationship between Attorney General and the Director of Public Prosecutions and the Director of the Serious Fraud Office. The Attorney General for England and Wales also holds the separate office of Advocate General for Northern Ireland. Northern Ireland has its own Attorney General.

<sup>65</sup> From *Review by Sweden and the Former Yugoslav Republic of Macedonia of the implementation by the United States of America of Articles 15 – 42 of Chapter III. “Criminalization and law enforcement” and Articles 44 – 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015* (United Nations Office on Drugs and Crime, 2013) at 17-19, online: <[http://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013\\_11\\_19\\_USA\\_Final\\_Country\\_Report.pdf](http://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_11_19_USA_Final_Country_Report.pdf)>. Reprinted with the permission of the United Nations. For more on US enforcement bodies see chapter 10 of Robert W Tarun, *The Foreign Corrupt Practices Act Handbook*, 3rd ed (ABA Publishing, 2013).

<sup>66</sup> Andrew Weissman, *The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance* (U.S. Department of Justice Criminal Division, 5 April 2016) at 1, online: <<https://www.justice.gov/criminal-fraud/file/838416/download>>.

88. In England, Wales and Northern Ireland, prosecutions for offences under the main anti-corruption legislation, The Bribery Act 2010, require the personal consent of the Director of one of the main prosecuting authorities (The Director of Public Prosecutions, the Director of Public Prosecutions for Northern Ireland, the Director of the Serious Fraud Office, or the Director of Revenue and Customs Prosecutions). This replaced a previous requirement for the consent of the Attorney General.

89. In Scotland, the head of prosecutions is the Lord Advocate, who supervises the work of the Crown Office and Procurator Fiscal Service (COPFS or Crown Office), with the other Law Officer, the Solicitor General. In Scotland, most serious corruption cases are handled by the Serious and Organised Crime Division contained within the Crown Office. In appropriate cases Crown Office works closely with UK agencies; protocols are in place between COPFS and CPS and also between COPFS and SOCA. A protocol is also being developed between COPFS and the SFO regarding a number of matters. Some orders (e.g. those under the Proceeds of Crime Act) can be enforced across the UK. Otherwise a procedure is in place for Scottish warrants to be backed by a magistrate in England and Wales before enforcement.

90. The Public Prosecution Service (PPS) is the principal prosecuting authority in Northern Ireland. In addition to taking decisions as to prosecution in cases investigated by the police in Northern Ireland, it also considers cases investigated by other statutory authorities, such as HM Revenue and customs. The PPS is headed by the Director of Public Prosecutions for Northern Ireland.

91. The Serious Fraud Office (SFO) is responsible for investigating and prosecuting serious or complex fraud cases, and is the lead agency in England and Wales for investigating and prosecuting cases of overseas corruption. Approximately 100 investigators work in the SFO's Bribery and Corruption Business Area. This investigates and prosecutes both domestic and foreign corruption cases. The SFO's Proceeds of Crime Unit is responsible for the restraint, freezing and confiscation of assets both in relation to suspected fraud and corruption cases.

92. The UK police service comprises 52 territorial police forces (43 for England and Wales, eight for Scotland - soon to be reduced to one - and one in Northern Ireland), along with four special police forces: the Ministry of Defence Police, the British Transport Police Force, the Civil Nuclear Constabulary, and the Scottish Drug Enforcement Agency. Police in the Crown Dependencies of Jersey and Guernsey are members of the UK Police Service, even though they are outside the UK prosecutorial system. Corruption-related specialised units exist within the Metropolitan Police ("the Met") and the City of London police (CoLP). The City of London Police, based in London's financial centre, is the UK's National Lead Police Force for Fraud. In addition to an Economic Crime Department the CoLP has an Overseas Anti-Corruption Unit, sponsored by DFID, which, alongside the SFO, handles all UK

international foreign corruption cases. The Metropolitan Police has a Proceeds of Corruption Unit that investigates foreign Politically Exposed Persons (PEPs) committing theft of state assets. It also has a Fraud Squad that investigates domestic corruption in the public sector.

93. The Independent Police Complaints Commission (IPCC) was established by the Police Reform Act 2002 and began work on 1 April 2004. The IPCC deals with complaints and allegations of misconduct against the police in England and Wales. The IPCC has a Lead Commissioner for corruption and an Operational Lead for corruption at Director Level. The Police Complaints Commissioner for Scotland and the Police Ombudsman for Northern Ireland are the independent equivalents of the IPCC in Scotland and Northern Ireland respectively.

94. The Serious Organised Crime Agency (SOCA) was established by the Serious Organised Crime and Police Act 2005 (SOCPA). Its functions are set out in that Act and (in relation to civil recovery functions) in the Serious Crime Act 2007. The functions are to prevent and detect serious organised crime; to contribute to its reduction in other ways and the mitigation of its consequences; and to gather, store, analyse and disseminate information on organised crime. SOCA works in close collaboration with UK intelligence and law enforcement partners, the private and third sectors, and equivalent bodies internationally. In Scotland, the SCDEA has a primary role in preventing and detecting serious organised crime. SOCA houses the UK's Financial Intelligence Unit (UKFIU). The unit has national responsibility for receiving analysing and disseminating financial intelligence submitted through the Suspicious Activity Reports (SARs) regime, and receives over 200,000 SARs a year. These are used to help investigate all levels and types of criminal activity, from benefit fraud to international drug smuggling, and from human trafficking to terrorist financing. SOCA also has an Anti-Corruption Unit which supports UK partners (police and/or prosecutors) in tackling corruption that enables organised crime and works to increase knowledge of the use of corruption in support of organised crime. The unit also tackles corruption directed against SOCA, or public sector corruption impacting on SOCA.

95. The Financial Services Authority (FSA) regulates most of the UK's financial services sector. It has a wide range of rule-making, investigatory and enforcement powers in order to meet its statutory objectives, which include the reduction of the extent to which it is possible for a financial business to be used for a purpose connected with financial crime. Financial crime includes fraud and dishonesty, money-laundering and corruption.

96. The FSA does not enforce the Bribery Act. However, authorised firms are under a separate, regulatory obligation to identify and assess corruption risk and to put in place and maintain policies and processes to mitigate corruption risk. The FSA can

take regulatory action against firms who fail adequately to address corruption risk; for example, the FSA has fined two firms for inadequate anti-corruption systems and controls. The FSA does not have to obtain evidence of corruption to take action against a firm.

97. Plans were published in June 2011 which set out in more detail plans to create in 2013 a new National Crime Agency (NCA) to enhance the UK law enforcement response to serious and organised criminality. The NCA will be UK-wide and will respect the devolution of powers to Scotland and Northern Ireland. Building on the capabilities of SOCA, the NCA will comprise of distinct operational Commands including an 'Economic Crime Command' (ECC) dealing with economic crimes (defined as including fraud, bribery and corruption). The ECC is planned to provide a national strategic and coordinating role with respect to the collective response to fraud, bribery and corruption across the UK organisations tackling these areas, which includes police forces, SFO, CPS, FSA, the Office of Fair Trading, Department for Business, Innovation and Skills, Her Majesty's Revenue and Customs and the Department for Work and Pensions. It will also have operational investigative capabilities focused on fraud, bribery and corruption linked to the areas of criminality which are the focus of the NCA's other Commands organised crime, border policing and the child exploitation and online protection centre (CEOP).

98. There are a number of coordination groups which bring together the different agencies working on international corruption issues. The Politically Exposed Persons (PEPs) Strategic Group, which meets quarterly, provides a strategic lead and coordinates government departments and agencies to tackle money laundering by corrupt PEPs. With the planned creation of the NCA in 2013, a new group was established in 2012 to interface between the NCA build on economic crime and the DFID-funded cross-agency work on international anti-corruption. This is the International Corruption Intervention Group which co-ordinates activity between the DFID funded overseas corruption units (the Metropolitan Police Service Proceeds of Corruption Unit; the City of London Police Overseas Anti- Corruption Unit and the Serious Organised Crime Agency International Corruption Intelligence Cell).<sup>67</sup>

END OF EXCERPT

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<sup>67</sup> UNCAC, Reviewers from Greece and Israel, Review Cycle 2011-2012, online: <[https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/UK\\_Final\\_country\\_review\\_report\\_18.3.2013.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/UK_Final_country_review_report_18.3.2013.pdf)>. For more on UK enforcement bodies, see Nicholls et al, (2011) ch 7.

The NCA replaced the SOCA in 2013. Corruption investigations are overseen by the NCA's Economic Crime Command. For a list of the NCA's activities in its first year of operations, see: <<http://www.nationalcrimeagency.gov.uk/publications/525-factsheet-results-of-nca-led-and-coordinated-activity-in-our-first-year-of-operation/file>>. Additionally, the City of London Overseas Anti-Corruption Unit, established in 2006 and funded by the Department for International Development, investigates corruption and bribery in developing countries.

### 3.3.3 Canada

The following extract is from the Executive Summary of the *Review of Implementation of the United Nations Convention against Corruption*:

Specialized services responsible for combating economic crimes and corruption have been established in the Royal Canadian Mounted Police ("RCMP"). In February 2005, the RCMP appointed a commissioned officer to provide functional oversight of all RCMP anti-corruption programmes. The corruption of foreign public officials is specifically referenced in the RCMP Commercial Crime Program's mandate, which includes major fraud cases and corruption offences.

In 2008, the RCMP established the International Anti-Corruption Unit, which comprises two seven-person teams based in Ottawa and Calgary. This structure is currently undergoing a reorganization process to make available additional resources and expertise in the investigation of corruption and other complex cases in the newly established Sensitive Investigations Unit. The Unit's mandate will include carrying out investigations of the CFPOA of Canada, related criminal offences and assisting foreign enforcement agencies or governments with requests for international assistance (asset recoveries and extraditions).<sup>68</sup>

The RCMP also promotes its work by developing educational resources for external partners using information pamphlets and posters that describe the RCMP's work and the negative effects of corruption for distribution and presentation to Canadian missions abroad.

In 2013, the RCMP disbanded the International Anti-Corruption Units and reorganized their resources for investigating corruption. Under the RCMP's newly created "National Division," corruption investigations are handled by the Sensitive and International

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<sup>68</sup> UNODC, 5th Session of Implementation Review Group (Vienna, June 2014) at 2–6. Reviewing countries: Switzerland and Iraq, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1400913e.pdf>>.

Investigations Section or they are assigned to Calgary's Financial Integrity Unit. Procnier summarizes the 2013 changes as follows:

Offences that fall under the *Corruption of Foreign Public Officials Act* (CFPOA) are either brought to the attention of Calgary's financial integrity unit or the Sensitive and International Investigations Section of the RCMP in Ottawa's National Division.

In Ottawa, members of the division's former international anti-corruption unit (IACU) work among four teams of investigators who investigate the many corruption complaints they receive. Depending on the nature, impact and priority of a given complaint, a team of investigators is assigned a file to work on and carry forward.

Being so close to the seat of the federal government, Ottawa's unit is often called upon to deal with other sensitive cases that may have national and international political implications.

"Politically sensitive cases or financial crimes that are rooted in Canada with international connections would come to us," says Sgt. Patrice Poitevin, senior investigator and outreach coordinator for the Sensitive and International Investigations Section.<sup>69</sup>

The section is currently involved in a number of ongoing investigations, such as the SNC Lavalin file, which has national and international implications.

In my view, it remains to be seen whether this disbanding and reorganization of the two anti-corruption units will result in the devotion of more or less police investigation time to allegations of foreign corruption, versus other types of politically sensitive or large scale financial crime cases. In addition, unlike other areas of the criminal law in Canada, provincial enforcement agencies are not able to share investigative and prosecutorial tasks for breaches under the *CFPOA*. Restricting the burden of investigation and prosecution to the RCMP has the potential to hamper enforcement capability.<sup>70</sup>

In 2006, the Public Prosecution Service of Canada (PPSC) was created, and it discharges the criminal prosecution mandate of the Attorney General of Canada. Unlike the former Federal Prosecution Service (FPS), the PPSC is not a part of the Department of Justice. The PPSC is an independent organization, reporting to Parliament through the Attorney General of Canada.

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<sup>69</sup> Mallory Procnier, "A Little Payment Here, a Little Gift There" (2013) 75:3 Gazette Magazine 9.

<sup>70</sup> Anne-Marie Lynda Boisvert et al, "Corruption in Canada: Definitions and Enforcement", Report No 46, prepared for Public Safety Canada by Deloitte LLP (Her Majesty the Queen in Right of Canada, 2014) at 46.

Unlike in the US, Canadian securities regulation authorities cannot investigate and prosecute *CFPOA* breaches and have not undertaken administrative enforcement proceedings for foreign corrupt practices.<sup>71</sup> Transparency International Canada recommends that Canada involve provincial securities regulators in *CFPOA* enforcement in a similar manner to the US Securities Exchange Commission.<sup>72</sup>

### 3.4 Cooperation Agreements between State Parties and between Enforcement Bodies

International cooperation between State Parties and between enforcement bodies is an integral part of investigating international corruption. The *Legislative Guide* to UNCAC summarizes it well:

Ease of travel from country to country provides serious offenders with a way of escaping prosecution and justice. Processes of globalization allow offenders to more easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven for their person and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international cooperation.<sup>73</sup>

Recognizing this, Article 46 of UNCAC and Article 9 of the OECD Convention require State Parties to provide Mutual Legal Assistance (MLA) to other State Parties investigating and prosecuting corruption. See Chapter 5, Section 6 for a more thorough description of MLA. See also Section 2.2.6 above, for a discussion of cooperative investigations across borders.

In brief, MLA may take the form of bilateral agreements between States, multilateral agreements between multiple States, or, in the absence of formal agreements, States can and do informally provide MLA to each other. Article 46(30) of UNCAC states that:

States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

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<sup>71</sup> Wendy Berman and Jonathan Wansbrough, "A Primer on Canada's Foreign Anti-Corruption Enforcement Regime" (Cassels, Brock & Blackwell LLP, 2014) at 16, online: <http://www.mondaq.com/canada/x/345442/White+Collar+Crime+Fraud/Risky+Business+A+Primer+on+Canadas+Foreign+AntiCorruption+Enforcement+Regime>.

<sup>72</sup> Transparency International Canada has noted that this lack of availability of conditional sentences or discharges is problematic for the prosecution of less severe violations of the *CFPOA*. See Transparency International Canada, *Review of Canada's Implementation of UNCAC* (October 2013) at 11.

<sup>73</sup> *Legislative Guide* (2012) at 143.

In addition to MLA, which often involves the bureaucratic formalities of state-to-state communication, Article 48 of UNCAC requires cooperation between State Parties' law enforcement bodies (police-to-police). Article 48(2) recommends that the law enforcement bodies of State Parties enter into direct bilateral or multilateral cooperation agreements with other State Parties' enforcement bodies to streamline international corruption investigations and prosecutions.

The International Foreign Bribery Task Force (IFBTF) is an example of a multilateral police-to-police agreement between enforcement bodies. Australia, Canada, the UK and the US signed a memorandum of understanding in May 2013 to create the IFBTF. It was formed to support the four countries' commitments to mutual legal assistance under the OECD Convention and UNCAC. Under the terms of the agreement, the Australian Federal Police, Canadian RCMP, City of London Police's Overseas Anti-Corruption Unit, and the FBI commit to working collaboratively to strengthen investigations into foreign bribery crimes by providing an efficient means of sharing knowledge, skills and methodologies, as well as providing swift assistance to one another.

#### 4. INVESTIGATING CORRUPTION: INTERNAL AND EXTERNAL INVESTIGATIONS

For the purposes of this section, it is important to distinguish between internal and external corruption investigations. External investigations are those performed by public enforcement bodies into allegations of corruption against individuals and corporations, while internal investigations are conducted internally by a company's board, management, or in-house counsel as part of that company's internal compliance program or in response to reports of corruption within their own company. Internal compliance programs are discussed at length in Chapter 8 of this book on the role of the corporate lawyer. In brief, most large corporations have internal compliance programs to monitor the legality of their international business activities and to prevent violations of anti-corruption legislation. As discussed below in Section 6.2.1 on criminal charges, evidence of a corporation's strong internal compliance program (including accounting procedures and controls) can serve as an affirmative defence to a corruption charge under the UK *Bribery Act*. In prosecutions under the *FCPA*, evidence of a corporation's strong internal compliance program and cooperation with external investigations is often the basis for not charging the corporation, entering into a deferred prosecution agreement, or reducing the sentence in cases where bribery convictions are obtained. There are additional reasons why a company would choose to conduct an internal investigation:

- To convince enforcement bodies to use prosecutorial discretion not to bring charges;
- To gather evidence and prepare a defence or negotiation strategy for prosecutions, enforcement actions and/or litigation with shareholders;

- To fulfill management's fiduciary duty to the company's shareholders and satisfy shareholder concerns;
- To assess the effectiveness of internal accounting procedures.

The board may hire outside counsel to conduct or manage the internal investigation. There is a significant financial cost incurred when a company is subject to a corruption investigation. As Koehler notes, before settling with a company, enforcement agencies will ask where else the conduct may have occurred, necessitating a team of lawyers, forensic accountants and other specialists to travel and investigate around the world. Avon, which settled with the SEC and DOJ for \$135 million, spent \$350 million in pre-enforcement expenses from 2009-2011.<sup>74</sup> Insurance carriers have responded with products covering investigation costs during corruption investigations.<sup>75</sup> For more on the costs of investigations see Chapter 7, Section 4.7.

The following sections briefly discuss sources and methodologies of both internal and external investigations.

## 4.1 Sources of Internal Investigations

### 4.1.1 Anonymous Sources and Whistleblowers

Robust internal compliance programs (discussed more fully in Chapter 8) generally include a mechanism for receiving anonymous reports from employees or others about suspected corrupt conduct. In the US, the *Sarbanes-Oxley Act* of 2002, which was enacted in response to the highly publicized accounting scandals at Enron and Worldcom, requires publicly traded corporations to provide an anonymous channel for whistleblowing employees to report wrongdoing. Additionally, the *FCPA Resource Guide*<sup>76</sup> states that “[c]ompanies may employ, for example, anonymous hotlines or ombudsmen” to satisfy the anonymous reporting mechanism requirement.

The following is an example of an internal investigation that was initiated after receiving tips from an anonymous source and an employee whistleblower. The excerpt is from a 2011 annual financial report filed by the Goodyear Tire & Rubber Company with the SEC:

In June 2011, an anonymous source reported, through our confidential ethics hotline, that our majority-owned joint venture in Kenya may have made certain improper payments. In July 2011, an employee of our

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<sup>74</sup> Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar, 2014) at 178.

<sup>75</sup> Lawrence J Trautman & Kara Altenbaumer-Prince, “Lawyers, Guns, and Money: The Bribery Problem and the U.K. Bribery Act” (2013) 47 *Int'l Law* 481 at 512.

<sup>76</sup> *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012), online:

<<http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>>.

subsidiary in Angola reported that similar improper payments may have been made in Angola. Outside counsel and forensic accountants were retained to investigate the alleged improper payments in Kenya and Angola, including our compliance in those countries with the U.S. Foreign Corrupt Practices Act. We do not believe that the amount of the payments in question in Kenya and Angola, or any revenue or operating income related to those payments, are material to our business, results of operations, financial condition or liquidity.

As a result of our review of these matters, we have implemented, and are continuing to implement, appropriate remedial measures and have voluntarily disclosed the results of our initial investigation to the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”), and are cooperating with those agencies in their review of these matters. We are unable to predict the outcome of the review by the DOJ and SEC.<sup>77</sup>

In early 2015, the SEC charged Goodyear Tire & Rubber Company with violating the books and records provisions of the *FCPA* because of the bribes discussed above.<sup>78</sup> Goodyear neither admitted nor denied the allegations, but agreed to pay more than \$16 million to settle the charges.<sup>79</sup> The SEC credited Goodyear for the “company’s self-reporting, prompt remedial acts, and significant cooperation with the SEC’s investigation.”<sup>80</sup> Furthermore, Goodyear announced that the Department of Justice closed their inquiry and would not be charging the company with any criminal offences.<sup>81</sup>

#### 4.1.2 Internal and External Accounting

As discussed in Chapter 2, “books and records” offences are an integral part of anti-corruption legislation. In order to satisfy the general accounting requirements of anti-corruption legislation and various other regulatory provisions, such as the provisions of the *US Security and Exchange Act*, public corporations are obliged to perform regular internal and external audits and regularly release published accounts of their business performance.

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<sup>77</sup> United States Securities and Exchange Commission, Form 10-K Annual Report of Goodyear Tire & Rubber Company (2012) at 20-21, online:

<<http://www.sec.gov/Archives/edgar/data/42582/000095012313000902/gt-123112x10k1.htm>>.

<sup>78</sup> United States Securities and Exchange Commission, Press Release, “SEC Charges Goodyear with FCPA Violations” (24 February 2015), online: <<http://www.sec.gov/news/pressrelease/2015-38.html>>.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> United States Securities and Exchange Commission, Form 10-K Annual Report of Goodyear Tire & Rubber Company (2014) at 20, online: <<https://www.sec.gov/Archives/edgar/data/42582/000095012315002527/gt-q4201410k.htm>>. Although there has been no official confirmation of this by the DOJ, it is likely accurate, as the DOJ usually announces charges simultaneously with SEC settlements.

Auditors may discover accounting discrepancies that suggest corruption activity, leading to an internal investigation.

### 4.1.3 Competitor Complaints

Corrupt behaviour often occurs in situations (such as public tendering processes) where a company is in direct competition with other companies and seeks to gain an advantage over them. Indeed, as discussed in Chapter 1, the OECD Convention is specifically focused on corrupt behaviour which confers an improper business advantage. Any improper advantage necessarily disadvantages the company's business competitors. If these competitors suspect that a company is gaining an advantage through corruption—for example, that a contract is awarded to a company because it bribed a public official—the competitors are motivated to report their suspicions to the management of the company or to the relevant enforcement bodies.

Whether a competitor reports its suspicions to the competing company itself or to law enforcement depends on factors like the seniority of the employees under suspicion and the perceived strength of a company's internal compliance program. Interestingly, in Dow Jones' "Anti-Corruption Survey Results 2014," only 33% of companies surveyed reported ever having lost business to competitors because of corruption, and this number appears to be falling.<sup>82</sup> While a majority of the companies agreed that bribery should always be reported, only 13% of companies reported ever having taken action against a corrupt competitor.

### 4.1.4 Reports of External Investigations

A company may not realize it is under suspicion for corruption until it learns that an external enforcement body is conducting an investigation into its actions and the actions of its employees. Companies learn of external investigations through a variety of sources: media reports, search warrants, subpoenas, arrest reports, etc. When a company learns that an external investigation is underway, it should immediately initiate its own internal investigation, preserve documents, interview witnesses and generally cooperate with the external enforcement bodies in order to gain cooperation credit. See Chapters 7 and 8 for more on this point.

### 4.1.5 Other Sources

A company may be alerted to the corrupt behaviour of its employees through various other sources. For example, the notable *FCPA* case *US v. Kay* began in a singular way:

In 1999 ARI [Kay's and Murphy's employer] retained a prominent Houston law firm to represent it in a civil suit. Preparing for this suit, the lawyers

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<sup>82</sup> Dow Jones, *Anti-Corruption Survey Results 2014*, Online: <<http://images.dowjones.com/company/wp-content/uploads/sites/15/2014/04/Anti-Corruption-Survey-Results-2014.pdf>>.

asked Kay for background information on ARI's rice business in Haiti. Kay volunteered that he had [made or authorized payments to Haitian customs officials], explaining that doing so was part of doing business in Haiti. Those lawyers informed ARI's directors. The directors self-reported these activities to government regulators.

The SEC launched an investigation into ARI, Murphy, and Kay. Murphy and Kay were eventually indicted on twelve counts of violating the *FCPA*.<sup>83</sup>

## 4.2 Internal Investigations by Corporations: Five Basic Steps

As discussed above, corporations are motivated to fully investigate reports of corruption against their own officers and employees and to voluntarily disclose the results of those investigations to the relevant enforcement authorities. Internal investigations may show that there was no wrongdoing or that the corporation met the standard of care required for an affirmative defence to corruption charges under the UK *Bribery Act*. At the least, internal investigations could mitigate the sanctions imposed under various other corruption statutes. Additionally, corporations are motivated to internally investigate reports of corruption rather than suffer the hardship and ignominy of external investigations by the relevant enforcement bodies. In order to accomplish all of this, an internal investigation must be carried out in a thorough and logical manner such that external auditors and enforcement bodies will accept the findings of the internal investigation. In serious cases, it is highly advisable to hire external counsel known to the enforcement body for high competence and unquestioned integrity to conduct the internal investigation. The following summary of the five basic steps for meeting a standard of thoroughness and precision in an internal investigation is based on Tarun's, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*.<sup>84</sup>

### 4.2.1 Determine the Scope of the Allegation

Understanding the nature and scope of the allegation is vital to engaging in a logical and adequate investigation. For example, if it is alleged that a regional manager who has overseen the company's business operations in Southeast Asia for the past five years bribed a public official in Malaysia, the scope of the investigation should include all the company's business activities in Southeast Asia for the past five years. Narrowly focusing on recent activities in Malaysia alone would likely be inadequate to accomplish the company's goal of discovering all of its corruption-related liabilities. An investigation with inadequate scope will not be credible to the relevant enforcement bodies and will not garner the same mitigation of sanctions as a more thorough investigation.

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<sup>83</sup> *US v Kay*, 513 F (3d) 432 (5th Cir 2007), online: <<http://www.justice.gov/criminal/fraud/fcpa/cases/kayd/10-24-07kay-5th-circuit-opinion.pdf>>.

<sup>84</sup> Robert W Tarun, *The Foreign Corrupt Practices Act Handbook*, 3rd ed (American Bar Association, 2013).

#### **4.2.2 Develop the Facts through Interviews and Document Review**

Prompt action is required to preserve documentation and to interview witnesses upon learning of corruption allegations. When assessing the cooperation of a company, public enforcement bodies evaluate how promptly and effectively the internal investigation secured both documentary and electronic evidence.

Forensic accounting firms should be hired to assist in performing thorough searches of company communications, financial records and public information. Comprehensive email searches have become standard in the contemporary context and must be thorough to establish a credible investigation.

#### **4.2.3 Assess Jurisdictional and Legal Issues**

The company must assess suspected corrupt acts in light of the overlapping application of anti-corruption legislation in different jurisdictions. For example, if the company's activities fall under concurrent US and UK jurisdiction under the *FCPA* and the *Bribery Act*, the company's legal strategy will be different than if the UK has jurisdiction alone. Legal issues discussed in Chapters 2 and 3, such as jurisdiction, party liability, corrupt intent, knowledge, vicarious liability, and defences, will need to be considered in light of the specific legislation violated by the alleged corrupt activities. Additionally, negotiating settlement agreements and mitigated sanctions will differ depending on which enforcement bodies have jurisdiction.

#### **4.2.4 Report to the Company**

Once internal investigators have gathered all possible evidence and considered the jurisdictional and legal issues, the next step is consulting with the company, whether that be an individual executive, board of directors or other committee. At this stage, various decisions must be made, including whether the company will voluntarily disclose information to the relevant enforcement bodies, terminate the employment of individuals involved, repudiate business contracts, or attempt to negotiate deferred prosecution or non-prosecution agreements.

#### **4.2.5 Recommend and Implement Remedial Measures**

The case of German conglomerate Siemens provides a model response for companies who discover corruption liabilities. A massive multinational company with 400,000 employees operating in 191 countries, Siemens implemented remedial measures on a grand scale after it became public that they were involved in widespread and systematic corrupt business activities. While the penalties imposed on Siemens were enormous (combined penalties of over \$1.6 billion including the largest *FCPA* fine ever imposed), the SEC and DOJ applauded Siemens for their extensive global investigation, the overhaul of their internal compliance program and the implementation of a state of the art anti-corruption compliance program. In order to conduct their investigation, Siemens retained over 300 lawyers, forensic analysts

and others to untangle transactions all over the world, with lawyers and an outside auditor accumulating 1.5 million billable hours.<sup>85</sup> Siemens now employs hundreds of full-time compliance personnel.<sup>86</sup>

The lesson for all companies, whether they have 10 employees or 400,000, is that the implementation of thorough and effective remedial measures can positively sway public opinion and the good graces of enforcement bodies. The final step in any internal investigation should be to assess what remedial measures should be taken and recommend their implementation to the company's executives, board of directors, or compliance committee.

### 4.3 Sources of External Investigations

Corruption activity which leads to an external investigation may be detected proactively or reactively. Proactive detection involves undercover investigation, wire taps, integrity testing and other forms of intelligence interception gathered by special investigative techniques, discussed below. Reactive detection, however, is by far the most common origin of external investigations; enforcement bodies are advised of corruption activity by a credible source and based on that information, they launch an investigation.

#### 4.3.1 Voluntary Disclosures

According to Koehler, "voluntary disclosures are the single largest source of corporate *FCPA* enforcement actions."<sup>87</sup> This reflects the reality that corporations, especially those with internal compliance programs and various regulatory auditing requirements, are in the best position to know whether they have committed any corruption offences. Additionally, the DOJ and the SEC strongly encourage voluntary disclosures and advise corporations that if they disclose violations and cooperate with enforcement, they may escape prosecution in some circumstances or their penalties will be significantly less severe.<sup>88</sup> According to

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<sup>85</sup> Siri Schubert, "At Siemens, Bribery Was Just a Line Item", *The New York Times* (21 December 2008), online: <<http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>>.

<sup>86</sup> The long list of Siemens' remedial measures is detailed in Tarun (2013) at 239-240.

<sup>87</sup> Koehler (2014) at 173.

<sup>88</sup> In the Canadian context, one could ask whether the new owners of Griffiths Energy International, who voluntarily disclosed bribes in Chad, received any significant reduction in sentence, compared to Niko Resources, which did not self-disclose. Griffiths paid \$10.35 million (fine) whereas Niko Resources paid nearly \$9.5 million (fine and victim surcharge). Griffiths also spent \$5 million on its internal investigation, which it turned over to the RCMP, saving the RCMP a significant amount of money, whereas Niko Resources cost the RCMP approximately \$1 million in investigation expenses. The major difference in the bribery in the two cases was the size of the bribe: \$2 million in the Griffiths case compared to \$200,000 in the Niko Resources case. On the other hand, Griffiths implemented a robust anti-corruption policy after the initial investigation revealed bribery, while Niko Resources did not. Thus, the Court put Niko Resources on probation for three years and required implementation of an anti-corruption compliance program as a condition of probation.

Koehler, “in 2012, 50 percent of all corporate *FCPA* enforcement actions were the result of voluntary disclosures.”<sup>89</sup>

Despite promises of leniency in the US, the actual benefit to a corporation of voluntarily disclosing corruption violations is often unclear. Recent studies, cited by Koehler, show no difference between the fines and penalties levied against disclosing and non-disclosing companies. Indeed, Tarun writes, “the SEC, especially through disgorgement of profits, can quickly eviscerate the credit the DOJ extended to companies for cooperation in *FCPA* investigations.”<sup>90</sup>

On the other hand, in 2014, Andrew Ceresney, the Director of the SEC Division of Enforcement, maintained that cooperation is “always in the company’s best interest.”<sup>91</sup> Ceresney pointed out that the SEC offers incentives such as non-prosecution agreements and reduced penalties, and is committed to “making sure that people understand there will be such benefits.”<sup>92</sup> In cases of “extraordinary cooperation,” Ceresney notes that penalties will be significantly lower. For example, in 2014, Layne Christensen Co. was charged with making improper payments to African officials but, thanks to self-reporting and cooperation, its penalty was reduced to 10% of the disgorgement amount, as opposed to the usual penalty of closer to 100% of the disgorgement amount. Ceresney also warned that the consequences will be worse and opportunities to gain credit through cooperation will be lost if a company chooses not to self-report and the SEC subsequently discovers violations through investigation or whistleblowers. A company’s failure to self-report could also indicate that their compliance program and controls were inadequate.

In the UK, the SFO issued guidance in 2009 on dealing with foreign corruption.<sup>93</sup> The guidance encouraged UK companies to voluntarily disclose corruption offences with the promise of more lenient negotiated civil settlements, rather than criminal prosecutions.<sup>94</sup> The Balfour Beatty case is a prime example. Balfour Beatty self-reported bribery payments made to secure engineering and construction contracts as part of a UNESCO project to rebuild the Alexandria Library in Egypt. As a result of the company’s voluntary disclosure, the SFO agreed not to bring criminal charges and required the relatively low amount of 2.5M GBP to be returned as a civil recovery.<sup>95</sup> In a speech given in 2016, Ben Morgan, the Joint Head of Bribery and Corruption in the UK, noted that deferred prosecutions cannot be “a cosy deal,”

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<sup>89</sup> Koehler (2014) at 173.

<sup>90</sup> Tarun (2013) at 297.

<sup>91</sup> Andrew Ceresney, “Remarks at the 31<sup>st</sup> International Conference on the Foreign Corrupt Practices Act” (19 November 2014), online: <<http://www.sec.gov/News/Speech/Detail/Speech/1370543493598>>.

<sup>92</sup> *Ibid.*

<sup>93</sup> Nicholls et al (2011) at 213-214.

<sup>94</sup> Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Ashgate Publishing, 2014) at 121, reports that the SFO’s new director, David Green, removed this guidance in October 2012 after a review. However, Green maintains that self-reporting is encouraged.

<sup>95</sup> Nicholls et al (2011) at 218-219.

but must be sufficiently lenient to reward self-reporting and cooperation. Morgan noted that some view a discount of one third of the fine as an insufficient incentive. Previous deferred prosecution agreements demonstrate the willingness of UK courts to consider a discount of up to 50% in the right circumstances, as the court did in the UK's second case involving the use of the new DPA option.<sup>96</sup>

### 4.3.2 Whistleblowers

UNCAC recognizes the reality that many instances of corruption will never come to light if witnesses to corrupt activity do not come forward with information. These witnesses face dangerous repercussions if they blow the whistle and are unlikely to come forward without adequate resources in place to protect them. Articles 32 and 37 of UNCAC require State Parties to provide effective protection to witnesses and participants in corruption offences who are willing to supply information and assistance to enforcement bodies. Article 33 of UNCAC recommends that State Parties consider extending these same protections to all persons who report corruption offences.

Recent legislative reforms in the US may result in an increase in the number of corruption investigations sparked by whistleblowers in the near future. Under section 922 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of 2010, if a whistleblower's information leads to an enforcement action, the whistleblower will be entitled to an award of 10 to 30 percent of any resulting monetary sanctions in excess of \$1 million.

See Chapter 12 for more on whistleblower laws and policies.

### 4.3.3 Competitor Complaints

The corruption investigation which led to the first case brought under Canada's *CFPOA* began with a competitor complaint. A Canadian company, Hydro Kleen Systems Inc., competed with other industrial cleaning companies, including Innovative Coke Expulsion Inc. (ICE), for contracts in the US and Canada. The employees of both companies often travelled back and forth across the US-Canada border with industrial cleaning equipment. Hydro Kleen paid bribes to a US border guard to facilitate easy movement of its own employees and equipment across the border. The border guard, on his own initiative, also denied ICE employees' admission to the US on multiple occasions and improperly photocopied confidential ICE documents that he had required the employees to present. He passed these documents on to Hydro Kleen. Incensed, ICE reported the guard's conduct and their suspicions about Hydro Kleen to an Alberta court and received a court order to search Hydro Kleen's premises for the confidential ICE documents. After the resulting

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<sup>96</sup> Ben Morgan, "Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution" (Serious Fraud Office, 2016), online: <<https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prosecution/>>.

investigation, Hydro Kleen pled guilty to bribing a public foreign official under the *CFPOA*.<sup>97</sup>

The Padma bridge case also provides a possible example of a competitor complaint. As discussed in Chapter 1, after the initial bidding process for the Padma River bridge project, SNC-Lavalin was reportedly in second position behind the Halcrow Group, a multinational engineering firm based in the UK, who had submitted a lower and more competitive bid. Following the alleged bribery conspiracy, however, SNC-Lavalin moved to first position and was awarded the bridge contract. As financiers of the Padma bridge project, it was the World Bank that initiated an investigation into the alleged bribery conspiracy, but it is easy to imagine that SNC-Lavalin's competitor, the Halcrow Group, was upset by the cloak and dagger bidding process and reported their suspicions to the World Bank.

#### 4.3.4 Diplomatic Embassies and Trade Offices

Diplomats and ambassadors are tasked with fostering strong relations with foreign states, and foreign trade offices are tasked with improving a country's business trade in foreign countries and protecting the reputation of the country's businesses. The pall of corruption detracts from the goals of both diplomats and trade officials; as such, they are motivated to swiftly address corruption concerns regarding their own countries' citizens and businesses and report their findings to the proper authorities.

A Canadian diplomat was instrumental to the instigation of an investigation and the ultimate conviction obtained in *R. v. Niko Resources Ltd* under the *CFPOA*. In the agreed statement of facts submitted during the *Niko* case,<sup>98</sup> it came to light that "the RCMP investigation into Niko Canada began after the Canadian Department of Foreign Affairs and International Trade (DFAIT) alerted the RCMP on June 20, 2005, to news stories concerning a possible violation of the *Corruption of Foreign Public Officials Act* by the Niko family of companies." DFAIT was informed of the possible corruption by David Sproule, Canada's High Commissioner to Bangladesh, who read a *Daily Star* article which reported that Niko had "gifted" a luxury SUV to a Bangladeshi minister.

#### 4.3.5 Cooperative Foreign Enforcement Bodies

Enforcement bodies that have cooperation agreements with foreign enforcement bodies often refer investigations or exchange information about corruption activity that leads to

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<sup>97</sup> A more in-depth account of the Hydro Kleen case can be found in Norm Keith, *Canadian Anti-Corruption Law and Compliance* (Lexis Nexis, 2013) at 115–21.

<sup>98</sup> Agreed Statement of Facts, *R v Niko Resources Ltd*, (June 23 2011) ABQB, online: <[http://www.osler.com/uploadedFiles/Agreed\\_statement\\_of\\_facts.pdf](http://www.osler.com/uploadedFiles/Agreed_statement_of_facts.pdf)>.

external investigations. For example, in 2007 the DOJ in the US referred their investigation into Innospec Ltd. to the UK's SFO.<sup>99</sup>

### 4.3.6 Non-Governmental Organizations

Non-governmental organizations like Transparency International (TI) are instrumental in reporting corruption activity.<sup>100</sup> Beginning in 2003, TI began operating Advocacy and Legal Advice Centres (ALACs) around the globe to empower witnesses and victims of corruption to fight back. To date, 140,000 people have contacted ALACs and their reports of corrupt activity have been passed on to enforcement bodies and recorded by TI in their role as advocates for change.

## 4.4 An Overview of the Essential Elements of an External Investigation

The following extract from Kwok's "Investigation of Corruption"<sup>101</sup> provides a good overview of the elements of a corruption investigation. While his paper is focused on investigations carried out by Hong Kong's ICAC, the requisite elements are similar for police investigations of bribery in other countries.

BEGINNING OF EXCERPT

### A. Introduction

The Hong Kong Independent Commission Against Corruption (ICAC) is popularly regarded as a successful model in fighting corruption, turning a very corrupt city under colonial government into one of the relatively corruption-free places in the world. One of the success factors is its three-pronged strategy — fighting corruption through deterrence, prevention and education. All three are important but in my view, deterrence is the most important. That is the reason why ICAC devoted over 70% of its resources into its Operations Department, which is responsible for investigating corruption. Nearly all of the major corruption cases I have dealt with were committed by people in high authority. For them, they have certainly been educated about the evil of corruption, and they may also be subject to certain degrees of corruption prevention control. But what inspired them to commit corruption? The

<sup>99</sup> See Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 222-23 for a fuller discussion.

<sup>100</sup> See Transparency International online for more information: <<http://www.transparency.org/getinvolved/report>>.

<sup>101</sup> Tony Kwok Man-Wai, "Investigation of Corruption" in Resource Materials Series No. 89 (UNAFEI, 2013) at 104-108 online: <[http://www.unafei.or.jp/english/pdf/RS\\_No89/No89\\_VE\\_Man-wai.pdf](http://www.unafei.or.jp/english/pdf/RS_No89/No89_VE_Man-wai.pdf)>.

answer is simply greed, as they would weigh the fortune they could get from corruption against the chance of being discovered. If they think that it is a low risk, high-return opportunity, they will likely succumb to the temptation. So how can we deter them from being corrupt? The only way is to make them realize that there is a high risk of being caught. Hence the Mission of the ICAC Operations Department is – to make corruption a high-risk crime. To do that, you need a professional and dedicated investigative force.

### **B. Difficulties of Investigating Corruption**

Corruption is regarded as one of the most difficult crimes to investigate. There is often no scene of the crime, no fingerprints, no eye-witnesses to follow up. It is by nature a very secretive crime and can involve just two satisfied parties, so there is no incentive to divulge the truth. Even if there are witnesses, they are often parties to the corruption themselves, hence tainted with doubtful credibility when they become prosecution witnesses in court. The offenders can be equally as professional as the investigators and know how to cover up their trails of crime. The offenders can also be very powerful and ruthless in enforcing a code of silence amongst related persons through intimidation and violence to abort any investigation. In this modern age, the sophisticated corrupt offenders will make full advantage of the loopholes across jurisdictions and acquire the assistance of other professionals, such as lawyers, accountants and computer experts in their clandestine operations and to help them launder their corrupt proceeds.

### **C. Corruption and Organized Crime**

Corruption rarely exists alone. It is often a tool to facilitate organized crimes. Over the years, ICAC has investigated a wide range of organized crimes facilitated by corruption. Law enforcement officers have been arrested and convicted for corruptly assisting drug traffickers and smugglers of various kinds; bank managers for covering up money laundering for the organized crime syndicates; hotel and retail staff for perpetuating credit card fraud. In these cases, we need to investigate not only corruption, but some very sophisticated organized crime syndicates as well.

### **D. Prerequisites for an Effective Investigation**

Hence, there is an essential need for professionalism in corruption investigations. There are several prerequisites to an effective corruption investigation:

- a. Independent — corruption investigations can be politically sensitive and embarrassing to the Government. The investigation can only be effective if it is truly independent and free from undue interference. This depends very much on whether there is a top political will to fight corruption in the

country, and whether the head of the anti-corruption agency has the moral courage to stand against any interference.

- b. Adequate investigative power — because corruption is so difficult to investigate, you need adequate investigative power. The HK ICAC enjoys wide investigative power. Apart from the normal police power of search, arrest and detention, it has power to check bank accounts, intercept telephone communications, require suspects to declare their assets, require witnesses to answer questions on oath, restrain properties suspected to be derived from corruption, and hold the suspects' travel documents to prevent them from fleeing the jurisdiction. Not only is the ICAC empowered to investigate corruption offences, both in the Government and private sectors, they can investigate all crimes which are connected with corruption. I must hasten to add that there is an elaborate system of checks and balances to prevent abuse of such wide power.
- c. Adequate resources — investigating corruption can be very time-consuming and resource intensive, particularly if the cases cross jurisdictions. In 2007, the HK ICAC's annual budget amounted to US\$90M, about US\$15 per capita. You may wish to multiply this figure with your own country's population and work out the anti-corruption budget that needs to be given to be the equivalent of ours! However, looking at our budget from another angle — it represents only 0.3% of our entire Government budget or 0.05% of our Gross Domestic Product (GDP). I think you will agree that such a small "premium" is a most worthwhile investment for a clean society.
- d. Confidentiality — it is crucial that all corruption investigations should be conducted covertly and confidentially, at least before an arrest is made, so as to reduce the opportunities for compromise or interference. On the other hand, many targets under investigation may prove to be innocent, and it is only fair to preserve their reputation before there is clear evidence of their corrupt deeds. Hence in Hong Kong, we have a law prohibiting any one, including the media, from disclosing any details of ICAC investigation until overt action such as arrests and searches have been taken. The media once described this as a "press gag law" but they now come to accept it as the right balance between press freedom and effective law enforcement.
- e. International mutual assistance — many corruption cases are now cross-jurisdictional and it is important that you can obtain international assistance in the areas such as locating witnesses and suspects, money trails, surveillance, exchange of intelligence, arrest, search and extradition, and even joint investigation and operation.
- f. Professionalism — all the investigators must be properly trained and professional in their investigations. The HK ICAC strives to be one of the most professional law enforcement agencies in the world. ICAC is one of the first agencies in the world to introduce the interview of all suspects under

video, because professional interview techniques and the need to protect the integrity of the interview evidence are crucial in any successful corruption prosecution. The investigators must be persons of high integrity. They must adhere strictly to the rule of confidentiality, act fairly and justly in the discharge of their duties, respect the rights of others, including the suspects and should never abuse their power. As corruption is so difficult to investigate, they need to be vigilant, innovative and prepared to spend long hours to complete their investigation. ICAC officers are often proud of their sense of mission, and this is the single most important ingredient of success of ICAC.

- g. An effective complaint system — No anti-corruption agency is in a position to discover all corrupt dealings in the society by itself. They rely heavily on an effective complaint system. The system must be able to encourage quality complaints from members of the public or institutions, and at the same time, deter frivolous or malicious complaints. It should provide assurance to the complainants on the confidentiality of their reports and if necessary, offer them protection. Since the strategy is to welcome complaints, customer service should be offered, making it convenient to report corruption. A 24-hour reporting hotline should be established, and there should be a quick response system to deal with any complaints that require prompt action. All complaints, as long as there is substance in them, should be investigated, irrespective of how minor the corruption allegation. What appears to be minor in the eyes of the authority may be very serious in the eyes of the general public!

### **E. Understanding the Process of Corruption**

It should be helpful to the investigators to understand the normal process of corruption, through which the investigators would be able to know where to obtain evidence to prove the corruption act. Generally a corrupt transaction may include the following steps:

1. Softening up process — it is quite unlikely that a government servant would be corrupt from his first day in office. It is also unlikely that any potential bribe-offerer would approach any government servant to offer bribes without building up a good relationship with him first. Thus there is always a “softening up process” when the briber-offerer would build up a social relationship with the government servant, for example, inviting him to dinner and karaoke, etc. Thus the investigator should also attempt to discover evidence to prove that the government servant had accepted entertainment prior to the actual corrupt transaction.
2. Soliciting/offering of bribe — when the time is ripe, the bribe-offerer would propose to seek a favour from the government servant and in return offer a

bribe to him. The investigator should attempt to prove when and where this had taken place.

3. Source of bribe — when there is agreement for the bribe, the bribe-offerer would have to withdraw money for the payment. The investigator should attempt to locate the source of funds and whether there was any third person who assisted in handling the bribe payment.
4. Payment of bribe — The bribe would then be paid. The investigator should attempt to find out where, when and how the payment was effected.
5. Disposal of bribe — On receipt of the bribe, the receiver would have to dispose the cash. The investigator should try to locate how the bribe was disposed, either by spending or depositing into a bank account.
6. Act of abuse of power – To prove a corruption offence, you need to prove the corrupt act or the abuse of position, in return for the bribe. The investigator needs to identify the documents or other means proving this abuse of authority.

The task of the investigator is to collect sufficient evidence to prove the above process. He needs to prove “when”, “where”, “who”, “what”, “how” and “why” on every incidence, if possible.

However this should not be the end of the investigation. It is rare that corruption is a single event. A corrupt government servant would likely take bribes on more than one occasion; a bribe-offerer would likely offer bribes on more than one occasion and to more than one corrupt official. Hence it is important that the investigator should seek to look into the bottom of the case, to unearth all the corrupt offenders connected with the case.

## **F. Methods to Investigate Corruption**

Investigating corruption can broadly be divided into two categories:

1. Investigating past corruption offences
2. Investigating current corruption offences

### **1. Investigating Past Offences**

The investigation normally commences with a report of corruption and the normal criminal investigation technique should apply. Much will depend on the information provided by the informant and from there, the case should be developed to obtain direct, corroborative and circumstantial evidence. The success of such investigations relies on the meticulous approach taken by the investigators to ensure that “no stone is left unturned”. Areas of investigation can include detailed checking of the related bank accounts and company ledgers, obtaining information from various witnesses

and sources to corroborate any meetings or corrupt transaction, etc. At the initial stage, the investigation should be covert and kept confidential. If there is no evidence discovered in this stage, the investigation should normally be curtailed and the suspects should not be interviewed. This would protect the suspects, who are often public servants, from undue harassment. When there is a reasonable suspicion or evidence discovered in the covert stage, the investigation can enter its overt stage. Action can then be taken to interview the suspects to seek their explanation and if appropriate, the suspects' home and office can be searched for further evidence. Normally further follow-up investigation is necessary to check the suspects explanation or to go through the money trails as a result of evidence found during searches. The investigation is usually time-consuming.

## 2. Investigating Current Corruption Offences

Such investigation will enable a greater scope for ingenuity. Apart from the conventional methods mentioned above, a proactive strategy should always be preferred, with a view to catch the corrupt redhanded. In appropriate cases, with proper authorities obtained, surveillance and telephone intercepts can be mounted on the suspects and suspicious meetings monitored. A co-operative party can be deployed to set up a meeting with a view to entrap the suspects. Undercover operation can also be considered to infiltrate into a corruption syndicate. The pre-requisites to all these proactive investigation methods are professional training, adequate operational support and a comprehensive supervisory system to ensure that they are effective and in compliance with the rules of evidence.

As mentioned above, corruption is always linked and can be syndicated. Every effort should be explored to ascertain if the individual offender is prepared to implicate other accomplices or the mastermind. In Hong Kong, there is a judicial directive to allow a reduction of 2/3 of the sentence of those corrupt offenders who are prepared to provide full information to ICAC and to give evidence against the accomplices in court. ICAC provides special facilities to enable such "resident informants" to be detained in ICAC premises for the purpose of debriefing and protection. This "resident informant" system has proved to be very effective in dealing with syndicated or high-level corruption.

## **G. Investigation Techniques**

To be competent in corruption investigations, an investigator should be professional in many investigation techniques and skills. The following are the essential ones:

- Ability to identify and trace persons, companies and properties
- Interview technique
- Document examination

- Financial Investigation
- Conducting a search & arrest operation
- Surveillance and observation
- Acting as undercover agent
- Handling informers
- Conducting an entrapment operation

## **H. Professional Investigative Support**

In order to ensure a high degree of professionalism, many of the investigation techniques can be undertaken by a dedicated unit, such as the following:

- **Intelligence Section**
  - as a central point to collect, collate, analyze and disseminate all intelligence and investigation data, otherwise there may be a major breakdown in communication and operations.
- **Surveillance Section**
  - a very important source of evidence and intelligence. Hong Kong ICAC has a dedicated surveillance unit of over 120 surveillance agents, and they have made significant contributions to the success of a number of major cases.
- **Technical Services Section**
  - provide essential technical support to surveillance and operations.
- **Information Technology Section**
  - it is important that all investigation data should be managed by computer for easy retrieval and proper analysis. In this regard, computers can be an extremely useful aid to investigations. On the other hand, computers are also a threat. In this modern age, most personal and company data are stored in computers. The anti-corruption agency must possess the ability to break into these computers seized during searches to examine their stored data. Computer forensics is regarded as vital for all law enforcement agencies worldwide these days.

## **I. Financial Investigation Section**

The corruption investigations these days often involve sophisticated money trails of proceeds of corruption, which can go through a web of off-shore companies and bank accounts, funds, etc. It is necessary to employ professionally qualified investigative accountants to assist in such investigations and in presenting such evidence in an acceptable format in court.

- **Witness Protection Section**

ICAC has experienced cases where crucial witnesses were compromised, with one even murdered, before giving evidence. There should be a comprehensive system to protect crucial witnesses, including 24-hour protection, safe housing, new identity and overseas relocation. Some of these measures require legislative backing.

#### **J. Conclusion and Observation**

In conclusion, the success factors for an effective corruption investigation include:

- An effective complaint system to attract quality corruption reports
- An intelligence system to supplement the complaint system and to provide intelligence support to investigations
- Professional & dedicated investigators who need to be particularly effective in interviewing techniques and financial investigation
- More use of proactive investigation methods, such as entrapment and undercover operations
- Ensure strict confidentiality of corruption investigation, with a good system of protection of whistleblowers and key witnesses
- International co-operation

END OF EXCERPT

## **4.5 Investigation Strategy in Corruption Cases**

Monteith, an anti-corruption specialist with working experience at both the International Centre for Asset Recovery (ICAR) and the SFO, wrote a brief, informative chapter on the importance of establishing an investigative strategy and plan when dealing with corruption allegations.<sup>102</sup> Monteith points out that planning and strategizing are instrumental in meeting the unique challenges posed by corruption cases. These challenges include the overwhelming amounts of data involved in untangling transactions and tracing assets, dealing with aggressive defence lawyers and a disinterested public, and the time lapse before corrupt conduct is brought to light. The transnational nature of many corruption cases creates other challenges and calls for mutual trust, cooperation, coordination and information sharing. Careful planning is needed to navigate these features of cross-border investigations.

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<sup>102</sup> Charles Monteith, "Case and investigation strategy" in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (International Academic Publishers, 2013) at 183-96.

The author outlines the key pieces of a successful investigation. As multiple agencies are often involved in each corruption case, cooperation between agencies is required to set the stage for the investigation. This means choosing a lead agency, allocating responsibilities and sharing information. Monteith also stresses the importance of assembling a team of intelligence officers, financial investigators, analysts and lawyers in order to ensure the right expertise is available at the right time.

He also recommends that an investigative plan cover the following key components. First, the plan must take into account the features of the corrupt activity, such as where, when, by whom and how corruption occurs. Second, a strategy is needed to meet the evidential requirements for proving the offence. Agencies must determine how to turn intelligence into admissible evidence and how to fill gaps in the evidence.

Third, investigating authorities must develop a plan for the implementation of investigative powers and techniques in order to avoid improper use of those techniques. A plan also assists investigators in sifting through vast amounts of evidence, focusing the investigation, and reaching the goal of connecting assets to corrupt conduct. This part of the plan should cover how an agency will use open source intelligence, human intelligence and financial intelligence, as well searches and seizures, compulsory requests for information, compulsory interviews, arrest and interview, and covert actions. The strategy should address how investigators will circumvent the weaknesses, pitfalls and timing issues involved with these tools. A strategy for ensuring the success of MLA requests for information is also important, along with a plan for coordinating cross-border surprise raids.

Fourth, the investigating agency should plan out media communications to promote public confidence. Investigating agencies should stress that proper gathering of evidence takes time, since the public might have unrealistic expectations surrounding the time frame of an investigation. Finally, Monteith recommends that the investigative plan be evaluated and adapted throughout the investigation to reflect new evidence.

#### **4.6 Investigative Techniques**

As Kwok's paper notes, detecting corruption and gathering evidence of corruption can be both difficult and time-consuming. Effective enforcement has many elements, two of which are well-trained and well-funded investigators who have the investigative powers essential to the task. However, the bestowing of investigative powers on investigators must be subject to checks and balances in respect to all persons' fundamental privacy interests. For that reason, in common law countries like the US, UK and Canada, investigative techniques which involve a significant invasion into a person's reasonable expectation of privacy of person or property normally require a judicial warrant—i.e., prior approval for the search or interception granted by an independent judicial officer who finds there are reasonable grounds to believe evidence of corruption will be found by the search or interception. Without reasonable grounds, searches and interceptions are generally illegal. While the laws on electronic interception and monitoring and on search and seizure vary in some details in

the US,<sup>103</sup> UK<sup>104</sup> and Canada,<sup>105</sup> each country authorizes such techniques subject to significant checks and balances. Electronic surveillance generally includes eavesdropping, wiretapping and intercepting communications from cell-phones (both oral and text messages), emails and postal services.<sup>106</sup>

#### 4.6.1 International Provisions for Special Investigative Techniques

##### 4.6.1.1 UNCAC

Article 50 states:

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

...

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as interception and allowing the goods or funds to continue intact or to be removed or replaced in whole or in part.

The investigative techniques mentioned in Article 50—controlled delivery, electronic or other forms of surveillance and undercover operations—are legally authorized in the US, UK and Canada, subject to legal restrictions which balance the individual's right to privacy and the State's interest in law enforcement.

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<sup>103</sup> For the law of search and seizure in the US, see Wayne R LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, vol 1, 5th ed (Thomas Reuters, 2013). For the law on electronic surveillance, interception and wiretaps see *American Jurisprudence*, 2nd ed, "Search and Seizures: Electronic Surveillance Generally", § 338 and "Undercover Activities", § 2406.

<sup>104</sup> For the law of search and seizure in the UK, see Lord Justice Hooper et al, eds, *Blackstone's Criminal Practice 2008* (Oxford University Press, 2007). For the law on electronic surveillance, interception and wiretaps, see Victoria Williams, *Surveillance and Intelligence Law Handbook* (Oxford University Press, 2006).

<sup>105</sup> For the law of search and seizure in Canada, see Tim Quigley, *Procedure in Canadian Criminal Law*, 2nd ed (Carswell, 2005) (loose-leaf). For the law on electronic surveillance, interception and wiretaps, see Robert Hubbard, Peter Brauti & Scott Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (Canada Law Book, 2000) (loose-leaf).

<sup>106</sup> Nicholls et al (2011) at 192; Quigley, (2005) at 8-49.

### 4.6.1.2 OECD Convention

The OECD Convention has no specific articles on special investigative procedures.

## 4.6.2 Controlled Deliveries: US, UK and Canadian Law

Controlled deliveries are a common technique in the investigation of offences such as possession of illegal drugs or stolen goods, and, though less likely, could be used to investigate ongoing bribery. Controlled deliveries involve investigation during the commission of a crime rather than afterward. For example, the police may believe that A is in possession of drugs, stolen goods or proceeds of crime and that A is going to deliver those goods to B, the kingpin or higher official of the organized activity. Rather than arrest A, the police will follow A to the delivery point in order to discover the identity of B and facilitate the arrest of both A and B. Controlled deliveries are lawful in the US,<sup>107</sup> UK<sup>108</sup> and Canada.<sup>109</sup> They raise no special concerns.

## 4.6.3 Integrity Testing versus Entrapment

While Article 50 of UNCAC does not specifically mention integrity testing, the *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigations*<sup>110</sup> promotes integrity testing as an “extremely effective ... investigative tool as well as ... an excellent deterrent.”<sup>111</sup> Moreover, the *UN Handbook* encourages the use of random integrity testing and targeted tests based on suspicion.<sup>112</sup> For example, integrity testing has been used very effectively by the New York Police Department to detect internal corruption<sup>113</sup> and in the UK to detect the presence of issues (not amounting to criminal offences) in private institutions.<sup>114</sup> Integrity testing, especially when coupled with video surveillance, can be very intrusive and is thus subject to the rules of entrapment (discussed below), as well as criminal procedure

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<sup>107</sup> Joshua D Poyer, “*United States v Miggins*: A Survey of Anticipatory search warrants and the Need for Uniformity Among the Circuits” (2004) 58: 2 U Miami L Rev 701 at 705.

<sup>108</sup> William C Gilmore, “Police Co-Operation and the European Communities: Current Trends and Recent Developments” (1993) 19:4 Commonwealth L Bull 1960 at 1962.

<sup>109</sup> Chantal Perras & Frederic Lemieux, “Convergent Models of Police Cooperation: The Case of Anti-Organized Crime and Anti-terrorism Activities in Canada” in Frederic Lemieux, eds, *International Police Cooperation: Emerging Issues, Theories and Practice* (Williams Publishing, 2010) 124 at 139.

<sup>110</sup> *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigations* (Vienna: United Nations Office on Drugs and Crime, September 2004), online: <<https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>>.

<sup>111</sup> *Ibid* at 91.

<sup>112</sup> *Ibid* at 90.

<sup>113</sup> *Ibid* at 92.

<sup>114</sup> Nicholls et al (2011) at 202.

and human rights legislation.<sup>115</sup> In some countries integrity testing is illegal unless there is reasonable suspicion that the persons being tested are violating a particular law.<sup>116</sup>

A distinction is drawn in some legal systems between integrity testing and entrapment. In short, integrity testing is the presenting (usually by an undercover police officer or agent) of an opportunity to commit a crime, for example by asking a person “would you like to buy some marihuana” or “would you like to pay me a bribe to avoid my arresting you for speeding.” Entrapment goes beyond offering an opportunity to commit a crime and involves active persuasion and inducement to commit the crime.

#### 4.6.3.1 US Law

There is no unified approach to the defense of entrapment in the United States.<sup>117</sup> Instead, there are two major approaches: (a) a subjective approach and (b) an objective approach.<sup>118</sup> Federal courts<sup>119</sup> and a majority of state courts follow the subjective approach, also called the *Sherman-Sorrells* doctrine.<sup>120</sup> This approach has a two-step test: (1) was the offense induced by a government agent; and (2) was the defendant predisposed to commit the type of offense charged?<sup>121</sup> There are a variety of factors taken into account during this test.<sup>122</sup> The focus of the *Sherman-Sorrells* doctrine is on the propensity of the defendant to commit the offense rather than the officer’s actions.<sup>123</sup>

The objective approach, also known as the Roberts-Frankfurter<sup>124</sup> approach, is followed by a few state courts.<sup>125</sup> This approach uses a test which focuses on the conduct of the government agent and determines if the offense was induced by the agent “employing methods of persuasion or inducement, which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.”<sup>126</sup> When the test is being applied it is necessary to consider the surrounding circumstances.<sup>127</sup> These two approaches differ in procedure, including whether a judge or jury considers the issue.<sup>128</sup> Under both

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<sup>115</sup> *Ibid.*

<sup>116</sup> For example, in Canada this would be considered an abuse of process and a violation of the section 8 right to privacy under the *Canadian Charter of Rights and Freedoms*.

<sup>117</sup> Paul H Robinson, *Criminal Law Defenses: Criminal Practice Series* (West Publishing, 1984) at 511.

<sup>118</sup> Wayne R LaFave, *Substantive Criminal Law*, 2nd ed (Thomson/West, 2003) vol 2 at 94.

<sup>119</sup> Federal courts follow the subjective approach. As a result, since bribery falls under federal jurisdiction in the US, the subjective approach is the relevant test for bribery.

<sup>120</sup> LaFave (2003) at 94. The approach is named after *Sherman v United States*, 365 US 369 (1958) and *Sorrells v United States*, 287 US 435 (1932), in which the majority adopted this approach.

<sup>121</sup> LaFave, *ibid* at 95.

<sup>122</sup> For a full list of the relevant factors see *ibid* at 96.

<sup>123</sup> *Ibid* at 97.

<sup>124</sup> Named after the judges who authored the concurring opinions in *Sorrells* and *Sherman*.

<sup>125</sup> LaFave (2003) at 99.

<sup>126</sup> *Ibid* at 100.

<sup>127</sup> *Ibid* at 100.

<sup>128</sup> For a full analysis of the procedural differences between the two approaches see *ibid* at 104-10

approaches a finding of entrapment will normally lead to an acquittal, but the defense is not available for offenses of bodily harm.<sup>129</sup>

There is also a debate in the US about whether entrapment should be considered an excuse (leading to an acquittal) or a non-exculpatory defense.<sup>130</sup> In two cases, the courts acknowledged that a finding of entrapment may sometimes be used as a due process (non-exculpatory) defense leading to a stay of proceedings.<sup>131</sup> As a result, LaFave suggests that “a reasonable suspicion prerequisite may ... emerge as an aspect of the due process limits upon encouragement activity” to curb over-involvement by the government.<sup>132</sup>

#### 4.6.3.2 UK Law

The House of Lords has repeatedly affirmed that there is no substantive defence of entrapment available in English law.<sup>133</sup> Instead, traditionally under English law, a finding of entrapment would lead to exclusion of evidence or result in a reduced sentence.<sup>134</sup> However, in response to a European Court of Human Rights decision,<sup>135</sup> the House of Lords in *R v Loosely* and *Attorney General’s Reference (No 3 of 2000)*<sup>136</sup> concluded that when a defendant has been entrapped, the appropriate remedy is a stay of proceedings, thus acknowledging a non-exculpatory defence of entrapment.<sup>137</sup> The House of Lords defined entrapment as “instigating[ing] or incit[ing] the target to commit an offence that he would not have otherwise committed,” as opposed to the legitimate technique of providing an “unexceptional opportunity” to commit the offence.<sup>138</sup>

When determining whether entrapment has occurred the court considers multiple factors, including whether the investigation was undertaken in good faith.<sup>139</sup> If the investigation was based on reasonable suspicion of an individual, group of individuals or a specific location, the court will likely find the investigation was undertaken in good faith.<sup>140</sup> The good faith criterion has the effect of curbing the use of random virtue integrity testing based on

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<sup>129</sup> Robinson, (1984) at 524.

<sup>130</sup> *Ibid* at 515.

<sup>131</sup> LaFave (2003) at 112. *United States v Russell*, 411 US 423 (1973), *Hampton v United States*, 425 US 484 (1976).

<sup>132</sup> LaFave, *ibid* at 114; *United States v Twigg*, 588 F (2d) 373 (3rd Cir 1978).

<sup>133</sup> Simester et al, (2010) at 741, 743; Nicholls et al, (2011) at 200.

<sup>134</sup> Pursuant to s 78 of the *Police and Criminal Evidence Act 1984* and *R v Latif*, [1996] 1 All ER 353 (HL); Simester et al, (2010) at 742.

<sup>135</sup> *Teixeira de Castro v Portugal*, [1998] Crim LR 751.

<sup>136</sup> These two case were heard together: [2002] Cr App R 29.

<sup>137</sup> Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 4th ed (Hart Publishing, 2010) at 743; Nicholls et al, (2011) at 201.

<sup>138</sup> Nicholls et al, (2011) at 201.

<sup>139</sup> *Ibid* at 202; see also Simester et al (2010) at 743 for the full list of factors.

<sup>140</sup> Nicholls et al (2011) at 202

speculation, as these types of investigations may lead to a stay of proceedings for abuse of process.<sup>141</sup>

The test described in *Loosely* applies to all covert investigations.<sup>142</sup> As stated by Nicholls et al., investigators must investigate, not create, the offence.<sup>143</sup> Investigators therefore must be cautious when deploying undercover agents and participating sources or when conducting intelligence-led integrity testing, which responds to intelligence that a target is or may be committing crime.<sup>144</sup>

#### 4.6.3.3 Canadian Law

In Canada, entrapment is a non-exculpatory defence and a finding of entrapment will result in a stay of proceedings for abuse of process.<sup>145</sup> Under Canadian law, entrapment can occur in two situations: (a) “the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in a criminal activity or pursuant to a *bona fide* inquiry, [or,] (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.”<sup>146</sup>

In regard to (a), the Supreme Court of Canada has created a threshold of reasonable suspicion or *bona fide* inquiries before random virtue testing is lawful.<sup>147</sup> Random virtue testing involves law enforcement officers approaching individuals randomly (i.e., without reasonable suspicion that he or she is already engaged in a particular criminal activity) and presenting him/her with the opportunity to commit a particular crime. The Supreme Court of Canada held that random virtue testing is an improper use of police power.<sup>148</sup> However, the Court has also acknowledged an exception. Under this exception, law enforcement officials may present any individual with an opportunity to commit a particular offence during a *bona fide* inquiry into a sufficiently defined location if it is reasonably suspected that criminal activity is occurring in that location.<sup>149</sup>

In regard to (b), the Court has outlined relevant factors for consideration when determining whether the police have gone beyond providing an opportunity and instead induced the

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<sup>141</sup> *Ibid* at 202; David Ormerod, *Smith and Hogan’s Criminal Law*, 13th ed (Oxford University Press, 2011) at 400.

<sup>142</sup> Nicholls et al (2011), *ibid* at 200.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid*. For a detailed account of covert investigation techniques in the UK, see *ibid* at 190-200.

<sup>145</sup> Stuart, (2014) at 642.

<sup>146</sup> *R v Mack*, [1988] 2 SCR 903 at para 130 quoting Estey J. in *Amato v The Queen*, [1982] 2 SCR 418.

<sup>147</sup> Stuart (2014) at 646.

<sup>148</sup> *R v Mack*, [1988] 2 SCR 903 at para 133.

<sup>149</sup> *R v Barnes*, [1991] 1 SCR 449 at 463.

commission of an offence.<sup>150</sup> Courts will objectively assess the conduct of the police and their agents rather than assessing the effect of the police conduct on the accused's state of mind.<sup>151</sup>

While entrapment normally involves undercover police operations, some undercover operations cannot constitute entrapment because they are used to detect past crimes, not induce future crimes. In Canada, the most controversial form of this covert police activity is the "Mr. Big Operation."<sup>152</sup>

#### 4.6.4 Obtaining Financial Reports

Corruption investigations usually involve obtaining and analyzing financial records. How do law enforcement investigators obtain access to the relevant financial records?

##### 4.6.4.1 US Law

The majority of *FCPA* investigations involve voluntary disclosure and cooperation by the company under investigation. In those cases, relevant financial documents are handed over to the DOJ or SEC investigators voluntarily. As noted in Chapter 5 (Asset Recovery), banks and other financial institutions are required to report suspicious money transactions. These reports, and other forms of information, will frequently provide the probable grounds or probable cause required to get a warrant to search and seize financial records in respect to suspected offenses of corruption or bribery. In the US, grand jury investigations are common and financial records can be obtained by the issuance of subpoenas *duces tecum*, although subpoenaed documents are subject to attorney-client privilege, particularly if the subpoena is directed to the target of the grand jury investigation.

Where the official actions involve civil enforcement of SEC anti-bribery and books and records violations, a "formal order of investigation" can be issued privately by the SEC which carries with it a subpoena power for financial records.<sup>153</sup>

##### 4.6.4.2 UK Law

In addition to the general police power to apply to a court for a search and seize warrant, section 2 of the *Criminal Justice Act 1987* grants power to the Director of the SFO to compel disclosures orally and in writing of information and documents relevant to an SFO investigation. There are limits on the use that can be made of statements obtained from the person under investigation and certain information is protected by solicitor-client privilege. The SFO disclosure orders are frequently directed to banks, accountants or other professional consultants and can override duties of confidence, but are only enforceable

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<sup>150</sup> For a full list of factors see Stuart (2014) at 646-47.

<sup>151</sup> *Ibid* at 645.

<sup>152</sup> For the latest restrictions on the use of "Mr Big Operations," see *R v Hart*, 2014 SCC 52 and *R v Mack*, 2014 SCC 58.

<sup>153</sup> Tarun (2013) at 254.

against UK institutions and persons.<sup>154</sup> The *Act* also creates offences and sanctions for those who refuse to comply with an order to disclose information.<sup>155</sup>

#### 4.6.4.3 Canadian Law

Domestic corruption offences are enforced by the relevant municipal or provincial police agencies. Enforcement of foreign bribery offences under *CFPOA* is conducted by special units within the RCMP. Unlike the Director's power in the SFO to order disclosure of relevant financial orders, no similar power exists for the RCMP or for municipal or provincial police. Instead, the police must obtain search warrants from a court in order to obtain financial records, unless of course the person or company under investigation is fully cooperating with the police. For example, in the *Griffiths Energy International* case, the company, under a new board of directors, voluntarily reported the company's acts of corruption and handed over to the RCMP the results of their extensive internal investigation. On the other hand, in the SNC-Lavalin investigation and subsequent charges related to corruption in Libya and Tunisia, the RCMP executed a search warrant on SNC-Lavalin headquarters in Montreal in April 2012.

#### 4.6.5 Use of Forensic Accountants

Detection and proof of corruption normally requires careful analysis of financial records and related communications. Forensic accountants are a necessity in such circumstances and are an integral part of the investigation team. Their evidence will frequently be the foundation of corruption charges and prosecution.

In *The Law of Fraud and the Forensic Investigator*, Debenham asserts that "understanding the rules of evidence is a critical part of the forensic accountants' skill set."<sup>156</sup> Potentially relevant evidence should always be brought forward, unless it is covered by privilege, to ensure the investigation has access to all pertinent documents. Debenham suggests that even potentially illegally-obtained evidence can be brought forward, particularly in civil proceedings. Often relevant evidence is left out due to misunderstandings about the law of evidence and too easily assumed privilege.<sup>157</sup> Where privilege is asserted, possibly in an attempt to veil wrongdoing, forensic accountants must be well informed on the legal rules of evidence in order to navigate the situation.

Forensic accountants should also be attentive to conflicts of interest. If a forensic accountant has accepted a retainer to investigate financial statements of a client, a conflict of interest can arise if they discover evidence of criminal activity. If the conflict involves a former client or

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<sup>154</sup> For more detail on SFO disclosure orders, see Nicholls et al (2011) at 181-83.

<sup>155</sup> *Ibid* at 182.

<sup>156</sup> David Debenham, *The Law of Fraud and the Forensic Investigator*, 3rd ed (Carswell, 2012) at 801.

<sup>157</sup> *Ibid*.

if the accountant is acting as a corporate auditor, the accountant's fiduciary duties may prevent them from disclosing confidential information to persons other than their client.

## **5. OVERVIEW OF DISPOSITIONS RESULTING FROM CORRUPTION INVESTIGATIONS**

### **5.1 Introduction**

When warranted by the evidence collected in a corruption investigation, individuals and/or organizations involved in alleged corrupt conduct can be subject to a range of civil and criminal procedures and sanctions. The State's choice to proceed with civil and/or criminal procedures is dependent on a large number of factors and also varies from country to country.

If a person or organization is charged with a criminal offence of bribery or corruption in common law countries like the US, UK or Canada, they have the choice to plead guilty to the charges or to plead not guilty, in which case the prosecutor will have to prove their guilt beyond a reasonable doubt in a trial before a judge alone, or a judge and jury. If the accused persons plead guilty or are found guilty at their trial, the judge will then sentence the offenders (e.g., impose a term of imprisonment, probation, suspended sentence, fine and/or a forfeiture order). In addition, there may be other consequences that flow from a conviction. The consequences can include restrictions on global travel, loss of civil privileges to drive, vote, hold public office, act as a lawyer or a broker, etc., or debarment from the right to bid for government or NGO projects.

The investigation and uncovering of corrupt behaviour will not always result in the laying of criminal charges. In some cases, the evidence may not be strong enough to establish "proof beyond a reasonable doubt." In some countries, only individuals, not organizations, may be charged and tried for a crime. In these countries, UNCAC requires that the organization be subject to civil or administrative liability for corruption. Even in countries like the US, UK and Canada, which allow organizations to be charged and convicted criminally, the relevant authorities may decide not to pursue criminal charges and instead pursue the individuals and/or organizations involved in corrupt actions through civil and administrative proceedings and remedies.

### **5.2 Criminal Options and Procedures**

Pursuing corruption through the criminal process involves three components:

- (1) Charging policies and the choice of charges;
- (2) Guilty plea negotiations, settlement agreements or prosecution by trial; and
- (3) Sentencing an offender after a guilty plea or after a conviction at trial.

### 5.3 Civil Options and Procedures

Civil procedures may be undertaken as an alternative to criminal charges or as a supplement to criminal charges. These civil procedures may include:

- (1) Civil forfeiture proceedings (freezing, seizing and recovery of illegally obtained assets);
- (2) Civil or administrative penalties (usually fines and/or suspension of licenses to operate); and
- (3) Civil actions for damages, contractual restitution or disgorgement of profits.

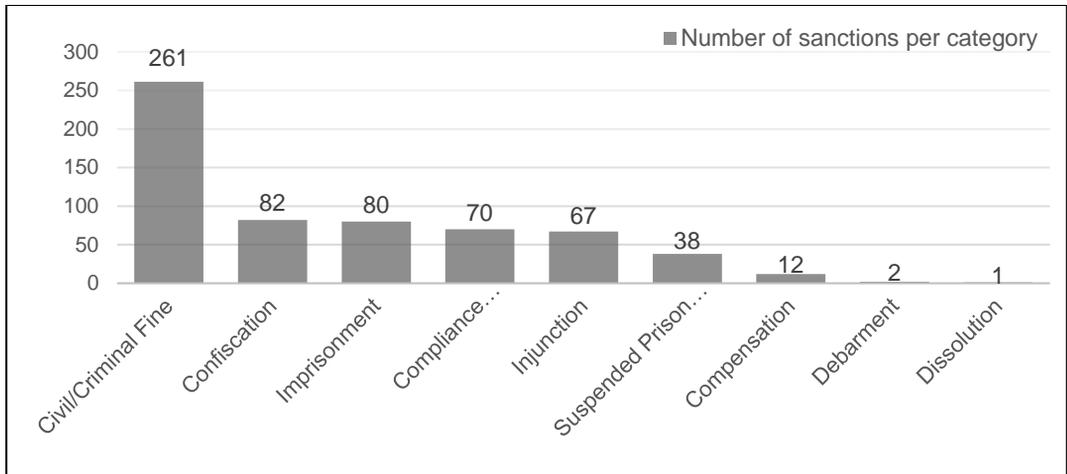
### 5.4 Comparative Data on the Use of Different Remedies in Bribery of Foreign Officials

The summary of data in Figure 6.1 below is from the OECD *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*. It is based on 427 foreign bribery convictions and sanctions imposed on 263 individuals and 164 collective entities.<sup>158</sup>

- As of 2014, 427 cases in OECD countries involving punishment of foreign bribery were reported to the OECD. Figure 6.1 reflects how foreign bribery was punished and includes data from cases where several types of sanctions were imposed.
- Compensation in this chart included compensation for victims, civil damages, and State costs related to the case. The proceeds of compensation were either paid to NGOs designated by law or as restitution to the government of the country where the bribery took place.
- Article 3(3) of the OECD Convention requires confiscation of the instrument of the bribe and its proceeds (or property of an equivalent value). Thus, the number of cases involving confiscation should be high. The low percentage of confiscation in these statistics may be explained by situations in which the proceeds of foreign bribery are confiscated from companies while individuals face fines and a prison or suspended sentence.
- The data also shows very low numbers of debarment despite the 2009 OECD *Recommendation for further Combating Bribery of Foreign Public Officials in International Business Transactions*, which encouraged debarment of enterprises which have been proven to have bribed foreign public officials in contravention of international law. However, European Union Member Countries are required to implement Directive 2014/24/EU which requires mandatory exclusion of economic operators that have been found guilty of corruption.

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<sup>158</sup> OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (OECD Publishing, 2014) at 18, online: <<http://dx.doi.org/10.1787/9789264226616-en>>.

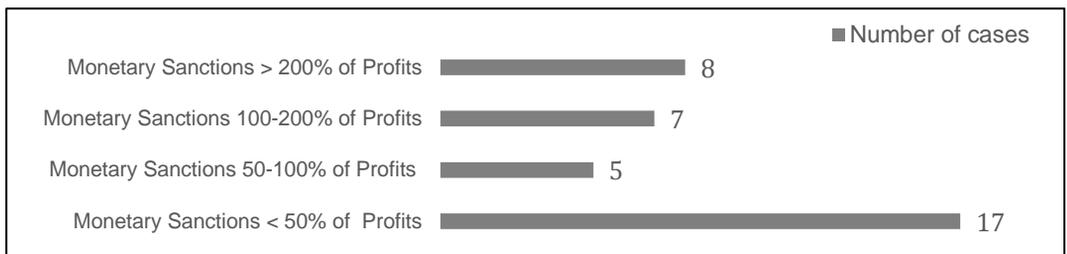


**Figure 6.1** Types of Sanctions Imposed. Adapted from *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*.<sup>159</sup>

It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.

Not listed on the chart are the substantial costs of foreign bribery enforcement actions that either cannot be quantified in monetary terms or do not constitute official sanctions, such as:

- Reputational damage and loss of trust by employees, clients and consumers;
- Legal fees;
- Monitorships; and
- Remedial action within the company.



**Figure 6.2** Monetary Sanctions as a Percentage of Profits Obtained. Adapted from *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*.<sup>160</sup>

<sup>159</sup> *Ibid* at 18–20, 28. It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.

<sup>160</sup> *Ibid* at 28.

- For 37 cases out of the 261 involving fines, data was available to determine the distribution of total sanctions imposed as a percentage of the profits gained from payment of the bribe. In 46% of these cases, the monetary sanction was less than 50% of the proceeds obtained by the defendant as a result of bribing foreign public officials.
- In 41% of the cases, monetary sanctions ranged from 100% to more than 200% of the proceeds of the corrupt transaction. The majority of these cases were concluded in the United States where the value of the financial sanction against a company involved in a foreign bribery transaction almost always includes confiscation (or disgorgement) of the proceeds of the foreign bribery offence.
- The highest amount in combined monetary sanctions imposed in a single case totals approximately EUR 1.8 billion; while the highest combined prison sentence imposed in a single case for conspiracy to commit foreign bribery is 13 years.

It is important to note that 69% of sanctions were imposed through settlement procedures, while 31% were imposed through convictions.

## 6. CHARGING POLICIES

All prosecuting bodies have technical standards and procedures that must be followed in entering criminal charges or launching civil enforcement actions. Examples of these standards are discussed in this section. Notwithstanding these formal guidelines, the near-universal standard employed by prosecutors is whether there is a reasonable likelihood that the defendant can be convicted or found liable on the admissible evidence. Prosecutors generally do not proceed with cases they do not believe they can win.

### 6.1 US

As described above in Section 3.3.1, the US has two enforcement bodies tasked with prosecuting *FCPA* offenses: (i) the DOJ, which is solely responsible for criminal prosecutions and civil proceedings against non-public issuers; and (ii) the SEC, which is responsible for civil enforcement actions against public issuers (corporations that are publicly traded on a US stock exchange or otherwise required to file securities documents with the SEC), as well as the agents and employees of public issuers.

The jurisdiction of the DOJ and SEC necessarily overlap in a large number of cases. According to Koehler, it is common for the DOJ and SEC to simultaneously prosecute the same *FCPA* offenses and to coordinate the announcement and resolution of their enforcement actions on the same day.<sup>161</sup> The DOJ and SEC may also coordinate with other jurisdictions and announce settlements on the same day. Companies and individuals being

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<sup>161</sup> Koehler (2014) at 55.

investigated for *FCPA* violations must be cognizant of the coordinated power of the DOJ and SEC and may negotiate with the two bodies accordingly. For example, a corporation willing to accept a hefty settlement with the SEC involving disgorgement of profits may be able to negotiate more lenient treatment by the DOJ in the criminal proceedings. The DOJ and SEC may also offset sanctions in light of fines received in foreign jurisdictions.

Koehler is critical of *FCPA* enforcement in the US and believes it is heavily in need of reform. Because of the expense of defending against *FCPA* enforcement actions and the negative effect the process can have on a company's public image, Koehler believes many companies are motivated to accept resolution agreements (discussed below) with the DOJ and SEC even when the case against them is not strong:

In short, the net effect of the above DOJ and SEC enforcement policies, and the 'carrots' and 'sticks' embedded in them, is often to induce business organizations subject to *FCPA* scrutiny to resolve enforcement actions for reasons of risk aversion and not necessarily because the enforcement agencies have a superior legal position. Business organizations are further motivated to resolve *FCPA* enforcement actions, including those based on aggressive enforcement theories, because the DOJ resolution vehicles typically do not result in any actual prosecuted charges against the company and the SEC resolution vehicles typically used traditionally have not required the company admit the allegations.<sup>162</sup>

### 6.1.1 Criminal Charges

The DOJ has the power to prosecute and pursue criminal convictions. In determining whether to bring criminal charges in an *FCPA* case, DOJ prosecutors consider the factors outlined in *Principles of Federal Prosecution*<sup>163</sup> and *Principles of Federal Prosecution of Business Organizations*.<sup>164</sup>

DOJ prosecutors are guided by the following general principle, pursuant to US Attorney's Manual s. 9-27.220:

- A. The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

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<sup>162</sup> *Ibid* at 60.

<sup>163</sup> US Attorney's Manual s 9-27.000, online: <<http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>>.

<sup>164</sup> US Attorney's Manual s 9-28.000, online: <<http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>>.

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.

In the context of *FCPA* cases against corporations, DOJ prosecutors also consider “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents” pursuant to US Attorney’s Manual s. 9-28.300. Cooperation is defined broadly as helping the DOJ ascertain the identity of corrupt actors and providing the DOJ with disclosure of relevant facts and evidence. However, according to Koehler, the history of DOJ enforcement shows that even raising legal arguments and disputing the DOJ’s enforcement theory is classified as “not cooperating” and can lead to the DOJ bringing criminal charges.<sup>165</sup>

The *Principles of Federal Prosecution* cited above also govern the use of alternatives to criminal charges. The use of these alternatives is seen as a desirable middle ground between declining prosecution and pursuing criminal charges. Evaluating the factors described above, DOJ prosecutors may come to the conclusion that they have insufficient evidence to obtain a conviction or that the public interest would not be best served by prosecuting the alleged offender. In such cases, the DOJ prosecutor may choose to pursue an alternative to criminal charges as opposed to declining prosecution altogether.

#### **6.1.1.1 Defense Counsel Submissions to the DOJ (“White Papers”)**

Given the negative publicity for government and the political repercussions that result from acquittal of defendants in high profile criminal cases, especially international business corruption cases, prosecutors do not proceed with cases they do not feel they can win. It follows that if defense counsel can present compelling reasons why the case against their client will not succeed, they stand an excellent chance of preventing charges from ever being brought or pursued.

In the US, most reasonable federal prosecutors share their theories and view of a case’s evidence at the conclusion of a corruption investigation and give defense counsel the opportunity to make oral or written presentations detailing the reasons why charges should not be brought, or why the charges should be reduced to lesser ones.

There are no formal guidelines for these defense counsel presentations, commonly called “white papers” or position papers, but defense counsel generally use the factors outlined in the *Principles of Federal Prosecution* to argue that their clients should not be charged.

White papers are presented in the context of settlement offers and negotiations, so they are privileged documents under the rules of evidence. If a prosecutor proceeds with criminal

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<sup>165</sup> Koehler (2014) at 56.

charges after defense counsel has submitted a white paper, the contents of the paper are inadmissible as evidence against the defendant at trial.

## 6.1.2 Alternatives to Criminal Charges

As alternatives to criminal conviction, the DOJ and SEC may pursue other resolution agreements referred to above, which include: (i) Non-Prosecution Agreements (NPA); (ii) Deferred Prosecution Agreements (DPA); and (iii) SEC “neither admit nor deny” settlements. These resolution vehicles are discussed below.

### 6.1.2.1 NPAs

An NPA is a private agreement between the DOJ and the alleged offender agreeing to a certain set of facts and legal conclusions. An NPA is not filed with a court. In essence, an NPA is a contract where both sides provide consideration: the DOJ agrees not to prosecute the alleged offender for its alleged offenses and allows the company to continue doing business in the international marketplace, while the alleged offender agrees to certain terms, including implementing compliance undertakings and paying the equivalent of criminal or civil fines and penalties.

### 6.1.2.2 DPAs

A DPA is a written agreement between the DOJ and an alleged offender. Unlike NPAs, DPAs are filed with a court; thus on their face, they are more similar to plea agreements. DPAs contain facts and legal conclusions agreed to by both parties and the alleged offender promises to fulfill compliance requirements and pay criminal penalties. In an NPA, the DOJ agrees not to prosecute the alleged offender if the terms of the agreement are satisfied. In a DPA, the DOJ agrees to defer prosecution of the alleged offender for a stipulated period of time (usually 2-4 years). If the terms of the agreement are fulfilled, the DOJ agrees to drop all charges. A DPA allows a person or company to avoid a formal guilty plea and will signal resolution of the matter to important audiences such as lenders, investors and customers.<sup>166</sup>

### 6.1.2.3 Data on the Use of NPAs and DPAs

According to Koehler, because NPAs and DPAs allow the DOJ to “show results” without bearing the heavy burden of obtaining a criminal conviction, they are the dominant vehicle of choice for resolution of alleged *FCPA* violations. Since 2004, when the DOJ used an NPA in the *FCPA* context for the first time, “NPAs and related DPAs have been used to resolve approximately 85 percent of corporate *FCPA* enforcement actions and in 2012 NPAs or DPAs were used in connection with 100 percent of corporate *FCPA* enforcement actions.”<sup>167</sup>

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<sup>166</sup> Tarun (2013) at 282.

<sup>167</sup> Koehler (2014) at 60–61.

#### 6.1.2.4 Criticism of NPAs and DPAs

Those, like Koehler, who are critical of the dominant use of NPAs and DPAs, point to their lack of transparency.<sup>168</sup> Negotiations for the agreements are privately held behind closed doors and NPAs are not filed with any court. In addition, most NPAs and DPAs include “muzzle clauses” preventing companies from commenting publicly on DOJ investigations, the circumstances of the alleged offenses, or the subsequent NPAs. The consequences for violating a muzzle clause can be severe. According to Koehler, in 2012, a financial institution named Standard Chartered agreed with the DOJ to enter into a DPA with a standard muzzle clause and a criminal penalty of \$230 million.<sup>169</sup> A few months later during an earnings call with investors, Standard Chartered’s chairman made benign comments about clerical mistakes that the company had made which led to its criminal penalty. Upon hearing of the comments, DOJ prosecutors demanded a transcript of the conference call and threatened to bring criminal charges if the company’s chairman did not make a full, public retraction of the comments.<sup>170</sup>

Koehler summarizes his critical view of the imbalanced power dynamic involved in NPA and DPA negotiations as follows:

- The DOJ can use its leverage and the ‘carrots’ and ‘sticks’ it possesses to induce business organizations under scrutiny to resolve an enforcement action and pay a criminal fine.
- The DOJ can use an NPA or DPA to insulate its version of facts and enforcement theories from judicial scrutiny.
- In the resolution agreement, the DOJ can include a ‘muzzle clause’ prohibiting anyone associated with the company from making any statement inconsistent with the DOJ’s version of the facts or its enforcement theories.
- If the DOJ believes, in its sole discretion, that a public statement has been made contradicting its version of the facts of its enforcement theories, the DOJ can ‘pounce’ and threaten to bring actual criminal charges.<sup>171</sup>

On the other hand, some commentators criticize DPAs for allowing companies that are “too big to fail” to escape criminal liability. District Judge Jed S. Rakoff is highly critical of the increasing tendency to prosecute companies instead of individuals, and of the “too big to fail” mentality, which implies that the rich can escape criminal prosecution. On the subject of prosecution of companies and DPAs, Rakoff states:

Although it is supposedly justified because it prevents future crimes, I suggest that the future deterrent value of successfully prosecuting

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<sup>168</sup> *Ibid* at 64–66.

<sup>169</sup> *Ibid* at 65.

<sup>170</sup> *Ibid* at 65–66.

<sup>171</sup> *Ibid* at 66.

individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing. Just going after the company is also both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager? And from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility.<sup>172</sup>

For further discussion of the pros and cons of DPAs, see Section 6.3.2 below.

### 6.1.3 SEC “Neither Admit nor Deny” Settlements

According to Koehler, the typical vehicle for resolution of an SEC *FCPA* enforcement action is the “neither admit nor deny” settlement where a corporation agrees to pay civil penalties and institute compliance controls without admitting or denying any of the SEC’s allegations.<sup>173</sup>

While the SEC announced in 2010 that it approved the use of NPAs and DPAs in civil enforcement actions, the use of such agreements is rare. According to Koehler, NPAs and DPAs by 2014 had only been used to resolve two SEC *FCPA* enforcement actions,<sup>174</sup> but he expects to see greater use of these resolution vehicles in the future.<sup>175</sup> In 2016, the SEC announced two NPAs connected to bribes paid to Chinese officials by foreign subsidiaries of American companies.<sup>176</sup>

Critics of neither admit nor deny resolution methods argue that these settlements are used merely to make the settling of cases more expedient. An alleged offender who disputes the facts and the SEC’s enforcement theory will often be motivated to settle with the SEC just to make the case go away. Thus, many companies who dispute any wrongdoing are forced to pay civil penalties. On the other hand, corporations who know they have engaged in egregious conduct can resolve the matter without publicly admitting any wrongdoing.

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<sup>172</sup> Jed S Rakoff, “The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?”, *The New York Review of Books* (9 January 2014), online:

<<http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/?page=1>>.

<sup>173</sup> Koehler (2014) at 66.

<sup>174</sup> Koehler (2014) at 68.

<sup>175</sup> *Ibid* at 68.

<sup>176</sup> “SEC Announces Two Non-Prosecution Agreements in *FCPA* Cases”, (7 June 2016), online: <<https://www.sec.gov/news/pressrelease/2016-109.html>>.

In view of this criticism, the SEC amended its “neither admit nor deny” settlements policy in 2012, announcing “that the settlement language would not be included in SEC enforcement actions involving parallel: (i) criminal convictions; or (ii) NPAs or DPAs that include admissions or acknowledgements of criminal conduct.”<sup>177</sup> In 2013, the SEC announced that alleged offenders would not be able to enter into settlement agreements without admitting wrongdoing in certain cases where the alleged misconduct harmed large numbers of investors, was particularly egregious, or where the alleged offender obstructed the SEC’s investigative process.<sup>178</sup>

#### 6.1.4 Defense Counsel Submissions to the SEC (“Wells Submissions”)

When the SEC contemplates bringing an enforcement action against a respondent, they send a “Wells notice” to the respondent informing them of the substance of the charges that the SEC intends to bring. This notice affords the respondent the opportunity to submit a written statement presenting facts and legal arguments to convince the SEC not to bring any action. Much like white papers in criminal cases, these written statements are called “Wells Submissions” in SEC cases (named after the chair of a committee that recommended the implementation of “Wells Notices” in SEC enforcement actions).

Prior to recommending the commencement of proceedings against a defendant, the SEC investigative staff will hear the Wells Submissions. These submissions may address factual issues, reliability of evidence and the appropriateness of the injunctive relief sought by the SEC. Unlike white papers, Wells submissions are not protected by settlement privilege and they can be used as evidence against a defendant in subsequent proceedings. Counsel must be very careful in what information they include in their Wells submission.

#### 6.1.5 SEC Charging Policies

In determining whether to credit a company for self-policing, self-reporting and cooperation, the SEC is guided by the 2001 *SEC Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, often called the Seaboard Report.<sup>179</sup> The Seaboard Report applies to all SEC matters, as well as FCPA offenses, and outlines 13 criteria the SEC will consider.<sup>180</sup> The Seaboard Report also identifies four broad measures of a company’s cooperation including:

1. *Self-policing* prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
2. *Self-reporting* of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct,

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<sup>177</sup> *Ibid* at 67.

<sup>178</sup> *Ibid*.

<sup>179</sup> Tarun (2013) at 262.

<sup>180</sup> For a copy of the report including all 13 criteria, see <http://www.sec.gov/litigation/investreport/34-44969.htm>.

and promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies and to self-regulatory organizations;

3. *Remediation*, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
4. *Cooperation* with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company's remedial efforts.<sup>181</sup>

The 13 criteria do not limit the SEC, and even if a company has satisfied all of the criteria, this does not guarantee the SEC will not follow through with an enforcement action.<sup>182</sup>

In January 2010, the Seaboard Report was supplemented and strengthened by a series of measures including the 2010 SEC *Policy Statement Concerning Cooperation by Individuals in Its Investigation and Related Enforcement Actions*.<sup>183</sup> These 2010 measures were designed to clarify the incentives for individuals and companies who provide early assistance in SEC investigations. Furthermore, the 2010 measures formally recognized cooperation tools available in SEC enforcement matters including cooperation agreements, deferred prosecution agreements and non-prosecution agreements.<sup>184</sup> Finally, the 2010 policy on individual cooperation delineated four criteria the SEC will consider when determining whether and how much to credit cooperation by an individual, including:

1. The assistance provided by the cooperating individual;
2. The importance of the underlying matter;
3. The societal interest holding the individual accountable; and
4. The risk profile of the cooperating individual.<sup>185</sup>

These criteria are similar to the 13 criteria in the Seaboard Report for evaluation of company cooperation by the SEC.<sup>186</sup>

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<sup>181</sup> *Enforcement Cooperation Program* (Department of Justice and Securities Exchange Commission, 2016), online: <<http://www.sec.gov/spotlight/enfcoopinitiative.shtml>>.

<sup>182</sup> Tarun, (2013) at 264.

<sup>183</sup> *Policy Statement of the Securities and Exchange Commission Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions*, SEC Rel. No. 34-61340 (Jan. 13, 2010), (2010 SEC Policy Statement) online: <<https://www.sec.gov/rules/policy/2010/34-61340.pdf>>.

<sup>184</sup> Tarun (2013) at 265.

<sup>185</sup> 2010 SEC Policy Statement.

<sup>186</sup> For more detailed information on US charging policies, including a list of factors considered by the DOJ and SEC, see Tarun (2013) ch 9.

## 6.1.6 No Charges

### 6.1.6.1 Immunity Requests

An employee of a company may wish to cooperate with the SEC and provide information; however, Tarun recommends that defense counsel “seek an immunity request from the SEC before allowing a client to make a statement of cooperation.”<sup>187</sup> If an individual can provide testimony and/or facilitate cooperation that will significantly assist in the investigation, the SEC may arrange for an immunity order to protect that individual against criminal prosecution.<sup>188</sup>

### 6.1.6.2 Declination

According to Tarun, in certain circumstances the DOJ or SEC may decline to charge a company when foreign bribery violations have occurred. Tarun quotes Jeffrey Knox, principal deputy chief of the DOJ’s Fraud Section, who states that “declinations are possible where companies facing an *FCPA* problem can demonstrate that they had a strong compliance program in place that, ‘for no lack of trying, just didn’t detect criminal conduct’.”<sup>189</sup> For example, in 2012 the DOJ charged Garth Peterson, the former managing director for Morgan Stanley’s Real Estate Group in China, with conspiring to evade internal accounting controls. However, neither the DOJ nor the SEC charged Morgan Stanley.<sup>190</sup> Tarun asserts there were multiple reasons why the DOJ and SEC may elect to decline charging a company: the company was the victim of a rogue employee; the company provides repeated ethics training; the bribe was small; an internal investigation followed the discovery of the problem; remedial action including discipline was taken; the company had strong internal controls in place; or the company voluntarily disclosed the misconduct and fully cooperated with the investigation.<sup>191</sup>

## 6.1.7 Patterns in *FCPA* Enforcement

As discussed above, the investigation and prosecution of corrupt behaviour can be compromised by strategic State interests (e.g., the UK investigation into BAE’s bribes to Saudi Arabian officials). When substantial criminal and civil penalties are in play at the level of prosecution, outside interests can bring intense pressure not to prosecute or engage in enforcement proceedings against defendants. Provisions like Article 36 of UNCAC and Article 5 of the OECD Convention address this by mandating that enforcement bodies should be created with the necessary independence to remain uninfluenced by State Parties’ other interests.

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<sup>187</sup> *Ibid* at 273.

<sup>188</sup> *Ibid*.

<sup>189</sup> *Ibid* at 287.

<sup>190</sup> *Ibid* at 284.

<sup>191</sup> *Ibid* at 284-86.

But is it possible to actually achieve this kind of independence? Law enforcement does not occur in a vacuum, free from all context. In his article, “Cross-National Patterns in FCPA Enforcement,” McLean undertakes an empirical analysis of US enforcement actions under the *FCPA*.<sup>192</sup> Using enforcement data over a ten-year period (2001-2011), McLean investigates four possible determinants for decreased or increased enforcement in cases involving foreign officials: i) corruption levels in the foreign country, ii) level of US foreign direct investment (FDI) in the foreign country, iii) level of international cooperation between the US and the foreign country, and iv) US foreign policy interests. Each of the variables was subject to equivocal hypotheses. On one hand, one might expect to see more *FCPA* cases involving countries with high levels of recorded corruption. It seems logical that in countries where corruption is a common part of doing business, more *FCPA* violations will occur. However, if a country has a reputation for widespread corruption, the consequent increased risk of incurring criminal liability by doing business in that country could produce a chilling effect on US business there, leaving fewer *FCPA* cases involving that country.

Similarly, it seems likely that in countries where US FDI is higher and more business transactions are occurring, there is a greater chance that US companies will become ensnared in *FCPA* violations leading to prosecutions. However, more US FDI in a country means that the domestic economic interests of the US are more tied to that country. This kind of State interest can have a suppressive effect on prosecutions if there is a lack of prosecutorial independence because the State does not want corruption prosecutions to hurt its domestic economy.

Due to the challenging cross-border nature of global corruption investigations and the fact that prosecutors generally do not try cases that they cannot win, it seems likely that more cases would be brought where US authorities were able to gather evidence via international cooperation. This would lead to a higher number of *FCPA* cases involving countries with which the US has effective international cooperation agreements. Of course, if there is greater cooperation between the two countries, the US may be more likely to allow the cooperating country’s prosecutors to try the case under its own anti-corruption legislation.

Finally, one might expect there to be less *FCPA* cases involving countries with close strategic ties to the US, and more *FCPA* cases involving countries with no strategic importance to the US or with which the US has hostile relations. This would be the worst case scenario, showing that US foreign policy interests lead to selective prosecution of corruption offenses.

Interestingly, McLean’s conclusions suggest that *FCPA* cases are not unduly influenced by other US policy interests. Increased *FCPA* enforcement occurs involving countries with

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<sup>192</sup> Nicholas McLean, “Cross-National Patterns in FCPA Enforcement” (2012) 121:7 Yale LJ, online: <<http://www.yalelawjournal.org/note/cross-national-patterns-in-fcpa-enforcement>>. See also Ellen Gutterman, “Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act” (2015) 53:1 Osgoode Hall LJ 31.

higher levels of corruption, increased US FDI and international cooperation with the US, but there is no variation in *FCPA* enforcement associated with US foreign policy interests.

## 6.2 UK

### 6.2.1 Criminal Charges

The SFO is an independent government department in the UK which only prosecutes the most serious or complex cases of fraud.<sup>193</sup>

SFO prosecutors are guided by the following publications:<sup>194</sup>

1. The Code for Crown Prosecutors;<sup>195</sup>
2. Guidance of the Attorney General on Plea Discussions in Cases of Serious or Complex Fraud;<sup>196</sup>
3. Guidance upon Corporate Prosecutions;<sup>197</sup>
4. Guidance on the approach of the SFO to overseas corruption offences;<sup>198</sup>
5. *Bribery Act 2010* Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions;<sup>199</sup>
6. Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America;<sup>200</sup> and
7. Deferred Prosecution Agreements Code of Practice.<sup>201</sup>

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<sup>193</sup> Nicholls et al (2011) at 180-81.

<sup>194</sup> Peter Alldrige, "Bribery and the Changing Pattern of Criminal Prosecution" in Jeremy Horder & Peter Alldrige, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013) at 224-25.

<sup>195</sup> Director of Public Prosecutions, *The Code for Crown Prosecutors*, online:

[https://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf).

<sup>196</sup> Attorney General's Office, *Guidance of the Attorney General on Plea Discussions in Cases of Serious or Complex Fraud*, online: <<https://www.gov.uk/guidance/plea-discussions-in-cases-of-serious-or-complex-fraud--8>>.

<sup>197</sup> Director of Public Prosecutions, *Corporate Prosecutions – Legal Guidance*, online:

<[http://www.cps.gov.uk/legal/a\\_to\\_c/corporate\\_prosecutions/](http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/)>.

<sup>198</sup> See Serious Fraud Office, "Approach of the SFO to Dealing with Overseas Corruption" (Serious Fraud Office, 2009).

<sup>199</sup> *Bribery Act 2010: Joint Prosecution Guidance of the Director of the SFO and the DPP*, [Joint Prosecution Guidance] online: <<https://www.compliance-instituut.nl/wp-content/uploads/SFO-UK-BRIBERY-ACT-2010-JOINT-PROSECUTION-GUIDANCE.pdf>>.

<sup>200</sup> Attorney General's Office, *Attorney General's Domestic Guidance for Handling Criminal Cases Affecting both England, Wales, or Northern Ireland and the United States of America*, online:

<<http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>>.

<sup>201</sup> *DPA Code of Practice*, online:

<[https://www.cps.gov.uk/publications/directors\\_guidance/dpa\\_cop.pdf](https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf)>.

As with any criminal case, the SFO begins by applying the Code for Crown Prosecutions (the Code) when deciding whether to prosecute. The Code prescribes a two-stage test for charging an offender (the Code Test): (i) the evidential stage, frequently described by reference to a probability of conviction in excess of 50 percent; and (ii) the ‘public interest’ stage, involving a decision on whether the public interest requires that a prosecution be brought.<sup>202</sup> Since bribery is considered a serious offence, as evidenced by the maximum sentence of ten years, Alldrige points out that “[t]here is an inherent public interest in bribery being prosecuted in order to give practical effect to Parliament’s criminalization of such behaviour.”<sup>203</sup> The Code sets out some public interest considerations common to offences under sections 1, 2, 6 and 7 of the *Bribery Act 2010*.<sup>204</sup>

Factors in favour of the prosecution of a bribery case include:

- A conviction is likely to attract a significant sentence;<sup>205</sup>
- Offences were premeditated and included an element of corruption of the person bribed;<sup>206</sup>
- Bribery was accepted within an organization as part of the cost of doing business;
- Offences were committed in order to facilitate more serious offending;<sup>207</sup> and
- Those involved in bribery were in positions of authority or trust and took advantage of that position.<sup>208</sup>

Factors tending against prosecution of a bribery case include:

- The court is likely to impose only a nominal penalty, for example in instances involving very small payments;<sup>209</sup>
- In cases of corporate criminal liability, a corporation had proper policies in place that weren’t followed by an individual;
- The bribe payer was in a vulnerable position;
- The harm can be described as minor and was the result of a single incident;<sup>210</sup> and

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<sup>202</sup> Alldrige (2013) at 225.

<sup>203</sup> *Ibid* at 226.

<sup>204</sup> *Ibid* at 226.

<sup>205</sup> Code 4.16a.

<sup>206</sup> Code 4.16e and k.

<sup>207</sup> Code 4.16i.

<sup>208</sup> Code 4.16n.

<sup>209</sup> Code 4.17a

<sup>210</sup> Code 4.17e

- There has been a genuinely proactive approach involving self-reporting and any remedial action that has already been taken.<sup>211</sup>

According to Monteith, the SFO's general approach is that "ethical businesses running into difficulties" will not face prosecution, whereas companies that continually engage in corruption and see corruption as a means of getting ahead are likely to be prosecuted.<sup>212</sup> Aggravating and mitigating factors, such as whether there was a breach of position of trust, will also be considered before proceeding with a prosecution.<sup>213</sup> Finally, prosecutors must be careful not to consider national economic interests while making the decision to charge, as this would be contrary to Article 4 of the OECD Convention.<sup>214</sup>

See Chapter 2, Section 4 for more considerations when determining whether to prosecute facilitation payments.

The Director of Public Prosecutions or the Director of the SFO must also give personal consent for prosecutions under the *Bribery Act*.<sup>215</sup>

## 6.2.2 Plea Agreements

In the UK, all foreign bribery cases against legal persons, as of 2014, have been resolved through settlements or plea agreements rather than proceeding to trial.<sup>216</sup> In criminal cases, plea agreements allow the defendant and the prosecutor to agree on an admission of facts and an appropriate sentence or penalty. A judge makes the final sentencing decision after hearing both sides.

As judicial discretion in sentencing is viewed as a key component of judicial independence in the UK, the court in *R v Innospec*<sup>217</sup> rejected the idea of a judge acting as a rubber stamp for agreements between the SFO and defendants.<sup>218</sup> The agreed-upon statement of facts in a plea agreement also can constrain a judge in sentencing, since the charges are limited by those facts. For example, in the BAE case, bribery was clearly at play, but the admission of facts allowed only for accounting charges.<sup>219</sup> The court warned that in extreme situations, charges might be too inappropriate for a judge to allow the case to proceed. The court also

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<sup>211</sup> Additional factor (a) in the SFO *Guidance on Corporate Prosecutions*, online: [http://www.cps.gov.uk/legal/a\\_to\\_c/corporate\\_prosecutions/](http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/).

<sup>212</sup> Charles Monteith, "Bribery and corruption: the UK framework for enforcement" in Horder & Alldridge, eds, (2013) 251 at 252.

<sup>213</sup> For a full list of factors see Karen Harrison & Nicholas Ryder, *The Law Relating to Financial Crime in the United Kingdom* (Ashgate Publishing, 2013) at 153.

<sup>210</sup> Nicholls et al (2011) at 186.

<sup>215</sup> Joint Prosecution Guidance at 12.

<sup>216</sup> Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (StAR/World Bank/UNODC, 2014) at 26.

<sup>217</sup> *R v Innospec Ltd*, [2010] EW Misc 7.

<sup>218</sup> Alldridge (2013) at 231.

<sup>219</sup> *R v BAE Systems plc*, [2010] EW Misc 16.

criticized the fact that the wording of the SFO press release formed part of the plea agreement with BAE.<sup>220</sup>

The Stolen Asset Recovery Initiative (StAR) has criticized plea agreements in the UK for their lack of transparency.<sup>221</sup> Although a public hearing takes place to determine the sentence, settlement documents are not made public. Agreements are only made public in rare cases, and some settlement agreements include a confidentiality clause preventing prosecutors from disclosing certain information.

### 6.2.3 Alternatives to Criminal Charges: Civil Forfeiture and DPAs

Civil (non-conviction based) forfeiture, discussed in Chapter 5, Section 2, allows the SFO to recover the proceeds of crime. Non-conviction based civil recovery orders were first intended as a fallback mechanism for situations in which criminal proceedings would not succeed. However, in 2009, the Home Secretary and Attorney General issued guidance advising civil forfeiture as an alternative even when criminal proceedings are possible.<sup>222</sup> Alldridge points out that this shift occurred after a new asset recovery incentive scheme was established, under which 50% of civil recovery goes to the investigating, prosecuting and enforcing body.<sup>223</sup>

Due to the difficulty of meeting the high threshold of initiating a charge and securing the successful prosecution of corporate offenders, the UK also introduced deferred prosecution agreements through the *Crime and Courts Act 2013* as an alternative to criminal prosecution. This occurred after the UK government published initial plans in May 2012 for the introduction of DPAs, receiving an overwhelmingly positive response with 86% of respondents supporting the proposals.<sup>224</sup> The very idea of DPAs is somewhat novel for UK prosecutors, given that plea bargaining is not as significant a part of the criminal justice system as it is in the US.<sup>225</sup> In “Deferred Prosecution Agreements: A Practical Consideration,” Bisgrove and Weekes write that the “[i]ntroduction of the alternative is clearly not supposed to be a gold standard for prosecution but a compromise, allowing for effective punishment

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<sup>220</sup> Alldridge (2013) at 239.

<sup>221</sup> Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (StAR/World Bank/UNODC, 2014) at 28.

<sup>222</sup> Alldridge (2013) at 246.

<sup>223</sup> *Ibid.*

<sup>224</sup> UK, Ministry of Justice, *Deferred Prosecution Agreements: Government Response to the Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations*, Response to Consultation CP(R) 18/2012 (23 October 2012) at para 18, online: <<https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf>>.

<sup>225</sup> See UK, Serious Fraud Office, *Operational Handbook*, “Guilty Pleas and Plea Bargaining” (2012) at 3, online: <<https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/>>. See *R v Inmospec Limited*, [2010] EW Misc 7 (EWCC) (in which Thomas LJ sternly warns that plea bargains are improper under UK law and that “no such arrangement should be made again”); *R v Dougall*, [2010] EWCA Crim 1048.

and regulation within a reasonable timeframe, where, in their absence, there might be none.”<sup>226</sup> As of November 2016, the UK has only concluded two DPAs.<sup>227</sup>

An SFO prosecutor can invite a person whom the SFO is considering charging criminally to enter into a DPA. The DPA Code of Practice, issued pursuant to the *Crime and Courts Act 2013*, guides the DPA process.<sup>228</sup> The prosecutor’s discretionary decision is made on a case-by-case basis, and a person facing charges has no right to be invited to negotiate a DPA.<sup>229</sup> Factors the prosecutor must consider are listed under 2.8.1-2.10 of the DPA Code of Practice.

The DPA Code of Practice prescribes a two-stage test that a prosecutor must apply before entering into a DPA. The first stage is the evidential stage, which is met if (a) the evidentiary stage of the full Code Test is met or (b) there is reasonable identification evidence and grounds to believe that further investigation will establish a realistic prospect of conviction in accordance with the full Code evidentiary test.<sup>230</sup> The second stage is the public interest stage, which is met if the public interest would be served by entering into a DPA rather than a prosecution. The more serious the offence at issue, the more likely prosecution will serve the public interest instead of a DPA.<sup>231</sup> If a DPA is appropriate, it must be approved by a court at a preliminary hearing. A court must also approve the agreement once the terms are settled.<sup>232</sup> The prosecutor will then indict the person, but suspend the indictment pending satisfactory performance of the terms set out in the DPA.<sup>233</sup> Once these terms are satisfied, the SFO will dismiss all charges.

The DPA negotiations are confidential, and information disclosed during the negotiations is subject to the *Crime and Courts Act 2013*. The prosecutor must disclose information to ensure the parties to the negotiation are informed and the information is not misleading.<sup>234</sup> A DPA must be governed by clear, agreed-upon terms that are “fair, reasonable, and proportionate.”<sup>235</sup> Generally, terms will include an end date, an agreement to cooperate with the investigation, a financial order, cost of the prosecutor, activity restrictions and reporting obligations.<sup>236</sup> A financial order under a DPA may require victim compensation, payment of

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<sup>226</sup> Michale Bisgrove & Mark Weekes, “Deferred Prosecution Agreements: A Practical Consideration” (2014) Crim LR 416 at 419.

<sup>227</sup> Ben Morgan, “Deferred Prosecution Agreements (DPA): A Practical Guide by Defence and Prosecution” (Serious Fraud Office, 2016), online: <<https://www.sfo.gov.uk/2016/10/17/deferred-prosecution-agreements-dpa-practical-guide-defence-prosecution/>>.

<sup>228</sup> *DPA Code of Practice*, 1.1, online: <[https://www.cps.gov.uk/publications/directors\\_guidance/dpa\\_cop.pdf](https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf)>.

<sup>229</sup> *Ibid* 2.1, 2.6.

<sup>230</sup> *Ibid* 1.2, I, a-b.

<sup>231</sup> *Ibid* 1.2, ii; 2.4.

<sup>232</sup> *Ibid* 9.10.

<sup>233</sup> *Ibid* 1.5.

<sup>234</sup> *Ibid* 4.1, 5.2.

<sup>235</sup> *Ibid* 7.2.

<sup>236</sup> *Ibid* 7.8, 7.10.

a penalty, charitable donations, or disgorgement of profits.<sup>237</sup> The terms can also require a monitor to ensure compliance and report misconduct.<sup>238</sup> In the event of a breach of the terms of the DPA, the prosecutor must notify the court. Small breaches can be rectified without court intervention, or through a court-approved remedy and cost award. If a material breach occurs or the court does not approve a remedy, the DPA may be terminated.<sup>239</sup> If the DPA is terminated, the prosecutor can lift the indictment and reinstitute criminal proceedings if the full Code Test is established.<sup>240</sup>

Furthermore, as described above in Section 4.3.1 on Voluntary Disclosures, the SFO issued guidance in 2009 to encourage companies to self-report violations of the *Bribery Act*. Companies that voluntarily disclose corruption offences are treated more leniently and may be able to negotiate civil settlements in lieu of criminal sanctions. This is an attractive alternative for companies because they can control publicity and avoid the automatic consequences of a criminal conviction.<sup>241</sup>

In determining whether to negotiate a civil settlement or proceed with criminal charges, the SFO considers the following:

- The sincerity of the board of directors' remorse and their commitment to improving corporate compliance in the future;
- The willingness of the directors to cooperate with the SFO in future investigations;
- The willingness of the directors to resolve the matter transparently, pay a civil penalty and allow external monitoring.

Where directors of a company have profited from corrupt conduct or been personally involved in the offences, the company will be prosecuted criminally, regardless of whether the offence is voluntarily disclosed. This reflects the SFO's "zero tolerance" policy for *Bribery Act* offences. In such cases, however, voluntary disclosure may be favourably taken into account during criminal plea negotiations. See Colin Nicholls et al., *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 213-14 for a description of the SFO's process in negotiating civil settlements.

The increased use of non-conviction based forfeiture, DPAs and civil settlements represents a shift away from the use of criminal prosecution to punish bribery. Alldridge is wary of this trend, warning that "[t]he possibility of the power of money operating to prevent adverse publicity and the other effects of convictions is a clear one to which regard must be had".<sup>242</sup>

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<sup>237</sup> *Ibid* 7.9.

<sup>238</sup> *Ibid* 7.12.

<sup>239</sup> *Ibid* 12.2-12.5.

<sup>240</sup> *Ibid* 12.

<sup>241</sup> Alldridge (2013) at 241.

<sup>242</sup> *Ibid* at 239.

## 6.3 Canada

### 6.3.1 Prosecution and Policies Guidelines

Section 91(27) of the *Constitution Act, 1867*, gives exclusive jurisdiction to the federal Parliament to enact laws on criminal law and procedure. Thus Canada, unlike the US, has only one *Criminal Code*. However, since 1867, the federal government has delegated its powers to prosecute crimes in the *Criminal Code* to provincial attorneys-general.<sup>243</sup> Domestic bribery offences, including breach of trust by a public officer, are in the *Criminal Code*; thus, provincial prosecutors are responsible for prosecuting those crimes.<sup>244</sup> Each province has its own written and unwritten policies on the prosecution of crimes. For example, provincial prosecutorial guidelines for Ontario and British Columbia are available on their respective websites.<sup>245</sup>

However, Parliament has also chosen to place some crimes in legislation outside of the *Criminal Code*. There are some crimes enacted in other federal statutes such as the *Controlled Drugs and Substance Act*, the *Competition Act*, and the *Customs Act*. The federal government, represented by federal prosecutors, is responsible for prosecuting all crimes that are not in the *Criminal Code*. The Public Prosecution Service of Canada (PPSC) is an independent agency headed by a Director of Public Prosecutions (DPP), which fulfills the role of federal prosecutor in Canada. Bribery of foreign public officials and books and records offences with the purpose of bribing a foreign official are crimes enacted in the *Corruption of Foreign Public Officials Act (CFPOA)*. Thus, the decision to prosecute an offence under the *CFPOA* is ultimately up to the PPSC.<sup>246</sup>

In September, 2014, a new PPSC *Deskbook* was issued containing directives and guidelines for federal prosecutors.<sup>247</sup> Part V of the *Deskbook* deals with specific directions for certain types of prosecutions. Part 5.8 (Corruption of Foreign Public Officials) deals with *CFPOA* offences and prosecutions. The guideline:

- Calls for federal coordination of all *CFPOA* investigations and charges;

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<sup>243</sup> There are a few examples in which the *Criminal Code* grants jurisdiction to prosecute to both federal and provincial authorities.

<sup>244</sup> In Canada, there are 10 provinces and 3 territories. The territories have fewer legislative powers than the provinces. The federal government has not delegated prosecution of criminal offences in the *Criminal Code* to the territories. Thus federal prosecutors are responsible for *Criminal Code* prosecutions in those 3 territories.

<sup>245</sup> Attorney General of Ontario, *Crown Prosecution Manual*, online: <<https://www.ontario.ca/document/crown-prosecution-manual/>>; BC Ministry of Attorney General, *Crown Counsel Policy Manual*, online: <<http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>>.

<sup>246</sup> Boisvert et al (2014) at 29.

<sup>247</sup> Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook*, online: <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/index.html>>.

- Notes that, since the 2013 amendments to the *CFPOA*, the RCMP are the only police force with authority to lay *CFPOA* charges;
- Provides data collection procedures for *CFPOA* offences to enable the tabling in Parliament of an Annual Report on the implementation of the *CFPOA* as required under s 12 of that Act.

Furthermore, section 3.2 of part 5.8 of the *Deskbook* states:

Like any decision regarding whether or not to prosecute, prosecutions under the *CFPOA* (*Corruption of Foreign Public Officials Act*) must be instituted or refused on a principled basis and must be made in accordance with the guideline “2.3 *Decision to Prosecute*”. In particular, Crown counsel should be mindful of s. [Article] 5 of the [OECD] *Convention* which states:

5. Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Crown counsel should record in writing the reasons for deciding or declining to institute proceedings. Such reasons may be highly relevant in dispelling any suggestion of improper political concerns influencing prosecutorial decision-making.

In part 2.3 (Decision to Prosecute), section 3.2 sets out the two-fold test for deciding whether to prosecute. The first step is to determine whether there is a reasonable prospect of conviction. The second step is to determine whether a prosecution would best serve the public interest. In regard to this second step, section 3.2 lists factors that the prosecutor should consider, such as the seriousness or triviality of the offence, the harm caused, the victim impact, the individual culpability of the alleged offender, the need to protect confidential informants and the need to maintain confidence in the administration of justice. Section 3.3 then lists “irrelevant criteria” in the following words:

A decision whether to prosecute must clearly not be influenced by any of the following:

- a. The race, national or ethnic origin, colour, religion, sex, sexual orientation, political associations, activities or beliefs of the accused or any other person involved in the investigation;
- b. Crown counsel’s personal feelings about the accused or the victim;
- c. Possible political advantage or disadvantage to the government or any political group or party; or
- d. The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

In the OECD Phase 3 Evaluation of Canada's compliance with the OECD Convention, the OECD Working Group on Bribery stated:

4. Regarding enforcement of the CFPOA, the Working Group recommends that Canada:

- a) Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved are never proper; (Convention, Article 5; Commentary 27; 2009 Recommendation IV, and Annex I, paragraph D)

Canada's response to recommendation 4a) in *Canada: Follow-up to the Phase 3 Report and Recommendations* (2013) was as follows:

The guidelines to be applied by all prosecutors in the Public Prosecution Service Canada (PPSC) are currently found in the Federal Prosecution Service Deskbook. Canada reiterates that understanding the Deskbook's guidance in its proper context would lead to the conclusion that Article 5 considerations would not come into play in the decision of whether or not to prosecute offences under the CFPOA. First, only where an offence is "not so serious as to plainly require criminal proceedings" would a prosecutor resort to the public interest guidelines, which were the subject of the WGB's criticism. Canadian authorities emphasize that offences under the CFPOA would not be considered as offences "not so serious as to plainly require criminal proceedings"; thus, no resort to the public interest guidelines would be required. Second, in the highly unlikely event that particular violations of the CFPOA were considered to be "not so serious as to plainly require criminal proceedings", the Deskbook sets out as public interest factors whether prosecution would require or cause disclosure of information that would be injurious to international relations, national defence, or national security. Canada maintains this establishes a higher threshold than Article 5 of the Convention, which refers to "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved".

That said, the PPSC has been re-writing the Federal Prosecution Service Deskbook – a major undertaking given that the existing Federal Prosecution Service Deskbook is comprised of 57 chapters and a number of schedules, and new elements are being added. The chapter of the Deskbook dedicated to the CFPOA is part of this review process, and consideration is being given to including specific reference to Article 5 of the Convention. All revisions are subject to a rigorous and lengthy review process before they can be made public. Canada will be pleased to share the relevant chapters with the WGB

once the review process is complete and the new PPSC Deskbook is made public.<sup>248</sup>

As noted, in September 2014, the new PPSC *Deskbook* was issued. In my view, the *Deskbook* does not fully deal with Article 5 of the OECD Convention. In section 3.3 of the *Deskbook*, quoted above, point c states that “political advantage or disadvantage” is not a relevant factor to consider in the decision to prosecute, but that expression does not capture the main concern in Article 5 of the OECD Convention. Article 5 states that decisions to investigate or prosecute “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.” The discontinuation of the investigation and prosecution in the BAE case in England, discussed in Chapter 1, raises these very factors. Section 3.2 of Part 5.8 on *CFPOA* prosecutions, quoted above, simply says the prosecutor “should be mindful of s.5 of the Convention.” The direction to be “mindful” is a far cry from declaring that the factors of national economic interest, etc., should not be considered in making investigation and prosecution decisions for *CFPOA* offences.

The *Corruption in Canada: Definitions and Enforcement* report identifies some further weaknesses in Canadian foreign bribery initiatives:<sup>249</sup>

- Under the *CFOPA* only criminal prosecutions can be brought against legal entities, unlike in the US where the SEC has a parallel civil investigative and prosecutorial power.
- There are no provisions providing for voluntary disclosure or self-reporting to regulatory authorities. If such provisions are enacted they may lead to the use of deferred prosecution agreements, which are already in use in the US and UK.
- Although Canada has disclosure protection law, it does not encourage disclosure by offering financial incentives, as is the case in the US. Incentives may encourage corporations to cooperate with authorities.
- The *CFPOA* does not provide for any debarment sanctions following an individual’s or business’ conviction for bribery or books and records provisions (although debarment consequences are found elsewhere: see Chapter 7, Section 8.6 of this book).

Nonetheless, Canada has taken some steps to strengthen its anti-corruption initiatives. For example, in its Follow-up Report (2013), the OECD, in addition to making recommendations, recognized that significant progress had been made because of amendments to the *CFPOA*

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<sup>248</sup> Working Group on Bribery in International Business Transactions, *Canada: Follow-Up to the Phase 3 Report & Recommendations* (OECD, 2013) at 3, online:<<https://www.oecd.org/daf/anti-bribery/CanadaP3writtenfollowupreportEN.pdf>>.

<sup>249</sup> Boisvert et al (2014) at 29.

in Bill S-14.<sup>250</sup> Moreover, in Transparency International's 2014 Progress Report on OECD Convention enforcement, Canada increased from the 'limited enforcement' to the 'moderate enforcement' category.<sup>251</sup> Additionally, on June 1, 2015, the *Extractive Sector Transparency Measures Act* ("ESTMA") came into force in Canada. This new legislation requires companies involved in certain parts of the extractive sector to report various types of payments made to domestic and foreign governments. The stated purpose of the Act:

6. ... is to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the Criminal Code and sections 3 and 4 of the Corruption of Foreign Public Officials Act.

The Government of Canada enacted *ESTMA* as part of Prime Minister Harper's commitment at the June 2013 G8 Leaders' Summit. *ESTMA* is further discussed in Chapter 8, Section 8.2.

### 6.3.2 Bidfell's Proposal for Deferred Prosecution Agreements in Canada

In "Justice Deferred? Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases," Bildfell examines the use of DPAs in the US and the UK and the advantages and concerns surrounding their use before proposing that Canada adopt DPAs in limited and controlled circumstances.<sup>252</sup>

#### (a) US DPAs

First, Bildfell traces the history of DPAs. DPAs were developed in the US in the 1930s in the context of juvenile offenders.<sup>253</sup> When a juvenile was charged with a crime, the prosecutor could extend to the juvenile an offer to defer the prosecution while the juvenile attended a rehabilitation program. If he or she successfully completed the program and promised not to commit any criminal acts in the coming year, the charge would be dropped.

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<sup>250</sup> Working Group on Bribery in International Business Transactions (2013) at 3. For information on the amendments made by Bill S-14 see: <[http://www.parl.gc.ca/About/Parliament/Legislative\\_Summaries/bills\\_ls.asp?ls=s14&Parl=41&Ses=1](http://www.parl.gc.ca/About/Parliament/Legislative_Summaries/bills_ls.asp?ls=s14&Parl=41&Ses=1)>.

<sup>251</sup> Fritz Heimann, Adam Foldes & Gabor Bathory, *Exporting Corruption Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery* (Transparency International, 2014) at 2, online: <[http://issuu.com/transparencyinternational/docs/2014\\_exportingcorruption\\_oecdprogre/24?e=2496456/9826003](http://issuu.com/transparencyinternational/docs/2014_exportingcorruption_oecdprogre/24?e=2496456/9826003)>.

<sup>252</sup> Connor Bildfell, "Justice Deferred: Why and How Canada Should Embrace Deferred Prosecution Agreements in Corporate Criminal Cases" (2016) 20:2 Can Crim L Rev 161.

<sup>253</sup> Rakoff, (19 February 2015).

In 1977, the DOJ introduced DPAs into federal criminal law with three principal objectives:

- (1) to prevent future criminal activity among certain offenders by diverting them from the traditional prosecution system into community supervision and services;
- (2) to save prosecutorial and judicial resources for concentration on major cases; and
- (3) to provide, where appropriate, a vehicle for restitution to communities and victims of crime.<sup>254</sup>

By the early 1990s, DPAs found their way into white-collar crime prosecutions.<sup>255</sup> Here, DPAs were seen as a more proportionate response to corporate wrongdoing. A conviction or guilty plea might eradicate or seriously damage a good company that was engaged in socially and economically productive activities but happened to have a few “bad apples.” DPAs were seen as offering a middle ground between letting the company off the hook entirely and bringing the full force of the law to bear on the company.

Bildfell observed a surge in the use of DPAs in the US in recent years. Between 2004 and 2014, federal prosecutors entered into 278 such agreements and extracted billions of dollars in penalties.<sup>256</sup> The use of DPAs and non-prosecution agreements (NPAs) in recent years has outstripped the use of plea agreements. Between 2010 and 2012 the Criminal Division of the DOJ entered into 46 DPAs or NPAs with corporations, compared to only 22 plea agreements.<sup>257</sup>

DPAs in the US typically contain three hallmark elements:

- (1) payment of a fine or penalty, which may include restitution to victims;
- (2) the requirement that company employees undergo education and training on ethics, legal obligations, best practices, and/or other matters relevant to the misconduct at issue; and
- (3) the implementation of new or improved compliance programs, sometimes including corporate governance reform measures or firings.<sup>258</sup>

There may also be corporate monitorships, reporting requirements, limits on public statements, civil penalties, restrictions on ongoing business practices, or other measures

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<sup>254</sup> United States Department of Justice, *US Attorneys' Manual*, §9-22.010, online: <<http://www.justice.gov/usam/usam-9-22000-pretrial-diversion-program>>.

<sup>255</sup> See Peter Spivack & Sujit Raman, “Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements” (2008) 45:2 *Am Crim L Rev* 159 at 161.

<sup>256</sup> See James R Copland & Isaac Gorodetski, “The U.K.’s New (and Improved) Deferred-Prosecution Agreements”, *Manhattan Institute for Policy Research* (3 March 2014), online: <<http://www.manhattan-institute.org/html/uks-new-and-improved-deferred-prosecution-agreements-4746.html>>.

<sup>257</sup> See David M Uhlmann, “Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability” (2013) 72:4 *Md L Rev* 1295 at 1317.

<sup>258</sup> Rakoff, (19 February 2015).

deemed appropriate. In the regular course, there is no judicial involvement in the DPA process in the US.

**(b) Benefits of DPAs in the US**

Bildfell observes that DPA proponents have lauded DPAs as the preferred means of “righting the corporate ship.” This sentiment is aptly summarized by Christie and Hanna:

In contrast to the far more rigid criminal sentencing process, deferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.<sup>259</sup>

DPAs are said to be effective in bringing about cultural reforms in corporations that have fallen astray, as well as ensuring a fair and efficient resolution of allegations of criminality. Thus, proponents point to DPAs as a sensible means of preserving prosecutorial and judicial resources while imposing appropriate sanctions on corporate criminality. Proponents of DPAs also suggest that such agreements mitigate the negative side effects felt by innocent parties—such as company employees, shareholders, and consumers of the company’s products or services—as a result of a corporate charge or conviction.

**(c) Concerns with DPAs in the US**

Bildfell reiterates several points raised in the earlier discussion regarding concerns over DPAs in the US (see Section 6.1.2.4 above), including the concern that DPAs are a threat to the rule of law because they are private resolutions reached behind closed doors instead of in open courts, with parties bound to confidentiality and non-disclosure of details,<sup>260</sup> as well as the concern that the DPA process in the US today is opaque, *ad hoc*, and unpredictable.<sup>261</sup> Bildfell enumerates five additional concerns associated with DPAs:

- (1) Under-prosecution: Detractors of DPAs argue that the company or individuals involved in the wrongdoing are not being punished or not being punished adequately. DPAs let companies and individuals “off the hook” and may be used improperly as a means of avoiding prosecutions where the corporation is “too big to prosecute.”

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<sup>259</sup> Christopher J Christie & Robert M Hanna, “A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Meyers Squibb Co.” (2006) 43:3 Am Crim L Rev 1043 at 1043.

<sup>260</sup> See Copland & Gorodetski (3 March 2014).

<sup>261</sup> Rakoff (19 February 2015).

- (2) Over-prosecution: Other detractors argue that, rather than creating “sweetheart deals,” DPAs can have Draconian effects on the corporation. DPAs afford comparatively little procedural protections, and prosecutors can use their leverage to push corporations into accepting unfair deals out of fear of receiving a “corporate death sentence” (i.e., the prosecution of criminal charges). Prosecutors’ emphasis on co-operation and negotiation may mask disproportionate prosecutorial leverage. In addition, some corporations may enter into DPAs as a form of risk management, despite there being no demonstrable criminal conduct.
- (3) Debarment and loss of privileges: Debarment (i.e., banning a corporation from obtaining government procurement contracts)<sup>262</sup> can be a potential consequence of a corporation’s entering into a DPA. Debarment is seen by some as a disproportionate response to white-collar crime, as the effect may be to extinguish companies whose success depends on their ability to secure government contracts.
- (4) Questionable incentives: Some have questioned the government’s use of DPAs. Detractors suggest that DPAs may be used as an economical, but unfair, means of signalling a victory to the public without pursuing a full-blown prosecution. DPAs may be subject to abuse, as the prosecutor is left to be judge, jury, and executioner. By keeping cases out of the courts, moreover, prosecutors maintain a fog of uncertainty around the boundaries of corporate criminal liability, giving prosecutors enhanced bargaining power at the negotiating table.
- (5) Expanding prosecutorial options: Some argue that the expansion of the prosecutorial toolkit should not be seen as a welcome development. Prosecutors should either (a) pursue a full prosecution if they have sufficient evidence or (b) investigate the case further or drop the case entirely if they have insufficient evidence. Some suggest that the “charge or walk away” dichotomy is more principled and fair: If the law and the facts justify prosecution, charges should be pursued; if not, further action should be declined. DPAs represent an uncomfortable “middle ground,” as they lack the transparency of a full prosecution. The process by which the DPA is reached is shielded from public scrutiny, and the facts underlying the alleged wrongdoing are never determined in open court.

#### **(d) DPAs in the UK**

Bildfell notes that DPAs in the UK, discussed in Section 6.2.3 above, are subject to a distinctly different process than the process applicable in the US. Perhaps most notably, the UK’s DPA model requires significant involvement of the courts. Whereas US DPAs are largely shielded from judicial scrutiny, UK authorities have embraced the idea that the courts should play a meaningful role in approving and overseeing the creation and implementation of DPAs. One of the most noteworthy features distinguishing the UK’s DPA process from that of the US is that the court will actually review the agreement and make a determination on whether the

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<sup>262</sup> See Chapters 7 and 11 for further discussion of debarment.

DPA is in the interests of justice and whether the terms of the agreement are fair, reasonable, and proportionate. More specifically, two hearings are contemplated:

- (1) First, there is the preliminary hearing, which takes place privately in order to preserve confidentiality and allow for full and frank discussion of proposed terms without fear of jeopardizing future prosecution. An application with supporting documents including a statement of facts must be submitted to the court before this hearing, and the prosecutor must apply to the Crown Court for a declaration that (a) entering into a DPA with the company is “likely to be in the interests of justice” and (b) “the proposed terms of the DPA are fair, reasonable and proportionate.”
- (2) Second, at the subsequent final hearing, the prosecutor must apply to the Crown Court for a declaration that (a) “the DPA is in the interests of justice” and (b) “the terms of the DPA are fair, reasonable and proportionate.” If the court approves the DPA and makes the requested declaration, it must give its reasons in open court.

The court’s involvement—which, on its face, appears to involve something more meaningful than the mere application of a “rubber stamp”—represents a powerful safeguard against the risk of DPAs being used inappropriately or otherwise against the public interest. UK policy makers appear to have recognized that the flexibility and discretion inherent in DPAs, while beneficial in some circumstances, can pose risks and should be moderated, at least to some degree, by the court’s involvement and oversight. We might understand the court’s role in this respect as a form of “check” on prosecutorial discretion. Unlike the nearly unfettered discretion in the hands of US prosecutors to employ DPAs and shape their terms without judicial oversight, the UK process envisions a process by which prosecutors and the courts each play a meaningful role in shaping the appropriate response to alleged corporate criminality. For those who see the courts as the institution best placed to make an objective determination regarding whether a particular legal outcome would be in the public interest, the UK model represents a significant improvement upon the US model. Furthermore, the UK’s DPA process is considerably more open and transparent. Unlike the prevailing state of affairs in the US, where DPAs are negotiated behind closed doors and there is no independent determination made in open court regarding the fairness of the process or the outcome, the UK model espouses a more transparent, open approach. This provides some assurance to the public that DPAs are being used appropriately.

Bildfell further observes that, at present, there is a policy in place in the UK that DPAs will be available only with respect to economic crimes, and only with respect to corporations, not individuals. It remains to be seen whether UK policy makers might remove this restriction and extend the use of DPAs to situations beyond economic crimes, and perhaps to employ DPAs vis-à-vis individuals.

#### **(e) Proposed DPAs for Canada**

DPAs are not, Bildfell notes, formally available in Canada at present, but some have called for their introduction. Perhaps most notably, SNC-Lavalin, after having been charged on

February 19, 2015 with one count of corruption and one count of fraud in connection with alleged activities of former employees in Libya, issued a swift and defiant response that brought the potential availability of DPAs squarely into focus. Referencing DPAs, SNC-Lavalin issued a press release stating that “companies in other jurisdictions, such as the United States and United Kingdom, benefit from a different approach that has been effectively used in the public interest to resolve similar matters while balancing accountability and securing the employment, economic and other benefits of businesses.”<sup>263</sup>

Having considered the competing arguments, Bildfell proposes that Canada adopt DPAs in limited and controlled circumstances. The author argues that DPAs, when used appropriately, can contribute to criminal sentencing objectives and can offer a robust means of providing restitution to victims and implementing reforms within the company. DPAs can be used to impose sanctions that are better calibrated to the gravity of the wrongdoing and that protect other public policy values. Notably, DPAs can assist prosecutors in tailoring an appropriate response to corporate criminality while minimizing collateral damage and harm to innocent parties.

In terms of the specific model to be adopted, Bildfell suggests that the UK approach better upholds public confidence in the procedures leading up to and implementing DPAs as compared to the US model. Although requiring court approval of DPAs adds to the time and expense of prosecutions, these marginal costs are far outweighed by the benefits derived from the greater transparency, fairness, and predictability that court involvement injects into the DPA process. He further suggests that Canada enact clear and detailed legislation that provides guidance and transparency with respect to the negotiation, key considerations, and the procedural process for reaching DPAs.

### 6.3.3 Canadian Government’s Gradual Movement Toward Enacting a DPA System

In July 2017, Transparency International Canada published a Report entitled *Another Arrow in the Quiver? Consideration of a Deferred Prosecution Agreement Scheme in Canada*.<sup>264</sup> This report covers much the same ground as the Bildfell article above by setting out the arguments in favour of and against implementing a DPA scheme in general and analyzing the positive and negative experiences in the US and UK with their DPA schemes. The Report also notes that the Australian government has prepared a draft Bill on DPAs as part of its consultation process on whether to enact a DPA scheme.<sup>265</sup> Finally, the TI Report sets out a number of

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<sup>263</sup> SNC-Lavalin Group Inc, Press Release, “SNC-Lavalin Contests the Federal Charges by the Public Prosecution Service of Canada, and Will Enter a Non-Guilty Plea” (19 February 2015), online: <<http://www.snclavalin.com/en/snc-lavalin-contests-the-federal-charges-february-19-2015>>.

<sup>264</sup> Online: <<http://www.transparencycanada.ca/wp-content/uploads/2017/07/DPA-Report-Final.pdf>>.

<sup>265</sup> *Ibid* at 23.

important questions that the government should consider before deciding whether to create a DPA scheme and, if so, what type of scheme.<sup>266</sup>

In September 2017, the government of Canada instituted a public consultation, which they referred to as “expanding Canada’s toolkit to address corporate wrongdoing.”<sup>267</sup> A major focus of the consultation was on whether Canada should adopt a DPA scheme. The consultation included a discussion paper for the consultation on DPAs, setting out 10 issues or considerations that should be taken into account in deciding whether to create a DPA system for Canada and if so, what its elements should be.<sup>268</sup> The consultation process, the consultation document and the discussion paper leave me with the impression that the government is on a slow and cautious path toward creating a DPA scheme for Canada. In February 2018, the Canadian government published a report on its consultations.<sup>269</sup> The report indicates that the government received 45 online submissions on the possible adoption of a DPA scheme with 47% from business, 26% from individuals, 20% from law enforcement and other justice sectors, and 7% from NGOs.<sup>270</sup> Government officials also held 40 meetings with 370 participants to hear their views (some on DPAs, others on the procurement process). On the critical question of whether or not to adopt some form of a DPA system, the report indicated that this question “received the most attention from participants, with the majority taking the view that the advantages of having a DPA regime would outweigh the possible disadvantages.”<sup>271</sup> The size of the “majority” and its sectoral divisions was not noted. The report summarizes the views the government received as follows:

### Advantages

The majority of participants thought that a DPA regime would encourage self-reporting, promote accountability, foster a compliance culture and enhance public confidence in addressing corporate wrongdoing. A DPA regime is also viewed as a means to improve enforcement outcomes and could increase justice system efficiencies by avoiding protracted criminal trials. The extent to which DPAs would encourage self-reporting is dependent on the predictability of the outcome, which in turn is linked to how the DPA regime is structured. While there is little judicial involvement in the US DPA process, under the UK regime, the courts must find that the

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<sup>266</sup> *Ibid* at 23-32.

<sup>267</sup> See the Government of Canada’s website devoted to the consultation: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/index-eng.html>>.

<sup>268</sup> Government of Canada, “Expanding Canada’s Toolkit to Address Corporate Wrongdoing: Discussion Paper for Public Consultation”, online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/documents/aps-dpa-eng.pdf>>.

<sup>269</sup> Government of Canada, “Expanding Canada’s Toolkit to Address Corporate Wrongdoing: What We Heard” (22 February 2018), online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/rapport-report-eng.html>>.

<sup>270</sup> *Ibid* at 7.

<sup>271</sup> *Ibid* at 14.

terms are fair and reasonable. This adds a degree of uncertainty, as the court could require that changes be made or may not approve the DPA at all.

Several participants noted that DPAs provide greater flexibility for prosecutors to structure tailored resolutions in appropriate cases, while reducing the negative consequences of a company's conviction for innocent third parties, such as employees.

Other cited advantages include that DPAs may:

- help Canada put in place a tool for prosecutors that is available in other jurisdictions
- provide an alternative means of holding a corporation accountable for misconduct, while avoiding the legal and reputational harm that could result from prosecution and conviction
- facilitate the more timely payment of compensation to victims

### **Disadvantages**

There was a sense among some participants that instituting a DPA regime could give companies a false sense of security as they might consider that they would not be at risk of prosecution, but could, rather, “buy their way” out of trouble through the payment of financial penalties rather than being held accountable by a court of law. If this were to be the case, it could weaken the deterrent effect of the criminal law on corporations and ultimately undermine public confidence in the criminal justice system.

Further disadvantages that were identified include that a DPA regime may:

- shield employees who have played an active role in the misconduct by focusing enforcement on the company rather than on pursuing charges against individual offenders
- allow corporate monitors too much leeway over their mandates, such that the terms of the DPA go beyond what was intended
- result in wasted effort and resources and potentially compromise a subsequent prosecution in cases where significant time is spent trying, unsuccessfully, to negotiate a DPA

Some thought that providing more investigation and prosecution resources would be more effective than adopting a DPA regime in addressing a possible perception that commercial crime and corruption are not sufficiently investigated and prosecuted in Canada.<sup>272</sup>

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<sup>272</sup> *Ibid* at 14-15.

While the government has not yet announced that it will proceed with adoption of a DPA system for Canada, a betting person would likely say “It’s on its way,” while a cynical person might say “The SNC-Lavalin Bill is on its way!”

## 7. ISSUES OF CONCURRENT JURISDICTION

### 7.1 Parallel Proceedings

While the global effort to increase enforcement against corruption is generally positive, it does lead to some potentially problematic issues. As Holtmeir notes, when the *FCPA* was enacted in 1977, the US took the lead in global corruption enforcement. Other major global players have recently come on board, including Germany and the UK, which became a more active prosecutor of foreign bribery with the passing of the *Bribery Act* in 2010. China amended its corruption law in 2011 to include corruption of foreign public officials but has done nothing so far to enforce that law.<sup>273</sup> Brazil strengthened its domestic and foreign corruption laws with the *Clean Company Act* in 2003.<sup>274</sup> These and other pieces of legislation have led to instances of overlapping (or concurrent) jurisdiction in which multiple States may prosecute the same corrupt activity. The result is that individuals and corporations charged with corruption offences may find themselves subject to criminal proceedings in multiple jurisdictions.

The potential for a multiplicity of prosecutions is the natural by-product of international cooperation between enforcement bodies. Though a pure, principled desire to fight corruption is the ideal, enforcement bodies are often motivated (for political reasons and otherwise) to justify their operations with highly publicized convictions. Thus, if multiple enforcement bodies have cooperated in a corruption investigation (especially where they have devoted extensive resources), each enforcement body may be motivated to prosecute the corruption offence themselves, regardless of how many other enforcement bodies have jurisdiction.

The idea of “parallel proceedings” in multiple jurisdictions is addressed in both UNCAC and the OECD Convention with a view towards preventing multiple prosecutions. These provisions are non-mandatory, however, and do not prohibit State Parties from prosecuting the same defendant in parallel proceedings.

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<sup>273</sup> Gerry Ferguson, “China’s Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End” (2017) 50:3 *Intl Lawyer* 503.

<sup>274</sup> Jay Holtmeir, “Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities” (2015) 84:2 *Fordham L Rev* 493 at 494. See also Mariano Predo et al, “The Brazilian *Clean Company Act*: Using Institutional Multiplicity for Effective Punishment” (2015) 53 *Osgoode Hall LJ* 107.

Article 42, paragraph 5 of UNCAC states:

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

Similarly, Article 4.3 of the OECD Convention merely requires Parties to consult with one another to discuss the most appropriate jurisdiction for the prosecution.

Parallel proceedings can take different forms. Holtmeier suggests that “carbon copy” prosecutions, in which multiple sovereigns prosecute the same or similar conduct, are the most problematic form.<sup>275</sup> “Carbon copy” prosecutions do present the advantage of allowing the second enforcer to piggyback on the efforts of the original jurisdiction. As corruption often occurs in developing parts of the world, the country where corruption actually occurred may not have the resources to investigate and prosecute the matter. However, if they are able to utilize another jurisdiction’s investigation, a successful “carbon copy” prosecution may be possible.

Holtmeier identifies the TSKJ joint venture<sup>276</sup> prosecutions as an example of “carbon copy” prosecutions. The case entailed huge bribes to Nigerian officials for access to liquid natural gas reserves. In 2010, the four companies involved reached a settlement agreement with the authorities in the US for a total of \$1.5 billion. A concurrent investigation in Nigeria led to subsequent settlements of \$126 million. In addition, a court in the UK approved a civil settlement against one of the companies and all the four companies agreed to penalties imposed by the African Development Bank. Finally, an Italian court imposed fines on one of the companies.<sup>277</sup>

Not all forms of parallel proceedings are simple “carbon copies” of the first jurisdiction’s prosecution. The prosecution of a single bribe in a single country may open the door to a larger, more complex web of corruption offences spanning extended periods of time across multiple jurisdictions. In these cases, different authorities may prosecute different aspects of a bribery scheme that occurred in different places at different times. Holtmeier provides the example of enforcement action against Siemens AG. In 2008, Siemens entered into settlements with the US and Germany for \$800 million and \$569 million respectively. The US settlements involved conduct in Latin America, the Middle East and Bangladesh, while

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<sup>275</sup> Holtmeier, *ibid* at 497-98.

<sup>276</sup> TSKJ is a private limited company registered in Portugal and company of four multi-national companies: Technip SA (of France), Snamprogetti Netherlands, Kellogg, Brown Root Inc. (of USA) and Japanese Gasoline Corp (JSG).

<sup>277</sup> Holtmeier, (2015) at 498. See also Marco Arnone & Leonardo Borlini, *Corruption: Economic Analysis and Law* (Cheltenham, UK: Edward Elgar, 2014) at 195–204.

the German charges involved corruption in Spain, Venezuela and China. In the five years following these settlements, Siemens reached settlements with the World Bank in relation to fraud allegations in Russia (\$100 million), with Switzerland in relation to a subsidiary's actions in Russia (\$65 million), and with Nigeria (\$46.5 million) and Greece (£270 million) for corruption in those countries.<sup>278</sup>

Parallel proceedings can promote anti-corruption efforts, particularly when the second jurisdiction would not otherwise have the resources to mount a full investigation and prosecution. However, there are potential drawbacks, including the violation of principles of double jeopardy and the imposition of duplicative penalties. These potential problems are discussed in greater detail below.

## 7.2 Risks of Parallel Proceedings

### 7.2.1 Double Jeopardy

Double jeopardy is a principle of fundamental justice that has existed in many justice systems for centuries. *Ne bis in idem*, the Latin form of the principle, concisely summarizes the doctrine: "not twice for the same thing." It is unjust for an accused to be prosecuted and convicted more than once for the same offence.<sup>279</sup>

The international nature of anti-corruption enforcement and the prospect of parallel proceedings in multiple jurisdictions, discussed above, gives rise to double jeopardy concerns. Do parallel proceedings violate international principles of fundamental justice? The answer is not straightforward. The doctrine of "dual sovereignty," developed by the US Supreme Court when faced with double jeopardy issues, could be applicable to international anti-corruption enforcement, as suggested by Colangelo:

The [dual sovereignty] doctrine "is founded on the...conception of crime as an offense against the sovereignty of the government." It holds that "[w]hen a defendant in a single act violates the (peace and dignity) of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" No violation of the prohibition on double jeopardy results from successive prosecutions by different sovereigns, according to the Court, because "by one act [the defendant] has committed two offences, for each of which he is justly punishable. The defendant, in other words, is not being prosecuted twice for the same "offence," if another sovereign successively prosecutes for the same act-even if the second sovereign prosecutes using a law identical to that used in the first prosecution."<sup>280</sup>

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<sup>278</sup> *Ibid* at 504.

<sup>279</sup> See generally, Martin L Friedland, *Double Jeopardy* (Clarendon Press, 1969).

<sup>280</sup> Anthony J Colangelo, "Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory" (2009) 86:4 Washington U LR 779.

The principal difficulty with the dual sovereignty doctrine in anti-corruption enforcement (apart from the fact that it appears to leave a loophole in the basic rights of accused persons) is that many corruption investigations and prosecutions depend on the voluntary disclosure and cooperation of the company or individual suspected of corrupt activity. Faced with a multiplicity of prosecutions in various countries with different sanctioning procedures, suspects may be significantly more reluctant to cooperate with enforcement bodies, which has a negative effect on anti-corruption enforcement. The trend today for multinational companies is to try to negotiate a coordinated global settlement with all potential prosecuting countries at the same time (see Section 7.3.2 “Coordinated Actions and Settlements below).

Issues of double jeopardy in anti-corruption enforcement were discussed at the 2011 B20 Summit (an international meeting of business leaders from the G20 countries) in Cannes, France. While supporting the 2010 G20 action plan on combating corruption, B20 leaders recommended enforcement reforms to prevent cases of double jeopardy. In the *B20 Final Report*, B20 leaders recommended the following:

Enhance inter-governmental cooperation concerning multijurisdictional bribery cases in order to avoid double jeopardy (principle of *ne bis in idem*).

Violations of anti-bribery laws should be vigorously investigated, prosecuted, and remedied in all affected jurisdictions. It is important, however, that enforcement authorities coordinate prosecutions to avoid, where possible, inappropriate multiple proceedings concerning the same offense. Avoidance of duplicate proceedings could in many cases accelerate remediation of the underlying causes of the offense.<sup>281</sup>

The principle contained in Article 4.3 of the OECD Convention and in Article 42 of UNCAC should be “translated” into a more immediate and effective rule in national anti-bribery legislation.

### 7.2.2 Unnecessary Deterrence

Holtmeier notes that in addition to being fundamentally unfair, multiple enforcement actions can lead to punishments that are more harsh than needed for future deterrence. This can be a waste of resources for enforcement agencies and lead to increased costs of doing business. If penalties are too high, companies will spend increased amounts of money on monitoring, which hinders their ability to provide competitive pricing. This could lead companies, according to Holtmeier, to pull out of a country if the risk of doing business in that country is too great. In its 2010 settlement with Panalpina World Transport (Holding) Ltd., the US DOJ noted that the company had ceased operations in one of the countries in which the corrupt behaviour occurred. In its 2015 settlement with Goodyear Tire & Rubber

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<sup>281</sup> November 2011, online: <<http://www.b20businesssummit.com/uploads/presse/Final-Report-with-with-appendices-B20-2011.pdf>>.

Company, the SEC “touted the divestiture of foreign subsidiaries.”<sup>282</sup> Such withdrawal of companies from corrupt countries could be seen as both desirable and undesirable. On one hand, withdrawal from corrupt countries will prevent companies from engaging in and thus supporting bribery in those countries. On the other hand, a company’s withdrawal from a corrupt country could be detrimental to the overall economic wellbeing of that country.

### 7.2.3 Chilling Effect on Self-Reporting

Holtmeier states that a final reason to avoid duplicative enforcement actions is the chilling effect on self-reporting. The author suggests that a “company may be willing to take the risk that misconduct will remain undetected by law enforcement” and direct resources to internal investigations rather than facing the possibility of years of investigations in multiple jurisdictions.<sup>283</sup>

## 7.3 Approaches to Multijurisdictional Enforcement

As more countries actively pursue corruption cases, there is an increased chance of companies facing concurrent prosecutions. Mechanisms to avoid duplicative punishments are discussed below.

### 7.3.1 Offsetting Monetary Penalties

Offsetting penalties gives a company “credit” for monetary penalties that have been paid for the same or similar conduct. Holtmeier suggests that offsetting provides a partial remedy for the unfairness of duplicative penalties. However, it may be difficult to determine the right amount to offset, and there is no guarantee that agencies will reduce penalties due to those previously imposed. Holtmeier notes that in its 2014 settlement with Alstom, the US DOJ did not appear to credit penalties paid to Switzerland and the World Bank for similar conduct. In fact, the DOJ pointed to these other penalties as evidence of Alstom’s repeated wrongdoing.

### 7.3.2 Coordinated Actions and Settlements

Companies may enter into settlements with multiple jurisdictions at the same time. For example, in 2011, Johnson & Johnson resolved a *FCPA* violation in the US on the same day that the SFO in the UK announced a civil recovery related to the same matter. Holtmeier sees this as “a step in the right direction,” but cooperation and coordination may not produce a single resolution and additional countries could always bring future charges.<sup>284</sup>

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<sup>282</sup> Holtmeir (2015) at 516.

<sup>283</sup> *Ibid* at 516-17.

<sup>284</sup> *Ibid* at 508.

In 2017, Rolls-Royce announced that it reached agreements in principle with prosecutors in the UK, US and Brazil to resolve multiple bribery and corruption incidents by intermediaries in a number of foreign countries. In the UK, the company has agreed to the payment of \$599 million under a DPA plus the costs of the SFO investigation. The DPA must still be approved by a court. The company further agreed to a payment of \$170 million to US DOJ and a payment of \$25.5 million to Brazil.<sup>285</sup>

### 7.3.3 Enforcement Comity and Declinations

The doctrine of comity informs international anti-corruption enforcement. Comity generally entails reciprocity and the extension of courtesies from one jurisdiction to another when the laws of both are involved. Though multiple States may legitimately exercise concurrent jurisdiction over corruption offences, the principle of comity might lead one State's enforcement body to defer to another State's enforcement body in the prosecution of corruption offences.<sup>286</sup>

Articles 42.5 and 47 of UNCAC and Article 4.3 of the OECD Convention are provisions regarding enforcement comity. Both UNCAC and the OECD Convention recommend that enforcement bodies communicate with one another during investigations and state that prosecutions should take place in the most appropriate jurisdiction. It appears that enforcement comity is at least a factor in US prosecutions under the *FCPA*. In "The Twilight of Comity," Waller writes that "both the Justice Department and the Federal Trade Commission (FTC) routinely consider comity factors in exercise of their prosecutorial discretion."<sup>287</sup>

According to Holtmeier, one jurisdiction may decline to prosecute a corruption offence on the basis that a company has resolved charges for the same or similar conduct elsewhere.<sup>288</sup> Since a rationale for forgoing prosecution is rarely given, it is difficult to predict situations in which one jurisdiction will drop charges. Holtmeier discusses the DOJ's decision to drop the investigation into Dutch-based SBM Offshore following the company's \$240 million settlement with Dutch prosecutors. The DOJ's decision may have been influenced by the fact

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<sup>285</sup> Richard L Cassin, "Rolls-Royce Agrees to Pay \$809 Million to Settle Bribery Allegations" (16 January 2017), *The FCPA Blog*, online: <<http://www.fcpablog.com/blog/2017/1/16/rolls-royce-agrees-to-pay-809-million-to-settle-bribery-alle.html>>.

<sup>286</sup> For a fulsome discussion of enforcement comity as a means of reducing parallel proceedings, see Colangelo, (2009) at 848-57.

<sup>287</sup> Weber Waller, "The Twilight of Comity" (2000) 38 Colum J Transnat'l L 563 at 566.

<sup>288</sup> There is no precise definition of declination, which can be considered broadly as any legal scrutiny that does not lead to an enforcement action or narrowly as an instance in which an enforcement agency has concluded it could succeed in a prosecution but nonetheless decides not to pursue the prosecution. See Mike Koehler, "The Need For A Consensus 'Declination' Definition" (15 January 2013), *FCPA Professor*, online: <<http://fcpaprofessor.com/the-need-for-a-consensus-declination-definition/>>; Marc Alain Bohn, "Revisiting the Definition of 'Declinations'" (22 January 2013), *The FCPA Blog*, online: <<http://www.fcpablog.com/blog/2013/1/22/revisiting-the-definition-of-declinations.html>>.

that a potential offsetting of the Dutch penalty could negate any penalty collectible in the US, as well as considerations of jurisdiction and evidence.<sup>289</sup>

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<sup>289</sup> Holtmeir (2015) at 511-12.