

CHAPTER 7

CRIMINAL SENTENCES AND CIVIL SANCTIONS FOR CORRUPTION

[Large segments of this chapter were written by Matthew Spencer, under Professor Ferguson's supervision and input. Section 13 was written by Dmytro Galagan.]

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PART A: CRIMINAL SENTENCES AND COLLATERAL CONSEQUENCES

1. INTRODUCTION

In Chapter 2, the main corruption offences—both domestic and foreign—are described and the maximum punishment for those offences is set out. In this section, the sentencing principles which guide the selection of an appropriate sentence in individual cases are briefly described, and the actual sentences imposed in some corruption cases are provided as illustrations of how those sentencing principles are applied in practice.

2. UNCAC

UNCAC has very little in the way of requirements or specific guidance for sanctions and sentencing in corruption cases and does not set out any minimum or maximum sentences for corruption offences. Some guidance is provided in the following Articles:

Article 12(1) provides that “each State Party shall take measures, in accordance with ... its domestic law ... to provide effective, proportionate and dissuasive civil, administrative or criminal penalties” for violation of corruption prevention standards and offences involving the private sector.

Article 30(1) provides that “each State Party shall make the commission of [corruption] offences ... liable to sanctions that take into account the gravity of that offence.”

Article 30(7) indicates that State Parties should consider disqualification of persons convicted of corruption from holding public office for a period of time.

Article 37(2) provides that State Parties shall consider mitigation of punishment (or immunity from prosecution under Article 37(3)) for accused persons who provide “substantial cooperation” in the investigation or prosecution of corruption offences.

Article 30(10) indicates that State Parties shall endeavor to promote the reintegration into society of persons convicted of corruption.¹

3. OECD CONVENTION

The OECD Convention also has very few provisions on sanctions and sentencing for corruption of foreign public officials. Article 3 of the OECD Convention, which is entitled “Sanctions,” provides in paragraph 1 that bribery of foreign officials “shall be punishable by effective, proportionate and dissuasive criminal penalties comparable to the penalties for corruption of domestic officials.” Article 8(2) has a similar penalty requirement for books and records offences.

Paragraph 2 of Article 3 requires those Parties who do not recognize the concept of “corporate criminal liability” in their legal systems to ensure that corporations are “subject

¹ United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005), online:

<https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions for bribery of foreign public officials.”

Paragraph 3 of Article 3 requires each Party to take necessary steps for seizure and confiscation of the proceeds of bribery and paragraph 4 states that each Party shall consider imposing additional civil or administrative sanctions in addition to criminal penalties.²

4. US SENTENCING LAW

Bribery of US officials is criminalized under both state and federal criminal law. This book only deals with corruption offenses involving US federal officials under the US Code³ and foreign public officials under the *Foreign Corrupt Practices Act (FCPA)*.⁴ Sentences for offenders under these laws are guided by the US Sentencing Commission’s *Guidelines Manual (Guidelines)*.⁵

4.1 Federal Sentencing Guidelines

The *Guidelines* were adopted in 1984 and were originally mandatory. In 2005, the US Supreme Court in *US v Booker* held that the mandatory nature of the *Guidelines* violated the US Constitution.⁶ Since that time, the sentencing range for each case set out in the *Guidelines* has been treated by sentencing courts as advisory, rather than mandatory. The *Guidelines* are designed to bring a reasonable degree of uniformity to similar offenses committed by similar offenders in similar circumstances. The recommended sentencing range (described in months of imprisonment) is determined by putting the severity of the offense on one axis (there are 43 different offense levels) and the severity of the offender’s prior criminal record on the other axis (there are six categories of seriousness for the prior record). Where the two axes intersect, the *Guidelines* give a recommended advisory range of sentence in terms of months. Departures from that range are made where the circumstances of a case warrant departure. The Sentencing Table (see Table 7.1) is also divided into four zones, the effect of which are described below.

² OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, online: <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

³ 18 USC.

⁴ *Foreign Corrupt Practices Act* of 1977, as amended, 15 USC §§ 78dd-1, et seq.

⁵ United States Sentencing Commission, *Guidelines Manual* [Guidelines Manual (2014)] (November, 2014), online: <<http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf>>.

⁶ *United States v Booker*, 125 S Ct 738 (2005).

4.1.1 Offense Seriousness

In the *Guidelines*, each offense is assigned a “base level” of offense seriousness and that base level will then be increased or decreased depending on the existence of specified aggravating or mitigating circumstances. For example, for offering, giving, soliciting or receiving a bribe, the offense base level is 12. If the offender is a public official, the base level is 14 and if the offense involved more than one bribe, the offense level rises to 16.

4.1.2 Criminal History of the Offender

An offender can receive an elevated sentence due to their prior criminal history. An offender receives one point for each prior sentence,⁷ two points if the prior sentence was for a period of incarceration of at least 60 days and three points if the prior sentence was for a period of imprisonment exceeding one year and one month.⁸

4.1.3 Zones

The Sentencing Table is also divided into four zones.⁹ Zone A (for the least serious offenses) indicates that a sentence of probation without any prison time would also be a fit sentence. Zone B indicates that the offender should serve at least a short period (no less than 30 days) in prison, while the remainder of the sentence could be served in community confinement (e.g., home detention, etc.). Zone C indicates that offenders should serve at least one half of the sentence in prison and the remainder could be served in community confinement. Zone D indicates that the minimum number of months set out in the specific recommended sentencing range (each range has a minimum and a maximum) should be served in prison.

⁷ As stated in §4A1.2.(a)(1), “[t]he term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense” and (c) “[a] conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence.” Certain offenses are excluded from calculation, including offenses for which the sentence was imposed more than ten years prior to the instant offense (or five years if the prior offense was committed prior to the offender’s 18th birthday) and certain minor offenses such as hitchhiking and public intoxication. The offender can receive a maximum of four points for sentences that do not result in incarceration for at least 60 days, whereas two points are given for each prior sentence of at least 60 days and three points for each prior sentence exceeding one year and one month.

⁸ For a full description of the Criminal History and Criminal Livelihood score see *Guidelines Manual* (2014).

⁹ For a full description of the zones and their impact see *ibid*, § 5C1.1 (Imposition of a Term of Imprisonment). For a full description of departures from guidelines ranges, see *ibid*, ch 5, pt K (Departures).

Table 7.1 US Sentencing Table for Imprisonment¹⁰

		SENTENCING TABLE (in months of imprisonment)					
		Criminal History Category (Criminal History Points)					
Offense Level		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
Zone B	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone C	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone D	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137	
26	63-78	70-87	78-97	92-115	110-137	120-150	
27	70-87	78-97	87-108	100-125	120-150	130-162	
28	78-97	87-108	97-121	110-137	130-162	140-175	
29	87-108	97-121	108-135	121-151	140-175	151-188	
30	97-121	108-135	121-151	135-168	151-188	168-210	
31	108-135	121-151	135-168	151-188	168-210	188-235	
32	121-151	135-168	151-188	168-210	188-235	210-262	
33	135-168	151-188	168-210	188-235	210-262	235-293	
34	151-188	168-210	188-235	210-262	235-293	262-327	
35	168-210	188-235	210-262	235-293	262-327	292-365	
36	188-235	210-262	235-293	262-327	292-365	324-405	
37	210-262	235-293	262-327	292-365	324-405	360-life	
38	235-293	262-327	292-365	324-405	360-life	360-life	
39	262-327	292-365	324-405	360-life	360-life	360-life	
40	292-365	324-405	360-life	360-life	360-life	360-life	
41	324-405	360-life	360-life	360-life	360-life	360-life	
42	360-life	360-life	360-life	360-life	360-life	360-life	
43	life	life	life	life	life	life	

¹⁰ Guidelines Manual (2014).

4.2 Sentencing Procedure and Guiding Principles

The sentencing of a criminal offender has been described as a three-step process. As explained by US District Judge John Adams:

Criminal sentencing is often described as a three-step process. A district court must begin the process by calculating the advisory guideline range suggested by the United States Sentencing Commission. *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007) (“The sentencing judge... will normally begin by considering the presentence report and its interpretation of the Guidelines.”). In so doing, the Court must determine the offense level for the crimes for which the defendant has been convicted and the defendant's criminal history. See *United States v. Boyd*, No. 3:07-CR-3, 2008 WL 4963198, at *14-16 (E.D.Tenn. Nov. 18, 2008).

Next, the Court must determine whether a variance or departure from the advisory guideline range would be appropriate. *United States v. Collington*, 461 F.3d 805, 807 (6th Cir. 2006).

Finally, a sentencing court must independently evaluate each of the factors in 18 U.S.C. § 3553(a), which details the considerations that a district court must weigh before sentencing a criminal defendant. Although the Guidelines form a starting point in the district court's analysis under 18 U.S.C. § 3553(a), a district court may not presume that the sentence suggested by the Guidelines is appropriate for an individual criminal defendant. A district court may hear arguments by prosecution or defense that the Guidelines sentence should not apply. In this way, a sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing.¹¹

Under § 3553 of Title 18 of the US Code, the factors to be considered in imposing a sentence are:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;

¹¹ *United States of America v Bernard K Watkins*, Case No. 1:09CR490 (ND Ohio 2010). United States District Court of Ohio, Eastern Division 2010 US Dist. LEXIS 90133.

- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines [issued by the Sentencing Commission] ...
- (5) any pertinent policy statement [issued by the Sentencing Commission]— ...
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.¹²

4.3 Specific Corruption Related Guidelines

Chapter 2 of the *Guidelines* contains information for offenses which are either directly related to corruption or contain aspects of corruption if they are committed on or by a public official. §2C1.1 of the *Guidelines* deals with the following offenses: Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; and Conspiracy to Defraud by Interference with Governmental Functions. §2C1.1 is one of the most commonly applied guidelines for corruption of a public official. As noted, the base level for this offense is 14 if the defendant is a public official, which in the Sentencing Table (see Table 7.1) corresponds to a guideline range of 15-21 months.

¹² 18 USC § 3553 (Imposition of a sentence), online:
<<http://www.law.cornell.edu/uscode/text/18/3553>>.

4.3.1 Seriousness of Offense

The following factors are also relevant in determining the offense level. Under §2C1.1 of the *Guidelines*, the offense level can be increased in the following circumstances:

- (1) If the offense involved more than one bribe or extortion, increase by 2 levels.
- (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.
- (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by 2 levels.¹³

As noted in item (2) above, the value of the bribe is relevant and is calculated based on the greatest of the following four measures:

- a) the value of the payment,
- b) the benefit received or to be received in return for the payment,
- c) value of anything obtained or to be obtained by a public official or others acting with a public official,
- d) the loss to the government from the offense.

¹³ Guidelines Manual (2014), § 2C1.1(b).

The table used to calculate the offense level increase is found in §2B1.1.(b)(1):

Table 7.2 Specific Offense Characteristics¹⁴

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$5,000 or less	no increase
(B)	More than \$5,000	add 2
(C)	More than \$10,000	add 4
(D)	More than \$30,000	add 6
(E)	More than \$70,000	add 8
(F)	More than \$120,000	add 10
(G)	More than \$200,000	add 12
(H)	More than \$400,000	add 14
(I)	More than \$1,000,000	add 16
(J)	More than \$2,500,000	add 18
(K)	More than \$7,000,000	add 20
(L)	More than \$20,000,000	add 22
(M)	More than \$50,000,000	add 24
(N)	More than \$100,000,000	add 26
(O)	More than \$200,000,000	add 28
(P)	More than \$400,000,000	add 30

¹⁴ *Ibid* at § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

Using the greatest of the four specified measures can lead to large increases in offense level, as demonstrated in the cases of *Edwards*,¹⁵ *Richard*¹⁶ and *Abbey*.¹⁷

4.3.2 Positions of Elevated Trust

In cases of public corruption, the position of power and degree of breach of trust is considered in sentencing. As stated, under §2C1.1 of the *Guidelines*, a four-level increase is given if the offense involved an elected public official or high-level decision-making or

¹⁵ In *United States of America v Jeffery Edwards*, 378 US App DC 86 (2007), an asbestos inspector was sentenced to 33 months in prison for bribery and extortion. As stated by Garland J:

Jeffrey Edwards was a District of Columbia asbestos inspector who issued a permit to a contracting company that allowed the company to conduct an asbestos abatement project. He told the company that he thought a more costly abatement procedure was required by the applicable regulations, but that he would permit it to use a less costly procedure if it paid him \$10,000. Unfortunately for Edwards, the FBI videotaped the transaction, and he was arrested and then convicted for bribery and extortion. The district court sentenced Edwards to 33 months in prison. Edwards now appeals, contending that the court erred in its application of the United States Sentencing Guidelines.

The parties agreed that § 2C1.1 of the *Sentencing Guidelines* was applicable, but disagreed on the amount of level enhancement. Edwards argued the court should consider the value of the bribe, \$10,000, and apply a two-level increase. The government argued that the less costly procedure made a difference of \$200,000, corresponding to a ten-level increase. The court found the cost difference to be \$100,000 and increased the offense level by eight, making the guideline range 30-37 months. The 33-month sentence imposed by the court under this range was upheld on appeal.

¹⁶ In *United States of America v Quincy Richard Sr*, 775 F (3d) 287 (2014), the offender, a former member of a school board, pledged to support an applicant for School Board Superintendent in exchange for \$5,000. A co-accused also was to receive \$5,000. The applicant for Superintendent was a government informant. Following a trial, Richard was found guilty of conspiracy to commit bribery and two counts of bribery. Richard was sentenced to 33 months in prison and three years' supervised release per count to be served concurrently. The district court increased the offense level by two levels because the two bribes totaled \$10,000. Richard appealed on various grounds, including that he should be responsible for, at most, \$5,000. The Court of Appeal upheld the entire sentence including the two-level increase, noting that the total bribe was the greatest amount of the bribe or loss to the government.

¹⁷ In *United States of America v Charles Gary-Don Abbey*, 560 F (3d) 513 (2009), Abbey, a city administrator, accepted a free building lot from a land developer. He was convicted of conspiracy to bribe a public official, solicitation of a bribe, and extortion by a public official and was sentenced to 15 months imprisonment. The sentencing court applied a four-level enhancement due to the value of the lot exceeding \$20,000. Abbey argued on appeal "that the land was basically worthless because he had to pay certain assessments on it after receipt, and further that the only relevant criteria was his subjective impression of the property's value." The court rejected this argument, finding the value of loss ordinarily means the fair market value and is determined objectively. The government presented evidence of surrounding lots selling for more than \$20,000 and the bank from whom Abbey sought a mortgage estimated the lots' value at \$40,000. The district court applied the value over \$20,000 and the Court of Appeal held that value was "not clearly erroneous" and upheld the sentence.

sensitive position, and if the resulting offense level is less than 18, it is to be increased to level 18.

In *United States of America v Bridget McCafferty*,¹⁸ McCafferty, a former judge, was convicted of 10 counts of making false statements to FBI agents arising out of a corruption investigation of another public official. The offense level was 6, with its corresponding guideline range for sentencing from 0-6 months. The district court applied a 5-level adjustment moving the range to 8-14 months and sentenced McCafferty to 14 months. The upward departure and ultimate sentence were both upheld on appeal, with the court stating: “For a sitting judge to knowingly lie to FBI agents after she had unethically steered negotiations in a case to benefit her associates is a shock to our system of justice and the rule of law.”¹⁹

In one of the highest profile corruption cases in the last decade, former Illinois Governor Rod Blagojevich was sentenced to 14 years in prison following 18 corruption convictions, most notably his attempt to “sell or trade” the United States Senate seat that had become vacated following Barack Obama’s election in 2008. Other charges included racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion and making false statements to federal agents.²⁰ In sentencing Blagojevich to 14 years in prison, Judge James Zagel stated “[t]he harm here is not measured in the value of property or money. The harm is the erosion of public trust in government.”²¹ On appeal, the 7th Circuit Court of Appeals vacated five of the convictions on a technicality and ordered a re-sentencing; further leave to the Supreme Court was denied. Despite the reduced number of convictions, the 14-year sentence was upheld at a re-sentencing in August, 2016. Blagojevich’s lawyer further appealed the sentence,²² but on April 21, 2017 the 7th Circuit Court of Appeals upheld the original sentence.²³

United States of America v Richard Renzi involved the trial and sentencing of a former Arizona Congressman in respect to a \$200,000 bribe payment (resulting in a 10-level enhancement).²⁴ Renzi was sentenced to 36 months imprisonment and his friend and business partner was sentenced to 18 months imprisonment. In affirming the sentences, the Court noted the substantial power granted to Renzi, stating:

¹⁸ *United States of America v Bridget McCafferty*, 2012 US Lexis 11247 (6th Cir 2012).

¹⁹ *Ibid* at VIII C.

²⁰ For the full indictment, see

<https://www.justice.gov/archive/usao/iln/chicago/2009/pr0402_01a.pdf>.

²¹ Monica Davey, “Blagojevich Sentenced to 14 Years in Prison”, *The New York Times* (7 December 2011), online: <http://www.nytimes.com/2011/12/08/us/blagojevich-expresses-remorse-in-courtroom-speech.html?_r=0>.

²² “Ex-Gov. Rob Blagojevich to appeal 14-year prison sentence”, *Chicago Tribune* (23 August 2016), online: <<http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-appeal-prison-sentence-20160823-story.html>>.

²³ “Ex-Gov. Rob Blagojevich loses appeal as judges quickly uphold 14-year prison term”, *Chicago Tribune* (21 April 2017), online: <<http://www.chicagotribune.com/news/local/breaking/ct-rod-blagojevich-appeal-20170421-story.html>>.

²⁴ *United States of America v Richard G Renzi*, 769 F (3d) 731 (9th Cir 2014).

The Constitution and our citizenry entrust Congressmen with immense power. Former Congressman Renzi abused the trust of this Nation, and for doing so, he was convicted by a jury of his peers. After careful consideration of the evidence and legal arguments, we affirm the convictions and sentences of both Renzi and his friend and business partner, Sandlin.²⁵

*United States of America v Richard McDonough*²⁶ involved the trial and sentencing of McDonough Salvatore DiMasi, the former Speaker of the Massachusetts House of Representatives, for bribes in relation to business transactions. DiMasi received a sentence of 96 months (8 years) imprisonment (the guideline range was 235 to 293 months) and McDonough was sentenced to 84 months (7 years) imprisonment (the guideline range was 188 to 235 months). The guideline range for DiMasi and McDonough was identical except for the enhancement given to DiMasi as a public official.

United States of America v Joseph Paulus involved the sentencing of Paulus, a former district attorney who accepted 22 bribes over the course of a two-year period for agreeing to favourable treatment of a defence lawyer's clients.²⁷ Paulus was sentenced to 58 months imprisonment (nearly 5 years), an upward departure from the guideline range of 27 to 33 months. The court justified their upward departure based on the nature of the trust breached, the number of bribes over a substantial period of time and the difficulty in detecting corruption. The court stated:

Bribery, by its very nature, is a difficult crime to detect. Like prostitution, it occurs only between consenting parties both of whom have a strong interest in concealing their actions. And often, when it involves public corruption as in this case, one of the parties occupies a position of public trust that makes him, or her, an unlikely suspect. In light of these facts, it is unusual to uncover even one instance of bribery by a public official, let alone twenty-two. This fact takes the case outside of the heartland That there was interference with a government function to an unusual degree and a loss of public confidence in government as a result of his offense are facts that this court has found. But the question of how to measure such impact and assign a numeric adjustment in the applicable offense level under the Guidelines is a matter of judgment. Such matters cannot be quantified, or at least easily quantified. For these reasons, and for the reasons set forth on the record in court, the defendant is sentenced to a term of fifty-eight months.²⁸

²⁵ *Ibid* at IX.

²⁶ *United States of America v Richard McDonough*, 727 F (3d) 143 (1st Cir 2013).

²⁷ *United States of America v Joseph Paulus*, 331 F Supp (2d) 727 (ED Wis).

²⁸ *Ibid* at para 16.

While §2C1.1 deals with one of the most common corruption offenses, there are other guidelines which apply to offenses which are either directly related to corruption or have an element of corruption if they are committed by a public official.²⁹

4.4 Imposition of Fines

Criminal offenders can also be fined as part of their sentence. Under 18 USC § 3571, fines for individual offenders may be no more than the greatest of:

- (1) the amount specified in the law setting forth the offense;
- (2) the applicable amount under subsection (d) of this section [not more than the greater of twice the value of the loss caused to another by the offense or twice the value of the defendant's gain from their criminal behaviour, unless this option would unduly complicate or lengthen the sentencing process];
- (3) for a felony, not more than \$250,000;

The factors governing the imposition of a fine are found in 18 USC § 3572, which states:

- (a) **Factors To Be Considered** — In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553 (a)—
 - (1) the defendant's income, earning capacity, and financial resources;
 - (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
 - (3) any pecuniary loss inflicted upon others as a result of the offense;
 - (4) whether restitution is ordered or made and the amount of such restitution;

²⁹ For the full guideline text of these provisions, see:
<http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/CHAPTER_2.pdf>.

- (5) the need to deprive the defendant of illegally obtained gains from the offense;
 - (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
 - (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
 - (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.
- (b) **Fine Not to Impair Ability to Make Restitution** — If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.³⁰

For the offense of bribery of domestic public officials and witnesses in 18 USC § 201, fines are determined by the above sections or may be up to three times the value of the thing given or offered to the official. This applies to both the bribe payer and the bribe receiver, meaning the penalty for both may be based on the amount of the bribe. Rose-Ackerman notes that this symmetry in the maximum fine fails to reflect the “asymmetries in gains between bribe payers and recipients.”³¹ Under subsection (2) above, the bribe payer’s gains may be taken into account; however, Rose-Ackerman argues that gains should be multiplied to reflect the probability of detection in order to effectively deter bribery.

4.5 Sentencing Corporations and Other Organizations

The *Guidelines* provide the following general principles for the sentencing of organizations:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

³⁰ 18 USC § 3572 (Imposition of sentence of fine and related matters), online: <<http://www.law.cornell.edu/uscode/text/18/3572>>.

³¹ Susan Rose-Ackerman, “The Law and Economics of Bribery and Extortion” (2010) 6 Annual Rev Law Soc Sci 217 at 225.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws.³²

The *Guidelines* set out the base fine for an organization:

- (a) The base fine is the greatest of:
 - (1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or
 - (2) the pecuniary gain to the organization from the offense;³³ or
 - (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.³⁴

³² Guidelines Manual (2014) ch 8, intro comment.

³³ Rose-Ackerman argues that fines should be a multiple of the gain to the organization, since the chances of being caught are far below 100%. See Rose-Ackerman, (2010) at 225.

³⁴ *Ibid*, § 8C2.4.

The *Guidelines* set out a fine of \$5,000 for an offense level of 6 or less and gradually rise to \$72.5 million for offense level of 38 or more. Each offense level increases the amount of the fine. For example:

Table 7.3 Offense Level Fine Table³⁵

Offense Level	Fine
6 or less	\$5000
8	\$10,000
15	\$125,000
22	\$1,200,000
30	\$10,500,000
36	\$45,500,000
38 or more	\$72,500,000

Fines are also multiplied based on the organization's culpability score. The culpability score is based on a number of factors including prior criminal history, involvement of high-level officials, whether the organization had a pre-existing compliance program, and voluntary disclosure and cooperation:

Table 7.4 Minimum and Maximum Multipliers³⁶

Culpability Score	Minimum Multiplier	Maximum Multiplier
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0	0.05	0.20

³⁵ Guidelines Manual (2014), § 8C2.4.

³⁶ *Ibid*, § 8C2.6. For a full description of the sentencing guidelines for organizations (including a discussion of restitution, effective compliance and ethics programs, determination of fines including departures from guideline fine ranges, organizational probation, and violations of probation), see *ibid*.

4.6 FCPA Sentencing

The *FCPA* sets out the criminal penalties for corruption offenses. All *FCPA* criminal offenses are prosecuted by the Department of Justice (DOJ). The *Resource Guide to the FCPA* (*Resource Guide*), produced by the DOJ and the Securities Exchange Commission (SEC), sets out nine factors to guide the DOJ and SEC in determining whether to seek indictment or an NPA, DPA or SEC civil settlement, and in determining the terms of those dispositions. The *Resource Guide* repeatedly emphasizes that voluntary early disclosure of possible *FCPA* violations and cooperation in the investigation of those violations will be key factors in obtaining more lenient treatment from the DOJ or SEC. The *Resource Guide* states that the nine factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- the existence and effectiveness of the corporation's pre-existing compliance program;
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
- the adequacy of remedies such as civil or regulatory enforcement actions.³⁷

³⁷ *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Department of Justice and Securities Exchange Commission, 2012) at 53, online:

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

The following excerpt from the *Resource Guide* discusses penalties:³⁸

BEGINNING OF EXCERPT

What Are the Potential Consequences for Violations of the FCPA?

The FCPA provides for different criminal and civil penalties for companies and individuals.

Criminal Penalties

For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$2 million. Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to \$250,000 and imprisonment for up to five years.

For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to \$25 million. Individuals are subject to a fine of up to \$5 million and imprisonment for up to 20 years. Under the Alternative Fines Act, 18 U.S.C. § 3571(d), courts may impose significantly higher fines than those provided by the FCPA – up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding. Fines imposed on individuals may not be paid by their employer or principal.

U.S. Sentencing Guidelines

When calculating penalties for violations of the FCPA, DOJ focuses its analysis on the U.S. Sentencing Guidelines (Guidelines) in all of its resolutions, including guilty pleas, DPAs, and NPAs. The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine the appropriate penalty, the “offense level” is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and, for business entities, additional factors such as voluntary disclosure, cooperation, pre-existing compliance programs, and remediation.

The Guidelines provide for different penalties for the different provisions of the FCPA. The initial offense level for violations of the anti-bribery provisions is determined under § 2C1.1, while violations of the accounting provisions are assessed under §

³⁸ *Ibid* at 68-69.

2B1.1. For individuals, the initial offense level is modified by factors set forth in Chapters 3, 4, and 5 of the Guidelines to identify a final offense level. This final offense level, combined with other factors, is used to determine whether the Guidelines would recommend that incarceration is appropriate, the length of any term of incarceration, and the appropriate amount of any fine. For corporations, the offense level is modified by factors particular to organizations as described in Chapter 8 to determine the applicable organizational penalty. ... For violations of the accounting provisions assessed under § 2B1.1, the procedure is generally the same, except that the specific offense characteristics differ. For instance, for violations of the FCPA's accounting provisions, the offense level may be increased if a substantial part of the scheme occurred outside the United States or if the defendant was an officer or director of a publicly traded company at the time of the offense. For companies, the offense level is calculated pursuant to §§ 2C1.1 or 2B1.1 in the same way as for an individual—by starting with the base offense level and increasing it as warranted by any applicable specific offense characteristics. The organizational guidelines found in Chapter 8, however, provide the structure for determining the final advisory guideline fine range for organizations.

...

Civil Penalties

Although only DOJ has the authority to pursue criminal actions, both DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.

For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to \$16,000 per violation. Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to \$16,000 per violation, which may not be paid by their employer or principal. For violations of the accounting provisions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$7,500 to \$150,000 for an individual and \$75,000 to \$725,000 for a company. SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings. [Footnotes omitted.]

END OF EXCERPT

The size of penalties for *FCPA* cases has continued to increase. All ten of the ten largest penalties have been imposed since 2008. Richard Cassin lists the top ten largest combined DOJ and SEC penalties of October 2016:

Table 7.5 Top Ten Largest *FCPA* Penalties³⁹

Company	Amount	Year
Siemens	\$800 million (DOJ - \$450 million) (SEC - \$350 million)	2008
Alstom	\$772 million (DOJ - \$772 million)	2014
KBR / Halliburton	\$579 million (DOJ - \$402 million) (SEC - \$177 million)	2009
Och-Ziff	\$412 million (DOJ - \$213 million) (SEC - \$199 million)	2016
BAE	\$400 million (DOJ - \$400 million)	2010
Total SA	\$398 million (DOJ - \$245 million) (SEC - \$153 million)	2013
VimpelCom	\$397.6 million (DOJ - \$230.1 million) (SEC - \$167.5 million)	2016
Alcoa	\$384 million (DOJ - \$209 million fine, \$14 million forfeiture) (SEC - \$161 million)	2014
Snamprogetti Netherlands B.V. / ENI S.p.A	\$365 million (DOJ - \$240 million) (SEC - \$125 million)	2010
Technip SA	\$338 million (DOJ - \$240 million) (SEC - \$98 million)	2010

Several of these mega-corruption cases have also led to additional penalties imposed by foreign jurisdictions. For example, the 2010 BAE Systems Plc (BAE) case currently ranks as

³⁹ Richard Cassin, "Och-Ziff takes fourth spot on our new Top Ten list" (4 October 2016), *The FCPA Blog*, online: <<http://www.fcpablog.com/blog/2016/10/4/och-ziff-takes-fourth-spot-on-our-new-top-ten-list.html> - sthash.mYslwT7F.dpuf>.

the fifth largest *FCPA* settlement. BAE, a multinational defense contractor headquartered in the UK, pleaded guilty to conspiring to defraud the US by impairing and impeding its lawful functions, to make false statements about its *FCPA* compliance program, and to violate the *Arms Export Control Act (AECA)* and *International Traffic in Arms Regulations (ITAR)*. BAE agreed to pay a \$400 million dollar penalty to the US Treasury⁴⁰ and to make a £30 million ex-gratia payment to authorities in the UK and Tanzania.⁴¹ Furthermore, in 2011, BAE entered into a civil settlement with the US Department of State and agreed to pay a \$79 million civil penalty.⁴² BAE falsely represented its efforts to comply with the *FCPA* and took steps to conceal its relationship with marketing advisors retained to assist BAE in securing sales.⁴³

Although the UK Serious Fraud Office (SFO) declared the £30 million payment to be a triumph for the UK, Pieth, the chairman of the OECD Anti-Bribery Working Group, expressed disappointment with the settlement. He argues that the penalty formed only a small part of the bribes involved in the cases under investigation. He views the penalties imposed by the US as adequate, but notes that the BAE case was “essentially a UK case and the UK should have dealt with it.” In his opinion, the “case casts a shadow on Britain’s ability to react to corruption.”⁴⁴ It should be noted that the BAE case preceded the coming into force of the new UK *Bribery Act* and the significantly increased enforcement efforts in the UK since 2010.

Koehler presents a more detailed examination into the top ten mega-corruption cases:

- In most cases the corruption was widespread in terms of the countries involved (spanning the entire globe) and occurred rather systematically over many years; for example, the Siemens AG corruption charges spanned more than ten years and occurred in eleven countries on five continents.

⁴⁰ Jacinta Anyango Oduor et al, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank, 2014) at 109.

⁴¹ For the full SFO press release see: <http://webarchive.nationalarchives.gov.uk/20101220171831/http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx>. The reparation payment was slated for Tanzania’s education needs. The Tanzania government, with the help and advice of the UK Department for International Development (UK DFID), submitted a detailed proposal for the allocation of the funds to the SFO. The proposal was accepted and the UK DFID continues to assist Tanzania in its use of the funds. See Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (World Bank and OECD, 2014) at 6, online: <https://star.worldbank.org/star/publication/few-and-far-hard-facts-stolen-asset-recovery>.

⁴² For the media note on the settlement with the Department of State see: <http://www.state.gov/r/pa/prs/ps/2011/05/163530.htm>.

⁴³ For the full DOJ press release see: <http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>.

⁴⁴ Siri Schubert, “BAE: How Good a Plea Deal Was It?”, *PBS Frontline World* (9 February 2010), online: <http://www.pbs.org/frontlineworld/stories/bribe/2010/02/bae-too-good-a-deal-says-chair-of-anti-bribery-group.html>.

- All of the *FCPA* cases were settled. Often settlements involve guilty pleas to books and records and internal control offenses rather than bribery offenses, allowing companies to avoid debarment from public procurement contracts. For example, the US DOJ allowed Siemens to plead to accounting offenses due to its cooperation with investigations, even though corruption was clearly entrenched within the company. This was demonstrated by the fact that an accountant in the telecommunications group oversaw an annual bribery budget of \$40-50 million. Siemens paid bribes for contracts in both highly corrupt countries like Nigeria and highly developed countries like Norway. When bribery laws changed in the 1990s, Siemens pursued more effective concealment of its bribery rather than complying. In spite of these blatant violations, Siemens avoided debarment from US public procurement due to the use of accounting offenses.⁴⁵ BAE was also charged with non-corruption-related offenses by the DOJ, thereby avoiding debarment from contracting with the Pentagon, which provided approximately half of its revenue.⁴⁶
- Five or more of the cases were settled in whole or in part by Deferred Prosecution Agreements (DPAs) and several involved Cooperation Agreements (whereby company officials agreed to full cooperation in the corruption investigation in exchange for charge immunity or charge and sentence reductions).
- There were very few US prosecutions of individual company officials with the exception of the KBR/Halliburton case and the Alcatel case. In KBR, two agents and the CEO of KBR were prosecuted; the CEO (Stanley) had his tentative sentence of 84 months imprisonment reduced to 30 months based on his cooperation; one of the agents (Tesler), who also cooperated, received 21 months imprisonment and agreed to forfeiture of nearly \$149 million; the second agent (Chodan) received one year probation (largely due to his age and poor health). In the Alcatel case, a former executive (Sapsizian) pled guilty to two *FCPA* offenses and was sentenced to 30 months imprisonment, three years of supervised release and forfeiture of \$261,500.
- The fact that company officials were not generally prosecuted in the US did not prevent their prosecution as individual offenders in other countries; in these ten cases, there currently are or have been individual prosecutions of these company officials in at least five other countries (France, Greece, Latvia, Costa Rica, and Argentina).⁴⁷

⁴⁵ 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?pagewanted=all&r=0>>.

⁴⁶ Schubert (9 February 2010).

⁴⁷ Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar Publishing, 2014) at 169-233.

4.7 Other Financial Consequences

While these settlements involve large dollar amounts, Koehler notes that criminal fines are only one aspect of financial exposure when one comes under *FCPA* scrutiny. Koehler outlines what he describes as the ‘three buckets’ of *FCPA* financial exposure as “(i) pre-enforcement action and professional fees and expenses; (ii) fine, penalty and disgorgement amounts in an actual *FCPA* enforcement action; and (iii) post-enforcement action professional fees and expenses.”⁴⁸ Koehler notes that, while the second amount generates the most attention, the first category is often the most expensive.⁴⁹

According to Koehler, pre-enforcement action is highly expensive because, before agreeing to resolve any enforcement action, enforcement agencies will often ask where else the conduct may have occurred in a company’s international dealings. After this question is asked, the “next thing the company knows, it is paying for a team of lawyers (accompanied by forensic accountants and other specialists) to travel around the world and answer the ‘where else’ question.”⁵⁰

Koehler cites Avon as an example of the expense of pre-enforcement action. As stated, Avon agreed to pay \$135 million to settle SEC charges and a parallel criminal case. However, according to Avon’s disclosures, pre-enforcement expenses reached \$350 million from 2009-2011 and amounted to \$110,000 per working day as of March 2012.⁵¹

DPAs and Non-Prosecution Agreements (NPAs) often contain a clause requiring the company to report compliance efforts for a period of two or three years. This leads to the third bucket of financial exposure, post-enforcement action professional fees and expenses. Koehler cites Willbros Group and Faro Technologies as examples of expenses incurred in the third bucket of exposure. Willbros Group settled their matter for \$32 million dollars, but the company estimates the cost of ongoing monitoring expenses to be approximately \$10 million dollars.⁵² Faro Technologies agreed to pay approximately \$3 million in fines. The company disclosed that monitoring expenses amount to \$1 million in just one quarter.⁵³

4.8 Comments on *FCPA* Enforcement

It is interesting to observe the enforcement patterns for corporate corruption. Between 2008 and 2012, the DOJ settled 53 cases involving corporate corruption—42 public companies and

⁴⁸ Koehler (2014) at 178.

⁴⁹ *Ibid.*

⁵⁰ *Ibid* at 180.

⁵¹ *Ibid* at 178, citing Peter Henning, “The Mounting Costs of Internal Investigations”, *The New York Times* (5 March 2012), online: <http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/?_r=0>.

⁵² *Ibid* at 192.

⁵³ *Ibid* at 193.

11 private companies. Rather than prosecuting and convicting both the company and the responsible company officers and agents, in 34 of the 42 public company cases (81%), no officers or agents were prosecuted or convicted. On the other hand, in the private company cases, there was a significantly higher rate of prosecuting the responsible officers as well as the company (55% of the cases [6 of 11] involved prosecution of both, whereas only 19% of the public corporation cases involved prosecution of both).⁵⁴

There is another form of double standard, Koehler notes, in some of the largest corruption cases. By agreeing to SEC civil enforcement of books and records violations, many of these giant multinational corporations avoided the stigma and adverse consequences of a criminal bribery conviction. Koehler refers to such cases as “bribery yet not bribery enforcement actions.”⁵⁵ For example, after discussing the cases of Siemens and BAE, Koehler states that some of the most egregious *FCPA* violations appear immune from bribery charges, since they are instead dealt with through books and records and other non-bribery offenses. Not surprisingly, these companies are usually major suppliers to the US government of goods and services considered critical to national security.⁵⁶

Koehler outlines several other criticisms of *FCPA* enforcement, including a lack of transparency, the DOJ and SEC’s lack of success when put to the burden of proof, and the fact that *FCPA* enforcement is a lucrative prospect for the US government as well as foreign governments.

Since almost all *FCPA* resolutions involve a DPA or NPA, Koehler states that “nearly all corporate *FCPA* enforcement actions in this new era are negotiated behind closed doors in the absence of meaningful judicial scrutiny.”⁵⁷ With DPAs, the DOJ calculates the value of the benefit allegedly received in a non-transparent way, and when resolution is via a NPA, the calculation of the fine amount is not transparent.⁵⁸ Because of this lack of transparency, Koehler is an advocate for the abolition of DPAs and NPAs. He argues that the government should be confronted with the choice to either indict or walk away.

While enforcement agencies have been able to leverage large *FCPA* settlements, Koehler maintains that “when put to its burdens of proof in the context of an adversarial system, the enforcement agencies have had substantially less success,”⁵⁹ and notes that the DOJ lost both of the two corporate *FCPA* prosecutions that they did pursue to trial.⁶⁰

⁵⁴ *Ibid* at 205.

⁵⁵ *Ibid* at 197.

⁵⁶ *Ibid* at 199.

⁵⁷ *Ibid* at 195.

⁵⁸ *Ibid* at 183.

⁵⁹ *Ibid* at 36.

⁶⁰ *Ibid* at 195. Koehler states that “it is believed the SEC has never been put to its burden of proof in a corporate *FCPA* action.”

Koehler writes that “[t]here are many who believe that FCPA enforcement in this new era represents a cash cow for the government as settlement amounts in FCPA enforcement actions simply flow into the U.S. treasury.”⁶¹ He cites the enforcement action against Total in support of this view, noting that “the enforcement action was against a French oil and gas company for making improper payments to an Iranian foreign official through use of an employee of a Swiss private bank and a British Virgin Island Company,” leaving as the sole jurisdictional nexus a 1995 wire transfer from a New York bank account of \$500,000 (less than 1% of the alleged bribe payments). The same conduct was the focus of an investigation in France (Total’s home country). The alleged conduct occurred between 1995 and 1997, years before the 2013 settlement, so old in fact that the DOJ stated in the DPA that there were “evidentiary challenges.”⁶²

Koehler is also critical of the fact the DOJ and SEC appear to be “double-dipping” and collecting duplicative penalties in *FCPA* cases, citing the Total case as a clear example. Out of the \$398 million penalty, Koehler estimates that \$150 million was a double dip.⁶³ Corruption enforcement is not just lucrative to the US government, but brings substantial returns and political points to governments of other nations as well. The author notes that an increasing number of *FCPA* actions “are followed by ‘tag-a-long’ or ‘carbon copy’ foreign law enforcement investigations and enforcement actions,”⁶⁴ likening these actions to “a piñata breaking at a party, with multiple hands eager to catch the resulting candy.”⁶⁵ Concurrent enforcement and carbon copy prosecutions are discussed in Chapter 6, Section 7 of this book.

The OECD Convention states that: “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.”⁶⁶ However, Koehler notes this has not been followed, stating “the reality is that countries often find themselves in competition with each other to bring enforcement actions based on the same core conduct and/or divide the enforcement proceedings.”⁶⁷

⁶¹ *Ibid* at 238.

⁶² *Ibid* at 239.

⁶³ *Ibid* at 186.

⁶⁴ *Ibid* at 261.

⁶⁵ *Ibid* at 263.

⁶⁶ OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, art 4.3, online: <<http://www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>>.

⁶⁷ Koehler (2014) at 265.

5. UK SENTENCING LAW

5.1 General Principles of Sentencing

The principles of sentencing under UK law are set out in Part 12 of the *Criminal Justice Act 2003*.⁶⁸ Section 142(1) lists the five common purposes of sentencing, namely punishment, deterrence, rehabilitation, protection of the public and reparation. Section 143 provides that in determining an offence's seriousness, the court must consider both the offender's culpability and the harm or risk of harm. In regard to the imposition of fines, section 164 states that before deciding on the amount of a fine, the court must inquire into the financial circumstances of the offender and impose a fine that reflects the seriousness of the offence and takes into account other circumstances of the case.

The sentencing structure for corruption-related offences has been modified significantly in recent years. The *Bribery Act 2010* introduced new penalties for corruption-related offences. As the *Bribery Act* is not applied retrospectively, there are still numerous cases before the courts that fall under a previous statute. The UK Sentencing Council also introduced sentencing guidelines for corruption-related offences.⁶⁹ These guidelines are applicable to sentences imposed on or after October 1, 2014, regardless of when the offences occurred. The UK also introduced deferred prosecution agreements (DPAs) as an alternative disposition in corruption cases.

5.2 Sentencing Cases before the *Bribery Act 2010*

Nicholls et al. described the sentences imposed in a number of corruption cases before the enactment of the *Bribery Act 2010*.⁷⁰ First, they summarize the sentences imposed on officials such as police, prison and immigration officers as follows:

Seeking guidance on sentencing in corruption cases is difficult as the sentences have been quite varied, as illustrated by those involving police, prison, and immigration officers. In *R v Donald* a total sentence of eleven years (the court having imposed consecutive sentences) was upheld in the case of a detective constable who pleaded guilty late to four counts of corruption under the 1906 Act for agreeing to accept £50,000 (he only received £18,000) from a defendant for disclosing confidential information and destroying surveillance logs. In *R v McGovern* a defendant charged with

⁶⁸ *Criminal Justice Act 2003* (UK), c 44, online: <<http://www.legislation.gov.uk/ukpga/2003/44/contents>>.

⁶⁹ United Kingdom, Sentencing Council, *Fraud, Bribery and Money Laundering Offences – Definitive Guideline*, [Sentencing Council Guidelines] online: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf>.

⁷⁰ Colin Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 208-209.

burglary who offered a £200 bribe to a police officer had his sentence reduced by the Court of Appeal to nine months. In *R v Oxdemir* an offender who offered a free meal or £50 to a police officer for not reporting a driving offence had his sentence reduced to three months' imprisonment. In *R v Garner* the Court of Appeal upheld sentences of eighteen months and twelve months respectively imposed on prison officers who pleaded guilty to providing luxury items to a prisoner. A sentence of two years' imprisonment was imposed in a similar case. In *R v Patel* an immigration administrator was sentenced to two years' imprisonment for accepting a £500 bribe to stamp a passport granting leave to remain, and ordered to forfeit the bribe. In *Attorney General's Reference (No 1 of 2007)* the defendant, a serving police officer, pleaded guilty to misfeasance in a public office after he befriended a known criminal and despite warnings from his superiors continued to associate with him and to pass on sensitive information about two individuals whom the criminal wanted to speak with over a drugs and assault matter. A sentence of eighteen months' custody was initially imposed but was reduced to nine months suspended for two years plus community service due to time served on remand, service of unpaid work, and other factors. [Footnotes omitted.]

Second, Nicholls et al. describe a number of sentences imposed in regard to corruption involving public procurement:⁷¹

A similar variation exists in public procurement cases. In 1974, when the maximum sentence for an offence under the 1889 and 1906 Acts was two years, the architect, John Poulson, was sentenced to a total of seven years' imprisonment for paying bribes to members of Parliament, police officers, and health authorities to obtain building contracts. T Dan Smith, the Labour leader of Newcastle-upon-Tyne, was sentenced to a total of six years' imprisonment and William Pottinger, a senior civil servant in the Scottish Office was sentenced to a total of five years' imprisonment. In *Foxley* a 71-year-old Ministry of Defence employee, convicted of four counts of corruption under the 1906 Act, was sentenced to four years' imprisonment for receiving over £2 million in the placing of defence contracts. A confiscation order was made for £1,503,901.08. In *Dearnley and Threapleton* a council employee and supplier of security services who was convicted of misrepresenting a loan to pay off a personal debt, had his sentence reduced to twelve months' imprisonment because of strong mitigation. In *R v Allday*, a case under the 1889 Act, council employees accepted bribes from waste contractors to tip waste. They were sentenced to eight and six months' imprisonment each and the contractors were sentenced to three months each. [Footnotes omitted]

⁷¹ *Ibid* at 209.

5.3 Sentences under the *Bribery Act 2010* (Pre-Guidelines)

The *Bribery Act 2010* came into force on July 1, 2011. The Act sets out the general offences of offering a bribe (section 1), being bribed (section 2) and bribery of foreign public officials (section 6). Commercial organizations may also commit an offence under section 7 of the Act if they fail to prevent bribery. Section 11 sets out maximum penalties for the offences:

11 Penalties

- (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
- (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
 - (a) on summary conviction, to a fine not exceeding the statutory maximum,
 - (b) on conviction on indictment, to a fine.
- (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
- (4) The reference in subsection (1)(a) to 12 months is to be read—
 - (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
 - (b) in its application to Northern Ireland, as a reference to 6 months.⁷²

The maximum term of imprisonment for a summary conviction offence is twelve months in England and Wales, and six months in Northern Ireland. The maximum statutory fine for a summary conviction offence is £10,000 in Scotland. The maximum fine for an indictable offence is unlimited.

One of the first cases under the *Bribery Act 2010* stemmed from an investigation into Associated Ocel Corporation, which subsequently changed its name to Innospec. As stated by the Serious Fraud Office, “Innospec itself pleaded guilty in March 2010 to bribing state officials in Indonesia and was fined \$12.7 million in England with additional penalties being imposed in the USA.”⁷³ Subsequently, in 2014, four individuals were sentenced for their role in the corruption in both Indonesia and Iraq. Two of the defendants pled guilty and two

⁷² *Bribery Act 2010* (UK), c 23, online: <<http://www.legislation.gov.uk/ukpga/2010/23/contents>>.

⁷³ Online: <<https://www.sfo.gov.uk/2014/08/04/four-sentenced-role-innospec-corruption/>>.

were tried and found guilty. The sentencing reasons show that a guilty plea and cooperation can be major mitigating factors. As the Serious Fraud Office reports, the individuals and sentences were:

- Dennis Kerrison, 69, of Chertsey, Surrey, was sentenced to 4 years in prison.
- Paul Jennings, 57, of Neston, Cheshire, was sentenced to 2 years in prison.
- Miltiades Papachristos, 51 of Thessaloniki, Greece, was sentenced to 18 months in prison.
- David Turner, 59, of Newmarket, Suffolk, was sentenced to a 16 month suspended sentence with 300 hours unpaid work.⁷⁴

The sentencing decision for these four individuals was released on August 4, 2014 before the sentencing guidelines on bribery came into force on October 1, 2014. In any event, the court stated:

BEGINNING OF EXCERPT

These four defendants, David Turner, David Kerrison, Paul Jennings and Miltiades Papachristos appear for sentence following conviction for corruption of public officials in Indonesia and Iraq. David Turner pleaded guilty to three charges of conspiracy to commit corruption in January 2012 in relation to Indonesia and Iraq. Paul Jennings pleaded guilty in June 2012 to two charges of conspiracy to commit corruption and to a further charge of conspiracy to commit corruption in Indonesia and Iraq in July 2012. David Kerrison and Miltiades Papachristos were convicted of conspiracy to commit corruption in June 2014 after a trial of approximately three months.

At different times, each of the defendants was in a position of responsibility in a company called Innospec, previously called Octel.... Innospec corruptly paid millions of dollars to agents in Indonesia to be handed over to government officials to delay lead free fuel. We cannot quantify the corrupt payments as some payments to agents were for legitimate purposes. In Iraq, payments were made to sabotage the test results of rival products. This was the intention of those authorising the payments even if this result wasn't achieved.

...

The corruption was endemic, ingrained and institutional.... A company is a separate legal entity. It is not an automated machine. Decisions are made by human minds. It

⁷⁴ *Ibid.*

follows that those high up in the company should bear a heavy responsibility under the criminal law.

Those who pleaded guilty are entitled to a reduction in their sentence. The others mustn't have their sentences increased for fighting the case. However, their sentence cannot be discounted in the same way as for those who pleaded guilty. As the Judge I am bound by the jury's verdict.

All four men are middle aged or older, family men, of previous good character; they have done work in communities and worked well with colleagues. There have been a number of character witnesses testifying to this. All have come from modest backgrounds, went to university and worked their way up. None of these defendants would consider themselves in the same category as common criminals who commit crimes of dishonesty or violence.

...

David Kerrison

As Chief Executive Officer from 1996 to 2005, over a period of 8 years, he must accept major responsibility for the corruption he is convicted of. He didn't instigate the corruption but he allowed it to continue. He could have stopped it but he didn't. I am satisfied that the jury's verdict is correct, that he became aware early on of the existence of corrupt payments and didn't stop it.

I take into account his good character account, that he has a wine business in South Africa, that he has improved the lot of black workers there, provided them with accommodation and healthcare, which is all commendable but doesn't detract from the crime.

Mr Kerrison is now 70, in poor health and his wife is in less than good health.

I make a reduction due to age, health and caring responsibility to his wife, and I have seen the medical reports. If he was 5 years younger I would have imposed a sentence of 5 years. The most lenient sentence I can give is 4 years.

Paul Jennings

Mr Jennings was CEO from April 2005 in succession to David Kerrison. He served until 2008 and he was formally dismissed in June 2009. He inherited an existing situation and didn't instigate it. He allowed the corruption to continue. He said that the Chairman told him that this was the way it was always done. By pleading guilty,

he accepts he knew and intended to be part of the corruption. As CEO he must accept substantial responsibility but less than David Kerrison.

Mr Jennings is also of good character. I have read the 50 character references. These show that he encouraged cooperation between management and the workforce, that he had a positive management effect and revitalised the workforce.

Mr Jennings cooperated with the American authorities, paying \$230,000. He has two young sons aged nine and seven. This case has been the background of their lives. The delay has not been his fault as he had to wait before he could be sentenced. I have read the doctor's report and read the references from his children's teachers.

In ordinary circumstances, I would impose a sentence of 4 years in prison after a trial. I reduce this starting point due to his cooperation firstly to 3 years. Before, I thought a 25% reduction was appropriate as he pleaded guilty after Dr Turner. However, it was always clear that he wasn't going to contest therefore the sentence should be reduced to 2 years, which also takes into account the effect on his family.

Mr Jennings is ordered to pay £5000 in prosecution costs.

Miltiades Papachristos

I cannot reduce his sentence as he did not plead guilty. Dr Papachristos is an impressively qualified scientist. He had no management responsibility. He was involved in TEL and then Plutosene which were small parts of the general business activities. He had a lesser but not insignificant role. He was relatively inexperienced when it came to management and was largely acting under the control of others. The Jury's verdict was that he was involved in the corruption.

A sentence of 18 months imprisonment is the least amount of time I can impose. For all the defendants, they will serve half of their sentence in prison and then they will be released on license based on specific terms. If they break these terms, they will go back to prison. These three defendants can now go down.

David Turner

In many ways, this is the most difficult. As Business Director he must accept substantial responsibility. The corruption went on for a number of years and he accepts he had an active part in it in Indonesia and Iraq as he pleaded guilty.... A defendant who enters into a cooperation agreement is entitled to more than a third discount... There is a public interest in providing an inducement for defendants to cooperate.... An inducement is an inverse deterrence. Just as sometimes it is

appropriate to sentence as a deterrent, it is also appropriate to encourage others to cooperate.

...

The starting point is 4 years if convicted by trial. He is entitled to having a third discounted and then half, or to a two thirds discount. [The discount of a third is for his guilty plea and then a discount of half of that is for his cooperation agreement.] The result either way is the same, a 16 month sentence. Should this 16 month be suspended? The important factors are:

1. the quality of his evidence;
2. the delay/lapse of time which was not his fault; and
3. that he made a voluntary repayment of \$40,000 to the US authorities so there can be no further confiscation order against him.

It is a combination of these factors which persuades me to suspend this 16 month sentence for 2 years.

There must be a punishment. Mr Jennings will do 300 hours of unpaid work and will pay £10,000 towards prosecution costs.⁷⁵

END OF EXCERPT

Sweett Group PLC was the first company to be sentenced under section 7 of the *Bribery Act 2010*. Media allegations led to an internal investigation, which discovered that a subsidiary made corrupt payments to help secure a contract in Abu Dhabi. The company admitted to failing to prevent bribery and was sentenced to a fine of £1.4 million, a confiscation order of £850,000 and £95,000 in costs.⁷⁶

In a case concerning Sustainable Agroenergy Plc, individuals received prison sentences ranging from 6-13 years. The company operated a Ponzi scheme. Charges fell under multiple statutes, including the *Bribery Act 2010*. The longest sentence was given to Chief Commercial Officer, Gary West, who was convicted by a jury of bribery under the *Bribery Act 2010* as well

⁷⁵ Sentencing decision for David Turner, David Kerrison, Paul Jennings, Miltiades Papachristos and David Turner, online: <<http://thebriberyact.com/2014/08/11/supersize-me-innospec-4-sentencing-remarks-do-much-more-than-they-say-on-the-tin/>>.

⁷⁶ "Sweett Group sentenced after first ever corporate conviction for failing to prevent bribery", *Eversheds* (2 February 2016), online: <http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Fraud_and_financial_crime/Sweett_group_sentenced>. See also Serious Fraud Office, "Sweett Group PLC sentenced and ordered to pay £2.25 million after Bribery Act conviction" (19 February 2016), online: <<https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/>>.

as offences under the *Criminal Law Act 1977* and *Companies Act 2006*. West received 13 years imprisonment, a £52,805 confiscation order and a 15-year disqualification from acting as a company director.⁷⁷

5.4 Sentencing Guidelines for Corruption-Related Offences by Human Offenders

The Sentencing Council published guidelines for fraud, bribery and money laundering offences (Guidelines).⁷⁸ These Guidelines are applicable to sentences imposed on or after October 1, 2014.⁷⁹ For bribery offences, the Guidelines dictate sentences can range from a discharge to eight years imprisonment.⁸⁰ Money laundering offences are punishable by up to 14 years imprisonment.⁸¹

The Guidelines lay out an eight-step process for determining the sentence for human offenders:

- 1) Step One – Determining the Offence Category
- 2) Starting Point and Category Range
- 3) Consider any factors which indicate a reduction such as assistance to the prosecution
- 4) Reduction for guilty pleas
- 5) Totality Principle
- 6) Confiscation, compensation and ancillary orders
- 7) Reasons
- 8) Consideration for time spent on bail.⁸²

Note: Guidelines for corporate offenders are set out in Section 5.5 below.

The Guidelines set out a grid for determining a sentencing range based on a combination of culpability and harm. Culpability is to be determined “by weighing up all the factors of the case to determine the offender’s role and the extent to which the offending was planned and

⁷⁷ Serious Fraud Office, “Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd” (17 November 2016), online: <<https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>>.

⁷⁸ Sentencing Council Guidelines.

⁷⁹ *Ibid* at 4.

⁸⁰ *Ibid* at 41.

⁸¹ *Ibid* at 35.

⁸² *Ibid* at 41-45.

the sophistication with which it was carried out.”⁸³ Culpability is measured in three levels: A (high culpability), B (medium culpability), and C (lesser culpability).⁸⁴

Harm is to be “assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender.”⁸⁵ Harm is measured in four levels, listed as categories 1 (most serious) to 4 (least serious).⁸⁶

The following tables from the Guidelines demonstrate how the sentences are calculated for natural persons:⁸⁷

⁸³ *Ibid* at 42.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at 42–45.

BEGINNING OF EXCERPT

STEP ONE
Determining the offence category

The court should determine the offence category with reference to the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out.

Harm is assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender.

Culpability demonstrated by one or more of the following:

A – High culpability

A leading role where offending is part of a group activity

Involvement of others through pressure, influence

Abuse of position of significant power or trust or responsibility

Intended corruption (directly or indirectly) of a senior official performing a public function

Intended corruption (directly or indirectly) of a law enforcement officer

Sophisticated nature of offence/significant planning

Offending conducted over sustained period of time

Motivated by expectation of substantial financial, commercial or political gain

B – Medium culpability

All other cases where characteristics for categories A or C are not present

A significant role where offending is part of a group activity

C – Lesser culpability

Involved through coercion, intimidation or exploitation

Not motivated by personal gain

Peripheral role in organised activity

Opportunistic 'one-off' offence; very little or no planning

Limited awareness or understanding of extent of corrupt activity

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

Harm demonstrated by one or more of the following factors:

- Category 1**
- Serious detrimental effect on individuals (for example by provision of substandard goods or services resulting from the corrupt behaviour)
 - Serious environmental impact
 - Serious undermining of the proper function of local or national government, business or public services
 - Substantial actual or intended financial gain to offender or another or loss caused to others

- Category 2**
- Significant detrimental effect on individuals
 - Significant environmental impact
 - Significant undermining of the proper function of local or national government, business or public services
 - Significant actual or intended financial gain to offender or another or loss caused to others
 - Risk of category 1 harm

- Category 3**
- Limited detrimental impact on individuals, the environment, government, business or public services
 - Risk of category 2 harm

- Category 4**
- Risk of category 3 harm

Risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or much less) actual harm, the normal approach is to move to the next category of harm down. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

STEP TWO
Starting point and category range

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Section 1 Bribery Act 2010: Bribing another person

Section 2 Bribery Act 2010: Being bribed

Section 6 Bribery Act 2010: Bribery of foreign public officials

Maximum: 10 years' custody

Harm	Culpability		
	A	B	C
Category 1	Starting point 7 years' custody	Starting point 5 years' custody	Starting point 3 years' custody
	Category range 5 – 8 years' custody	Category range 3 – 6 years' custody	Category range 18 months' – 4 years' custody
Category 2	Starting point 5 years' custody	Starting point 3 years' custody	Starting point 18 months' custody
	Category range 3 – 6 years' custody	Category range 18 months' – 4 years' custody	Category range 26 weeks' – 3 years' custody
Category 3	Starting point 3 years' custody	Starting point 18 months' custody	Starting point 26 weeks' custody
	Category range 18 months' – 4 years' custody	Category range 26 weeks' – 3 years' custody	Category range Medium level community order – 1 year's custody
Category 4	Starting point 18 months' custody	Starting point 26 weeks' custody	Starting point Medium level community order
	Category range 26 weeks' – 3 years' custody	Category range Medium level community order – 1 year's custody	Category range Band B fine – High level community order

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender.

Identify whether any combination of these or other relevant factors should result in an upward or downward adjustment from the starting point.

Consecutive sentences for multiple offences may be appropriate where large sums are involved.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
Statutory aggravating factors:	No previous convictions or no relevant/recent convictions
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Remorse
Offence committed whilst on bail	Good character and/or exemplary conduct
Other aggravating factors:	Little or no prospect of success
Steps taken to prevent victims reporting or obtaining assistance and/or from assisting or supporting the prosecution	Serious medical conditions requiring urgent, intensive or long-term treatment
Attempts to conceal/dispose of evidence	Age and/or lack of maturity where it affects the responsibility of the offender
Established evidence of community/wider impact	Lapse of time since apprehension where this does not arise from the conduct of the offender
Failure to comply with current court orders	Mental disorder or learning disability
Offence committed on licence	Sole or primary carer for dependent relatives
Offences taken into consideration	Offender co-operated with investigation, made early admissions and/or voluntarily reported offending
Failure to respond to warnings about behaviour	
Offences committed across borders	
Blame wrongly placed on others	
Pressure exerted on another party	
Offence committed to facilitate other criminal activity	

STEP THREE

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FOUR

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP FIVE

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour.

STEP SIX**Confiscation, compensation and ancillary orders**

The court must proceed with a view to making a confiscation order if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.

Where the offence has resulted in loss or damage the court must consider whether to make a compensation order.

If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).

The court may also consider whether to make ancillary orders. These may include a deprivation order, a financial reporting order, a serious crime prevention order and disqualification from acting as a company director.

STEP SEVEN**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP EIGHT**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

END OF EXCERPT

On February 12, 2015, Nicholas and Christopher Smith, a father and son involved in a printing business, were sentenced for corruption relating to bribery of officials in Kenya.⁸⁸ The offenders were convicted under the *Prevention of Corruption Act 1906*, as the offences predated the *Bribery Act 2010*. However, since the sentencing post-dated October 1, 2014, the Sentencing Council's new Guidelines applied. The sentencing decision provides one of the first applications of the Guidelines.

Nicolas Smith received three years imprisonment, while Christopher Smith received 18 months imprisonment, which was suspended for two years on condition that he commit no further offences. The suspended sentence was characterized by Higgins J as "an act of mercy."⁸⁹ Christopher was also sentenced to 250 hours unpaid work and a three-month curfew. Both offenders were disqualified from being the director of a company for six years. Later, the company received a fine of £2.2 million. Additionally, Nicholas and Christopher

⁸⁸ "Opinion: It was so easy to avoid: Chickengate: Smith & Ouzman Sentencing Remarks in full under new sentencing guidelines" (15 February 2014), *thebriberyact.com*, online: <<http://thebriberyact.com/2015/02/15/opinion-it-was-so-easy-to-avoid-chickengate-smith-ouzman-sentencing-remarks-in-full-under-new-sentencing-guidelines/>>.

⁸⁹ *Ibid.*

were ordered to pay a confiscation order of £18,693 and £4,500 and each was ordered to pay costs of £75,000.

The Smiths' corrupt activities followed a decision to expand their business into Africa. Between 2006 and 2010, bribes were "routine and common place."⁹⁰ The bribes included a payment of £5,000 to a Kenyan government official, which was a large bribe in light of the official's salary of £40,000. Other bribes included payments of just under £400,000 to receive contracts worth £2 million. The pricing of the product was not elevated aside from the bribery uplift. However, as the product included electoral ballot papers, the bribe risked undermining the integrity of and confidence in the electoral system.

Using the Sentencing Council's Guidelines, Higgins J found that the level of culpability was high based on four factors:

1. A leading role was played
2. There was intended corruption of a public official
3. The offences were of a sophisticated nature
4. The motive was for substantial financial gain⁹¹

Examining harm, Higgins J considered the fact that governance in Kenya and Mauritania was undermined and financial gain for the Smiths was substantial, while a loss was incurred by Kenya and Mauritania due to the inclusion of bribes in the price of products sold to those countries. Higgins J found that the harm caused placed the offence in category 2, meaning the offence falls under A(2) in the Guidelines. A(2) has a starting point of 5 years' custody and a range of 3-6 years' custody (see the above excerpt from the Guidelines).

Based on the aggravating factors, which included negative impacts on good governance and the cross-border nature of the offence, and the mitigating factors, which included good character and Christopher Smith's health and age, Higgins J found that the "terms of A (2) should be reduced."⁹² Nicholas Smith's sentence of three years imprisonment fell at the bottom end of the range, while Christopher Smith's sentence fell below that range.

5.5 Sentencing Guidelines for Corporate Offenders

The Sentencing Council's Guidelines are also used for sentencing corporations in respect to the offences of fraud, bribery and money laundering. The Guidelines are as follows:⁹³

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Sentencing Council Guidelines.

BEGINNING OF EXCERPT

STEP ONE
Compensation

The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence in such an amount as the court considers appropriate, having regard to the evidence and to the means of the offender.

Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty.

Reasons should be given if a compensation order is not made.

(See section 130 Powers of Criminal Courts (Sentencing) Act 2000)

STEP TWO
Confiscation

Confiscation must be considered if either the Crown asks for it or the court thinks that it may be appropriate.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).

(See Proceeds of Crime Act 2002 sections 6 and 13)

STEP THREE

Determining the offence category

The court should determine the offence category with reference to **culpability** and **harm**.

Culpability

The sentencer should weigh up all the factors of the case to determine **culpability**. **Where there are characteristics present which fall under different categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

Culpability demonstrated by the offending corporation's role and motivation. May be demonstrated by one or more of the following **non-exhaustive** characteristics.

A – High culpability

Corporation plays a leading role in organised, planned unlawful activity (whether acting alone or with others)

Wilful obstruction of detection (for example destruction of evidence, misleading investigators, suborning employees)

Involving others through pressure or coercion (for example employees or suppliers)

Targeting of vulnerable victims or a large number of victims

Corruption of local or national government officials or ministers

Corruption of officials performing a law enforcement role

Abuse of dominant market position or position of trust or responsibility

Offending committed over a sustained period of time

Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place (section 7 Bribery Act only)

B – Medium culpability

Corporation plays a significant role in unlawful activity organised by others

Activity not unlawful from the outset

Corporation reckless in making false statement (section 72 VAT Act 1994)

All other cases where characteristics for categories A or C are not present

C – Lesser culpability

Corporation plays a minor, peripheral role in unlawful activity organised by others

Some effort made to put bribery prevention measures in place but insufficient to amount to a defence (section 7 Bribery Act only)

Involvement through coercion, intimidation or exploitation

Harm

Harm is represented by a financial sum calculated by reference to the table below

Amount obtained or intended to be obtained (or loss avoided or intended to be avoided)

Fraud For offences of fraud, conspiracy to defraud, cheating the Revenue and fraudulent evasion of duty or VAT, harm will normally be the actual or intended gross gain to the offender.

Bribery For offences under the Bribery Act the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. An alternative measure for offences under section 7 may be the likely cost avoided by failing to put in place appropriate measures to prevent bribery.

Money laundering For offences of money laundering the appropriate figure will normally be the amount laundered or, alternatively, the likely cost avoided by failing to put in place an effective anti-money laundering programme if this is higher.

General Where the actual or intended gain cannot be established, the appropriate measure will be the amount that the court considers was likely to be achieved in all the circumstances.

In the absence of sufficient evidence of the amount that was likely to be obtained, 10–20 per cent of the relevant revenue (for instance between 10 and 20 per cent of the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending) **may** be an appropriate measure.

There may be large cases of fraud or bribery in which the true harm is to commerce or markets generally. That may justify adopting a harm figure beyond the normal measures here set out.

STEP FOUR
Starting point and category range

Having determined the culpability level at step three, the court should use the table below to determine the starting point within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

The harm figure at step three is multiplied by the relevant percentage figure representing culpability.

	Culpability Level		
	A	B	C
Harm figure multiplier	Starting point 300%	Starting point 200%	Starting point 100%
	Category range 250% to 400%	Category range 100% to 300%	Category range 20% to 150%

Having determined the appropriate starting point, the court should then consider adjustment within the category range for aggravating or mitigating features. In some cases, having considered these factors, it may be appropriate to move outside the identified category range. (See below for a **non-exhaustive** list of aggravating and mitigating factors.)

Factors increasing seriousness

Previous relevant convictions or subject to previous relevant civil or regulatory enforcement action
Corporation or subsidiary set up to commit fraudulent activity
Fraudulent activity endemic within corporation
Attempts made to conceal misconduct
Substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending
Risk of harm greater than actual or intended harm (for example in banking/credit fraud)
Substantial harm caused to integrity or confidence of markets
Substantial harm caused to integrity of local or national governments
Serious nature of underlying criminal activity (money laundering offences)
Offence committed across borders or jurisdictions

Factors reducing seriousness or reflecting mitigation

No previous relevant convictions or previous relevant civil or regulatory enforcement action
Victims voluntarily reimbursed/compensated
No actual loss to victims
Corporation co-operated with investigation, made early admissions and/or voluntarily reported offending
Offending committed under previous director(s)/manager(s)
Little or no actual gain to corporation from offending

General principles to follow in setting a fine

The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and requires the court to take into account the financial circumstances of the offender.

Obtaining financial information

Companies and bodies delivering public or charitable services

Where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

1. *For companies:* annual accounts. Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to file audited accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships:* annual accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. Limited liability partnerships (LLPs) may be required to file audited accounts with Companies House. If adequate accounts are not produced on request, see paragraph 1.
3. *For local authorities, fire authorities and similar public bodies:* the Annual Revenue Budget ("ARB") is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

STEP FIVE **Adjustment of fine**

Having arrived at a fine level, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine. The court should 'step back' and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:

- the removal of all gain
- appropriate additional punishment, and
- deterrence

The fine may be adjusted to ensure that these objectives are met in a fair way. The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence.

The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties. In doing so the court should bear in mind that the payment of any compensation determined at step one should take priority over the payment of any fine.

The table below contains a **non-exhaustive** list of additional factual elements for the court to consider. The Court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

Factors to consider in adjusting the level of fine
Fine fulfils the objectives of punishment, deterrence and removal of gain
The value, worth or available means of the offender
Fine impairs offender's ability to make restitution to victims
Impact of fine on offender's ability to implement effective compliance programmes
Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
Impact of fine on performance of public or charitable function

STEP SIX

Consider any factors which would indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP SEVEN

Reduction for guilty pleas

The court should take into account any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP EIGHT

Ancillary Orders

In all cases the court must consider whether to make any ancillary orders.

STEP NINE

Totality principle

If sentencing an offender for more than one offence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP TEN

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

END OF EXCERPT

5.6 Deferred Prosecution Agreements in the UK

Like the US, the UK has begun utilizing DPAs as a method of disposition in corruption cases. The first DPA was entered into with Standard Bank Plc, which was indicted for failing to prevent corruption. Standard Bank agreed to pay \$25.2 million USD to the UK and a further

\$7 million in compensation to the Government of Tanzania, as well as costs of £330,000.⁹⁴ The UK's second corruption-related DPA was entered into by a company that cannot be named due to ongoing related prosecutions. This second DPA involved financial orders of £6.5 million.⁹⁵ For further discussion of DPAs in the US and UK, see Chapter 6, Sections 6.1 and 6.2 respectively.

6. CANADIAN SENTENCING LAW

6.1 Sentencing Principles in General

The general principles of sentencing are set out in the Canadian *Criminal Code*. Section 718 indicates that the fundamental purpose of sentencing is to impose a “just sanction” that contributes to respect for the law and to the maintenance of a safe society by pursuing one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims and the community;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to the victims and to the community.⁹⁶

The *Criminal Code* states that proportionality is the “fundamental” sentencing principle:

718.1 A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.⁹⁷

⁹⁴ Serious Fraud Office, “SFO agrees first UK DPA with Standard Bank” (30 November 2015), online: <<https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>>.

⁹⁵ Serious Fraud Office, “SFO Secures Second DPA” (8 July 2016), online: <<https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/>>.

⁹⁶ *Criminal Code*, RSC 1985, c C-46, s 718.

⁹⁷ *Ibid*, s 718.1.

Section 718.2 then sets out other sentencing principles:

- (1) sentences should be increased or decreased to account for aggravating or mitigating factors related to the offence or the offender;
- (2) parity – similar sentences for similar cases;
- (3) totality – “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh”;
- (4) restraint – use least restrictive sanction that is reasonable and appropriate in the circumstances.⁹⁸

For corruption offences, the courts have indicated that the objectives of denunciation and deterrence are usually primary. For example, in *R v Serre*, Justice Aitken stated:

It is well established that, in cases of this nature involving breach of trust by a public official, the most important objectives are general deterrence and denunciation. (See *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at 1138; *R. c. Wong*, [2005] Q.J. No. 22795 (C.Q.); *R. v. Zhang* 2006 QCCA 1534.) It has been held in numerous cases that breach of trust by a public official generally calls for a custodial sentence, even where there are significant mitigating factors. (See *R. v. MacInnis* (1991), 95 Nfld. & P.E.I.R. 332 (S.C.); *R. c. Wong*, [2005] Q.J. No. 22795 (C.Q.); *R. v. Zhang* 2006 QCCA 1534; *R. v. Macaluso*, 2006 QCCS 2301; *R. v. Blanas* (2006), 207 O.A.C. 226 (C.A.); *R. c. Liu*, 2006 QCCS 1211; and *R. v. Gonsalves-Barriero*, [2012] O.J. No. 4369 (Ct. J.)). All too frequently, white collar crime can appear to be harmless and victimless. However, it is anything but that. All Canadians, and our society as a whole, are victims when public officials breach the trust placed in them.⁹⁹

While the effectiveness of general deterrence is seriously questioned in the research literature on sentencing, courts nonetheless give considerable weight to deterrence on the basis of the choice and risk-reward calculation that corruption offences frequently embody. In *R v Drabinsky*, a corporate securities fraud case, the Ontario Court of Appeal stated:

The deterrent value of any sentence is a matter of controversy and speculation. However, it would seem that if the prospect of a long jail sentence will deter anyone from planning and committing a crime, it would deter people like the appellants who are intelligent individuals, well aware of potential consequences, and accustomed to weighing potential future risks against potential benefits before taking action.¹⁰⁰

⁹⁸ *Ibid*, s 718.2(b-e).

⁹⁹ *R v Serre*, 2013 ONSC 1732 at paras 28–29.

¹⁰⁰ *R v Drabinsky*, 2011 ONCA 582 at para 158.

6.2 Sentencing Principles for Corporations and Other Organizations

Section 718.21 of the *Criminal Code* sets out additional factors to be considered when a court is sentencing a corporation. The section states:

A court that imposes a sentence on an organization shall also take into consideration the following factors:

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not about to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to the public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of conduct that formed the basis of the offence;
- (g) whether the organization was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

While corporate entities cannot be sentenced to imprisonment, they can be fined or placed on probation with conditions. Section 732.1(3.1) sets out optional conditions that courts may impose when sentencing a corporation to probation:

(3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;

- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

(3.2) Before making an order under paragraph (3.1)(b), a court shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.

The Canadian *Criminal Code* does not have a set of detailed sentencing guidelines like those in the US or UK. The *Criminal Code* simply sets out the maximum sentence for each offence. For some offences, but not bribery or corruption offences, a mandatory minimum penalty is also prescribed. Starting points and ranges for some offences have been developed by appellate courts slowly over time. A starting point is the level (or quantum) of sentence that generally seems to fit for that type of offence. That starting point sentence can then be adjusted up or down depending on the aggravating and mitigating factors in each case. A range gives a court the low and high end of the quantum of sentence that is normally fit for that type of offence. Starting points and ranges are created through case law and are advisory, not mandatory. A starting point or range sentence is fine-tuned by the judge with consideration to aggravating and mitigating factors. For corruption offences, courts usually consider large bribes, bribes occurring over a long time and previous related convictions as significant aggravating factors. The courts typically consider a guilty plea as a mitigating factor but no specific percentage reduction for a guilty plea is suggested in Canadian case law. Self-reporting, cooperating with authorities and remorse are also cited as mitigating factors in corruption cases.

Corruption cases are often resolved by a bargained-for guilty plea. Part of the bargain may involve the prosecutor reducing the number or severity of offences charged. Another part of

the bargain will often involve the prosecutor and the defence agreeing on the sentence they will recommend to the judge. Canadian case law has consistently held that sentencing judges should follow a joint sentencing submission unless the submission is clearly and demonstrably unfit in regard to all of the circumstances, including the importance of having the case resolved by a negotiated guilty plea. If the judge is leaning toward rejecting the joint submission, the judge must give the Crown and defence an opportunity to further explain why the joint sentencing proposal is appropriate, or at least not demonstrably unfit.

6.3 Sentencing Cases for Domestic Corruption and Bribery

Bribery of judges, politicians and police officers is treated as the most serious type of bribery offence in Canada and is punishable by a maximum of 14 years imprisonment. As stated by Justice Fish, then of the Quebec Court of Appeal, “[a]ny attempt to corrupt a police officer amounts to an attack on the integrity of an important social institution. Where the purpose of the bribe is to pervert the course of justice, especially in relation to a serious crime, the offenders must be severely punished.”¹⁰¹ In *R v Kozitsyn*,¹⁰² the offender was sentenced to five months imprisonment and two years of probation for offering a bribe to a police officer. Kozitsyn had approached a police officer and proposed that if a massage parlor she was going to purchase was not issued tickets, she would make donations to a charity chosen by the officer. In a second meeting, which was taped, Kozitsyn repeated the offer of an unspecified amount of money derived from a percent of revenues, without reference to donations made to charity. In sentencing Kozitsyn, Justice Bourque noted that the amount offered would not have been insignificant, would have been paid over an extended period of time and could have led to further crimes and acts of corruption. Mitigating the sentence was Kozitsyn’s lack of a criminal record and some contrition. Justice Bourque also noted that the offender was from Russia, stating that “there are many cultural issues as to why Ms. Kozitsyn may have had some difficulty in coming to grips with the seriousness of the matter. I accept that she was born into and raised in a country which historically has problems with corruption at all levels of its society.”¹⁰³ Justice Bourque reviewed the following authorities on sentencing:

- 15 All of the cases that I’ve looked at strongly suggest that the bribery or attempted bribery of a person who is in position to directly affect the administration of justice, is an extremely serious matter and general deterrence is an important factor. Where there is not a joint submission, sentences have ranged anywhere from 90 days to 24 months in prison.
- 16 In *R. v. Dennis* [2001] O.J. No. 1983, the Superior Court judge refused to accept a joint submission for a conditional sentence [a sentence of

¹⁰¹ *R v De Francesco* (1998), 131 CCC (3d) 221 (Que CA) at para 42.

¹⁰² *R v Kozitsyn*, 2009 ONCJ 455 at para 26.

¹⁰³ *Ibid* at para 9.

imprisonment served at home] for a clerk in the Crown Attorney's office who accepted a bribe to remove some documents from a file. The trial judge sentenced her to 12 months in custody. The Court of Appeal at [2002] O.J. No. 237, found that the trial judge had not given sufficient reasons for departing from the joint submission and set aside the custodial sentence and imposed the conditional one which was initially the subject of the joint submission.

- 17 In *R. v. Dennis*, at last [sic] at the Superior Court level, the court refers to authorities from the Courts of Appeal in Alberta and Quebec. I realize that they are not binding upon me, however the[y] do give me some instruction. The longer sentence[s] of imprisonment in those cases involved factual situations where there is a background of organized crime and the actual bribery itself is a mere tip of the iceberg. Sentences range in those cases from six to 12 months.
- 18 In *R. v. Shaegal* [1984] O.J. No. 971, a decision of the Ontario Court of Appeal. The court imposed a sentence of 90 days on a man who contacted a police officer and attempted to bribe him to drop a shoplifting charge against him. The defendant in that case had no criminal record and was a teacher. It was clear that the affect [sic] on that defendant of the sentence would have been devastating to his career.¹⁰⁴

While the offering of a bribe to a public official is considered a serious offence, when a public official accepts or solicits a bribe, the breach of trust is highly aggravating. In *R v David*,¹⁰⁵ Justice Duncan sentenced the offender, a deputy sheriff, to four years in a penitentiary under section 120(a)(i) of the *Criminal Code*. This sentence ran concurrently to various other sentences, the longest being four years and nine months for possession of Schedule I drugs for the purposes of trafficking. David pled guilty to nine offences of possession of controlled substances for the purpose of trafficking and one count of bribery of an officer. Justice Duncan considered it aggravating that David was in a position of trust as a correctional officer and breached this trust by taking advantage of his reduced screening at the prison.¹⁰⁶

In *R v Ticne*,¹⁰⁷ a correctional officer was sentenced to 39 months in prison for bribery under section 120(a) of the *Criminal Code*. That sentence was concurrent to a 39-month sentence for obstruction of justice under section 139(2) of the *Criminal Code*. The offender assisted an inmate's escape based on the inmate's promise to pay \$50,000, which the offender never received. The Crown appealed, seeking a sentence of seven years. The majority of the British Columbia Court of Appeal dismissed the appeal, noting that appellate courts must give substantial deference to the sentences imposed by trial judges. Dissenting, Justice Frankel

¹⁰⁴ *Ibid* at paras 15-18.

¹⁰⁵ *R v David*, 2013 NSSC 83.

¹⁰⁶ *R v David*, 2013 NSSC 83 at paras 25, 78.

¹⁰⁷ *R v Ticne*, 2009 BCCA 191.

would have allowed the Crown's appeal. In his view, the appropriate range for these types of sentences was eight to twelve years. He stated:

The offences here can, individually and collectively, encompass a wide range of misconduct. What Mr. Ticne did approaches the worst-case end of that spectrum. In my view, absent mitigating factors, the need to maintain a properly functioning system for the detention of those whom our collective interest requires be detained, calls for the imposition of sentences close to the maximum permitted by law. Those who are prepared to accept a bribe to set a prisoner free are betraying the trust that has been placed in them. They should normally expect to be deprived of their own liberty for between eight and twelve years.¹⁰⁸

In *R v Morency*,¹⁰⁹ the offender received concurrent sentences of three years imprisonment for bribery and two years imprisonment for breach of trust. Morency, a Crown prosecutor, had been under suspicion for dubious practices. During an unrelated wiretap, a suspect spoke about bribing Morency to avoid a criminal record following an impaired driving arrest. A sting operation was put in place to see if Morency would intercede on another impaired driving offence, which he did. To assist in the sentencing decision, Justice Morand appended a table of 62 corruption-related cases in which the offender was a public official such as a prosecutor, police officer or politician.¹¹⁰ Justice Morand excluded sentences at the extreme ends of the range and provided the following broad outline of the table:

- Except in rare cases, the objectives of general deterrence and societal condemnation are predominant;
- In nearly a third of the decisions, the courts imposed prison sentences to be served in the community for periods varying between twelve months and two years less one day, the average being around eighteen months;
- In a majority of cases, the courts ordered prison sentences ranging between three months and six years; the average, however, was between two and a half and three years, despite the presence of numerous mitigating circumstances such as guilty pleas, the absence of criminal records, remorse, non-existent risks of re-offending, and social reintegration that was well underway or even assured;
- In most cases involving attorneys practising their profession, judges insisted on the importance of using the prison sentence to clearly express the particular seriousness of the offence when it is

¹⁰⁸ *Ibid* at para 28.

¹⁰⁹ *R v Morency*, 2012 QCCQ 4556.

¹¹⁰ *Ibid* at Schedule I.

committed by an officer of the court whose professional conduct must be completely honest.¹¹¹

6.3.1 Bribery and Breach of Trust of Government Officials and Employees

Bribery and other corruption offences committed by government officials and employees are punishable by a maximum sentence of five years imprisonment under sections 121-125 of the *Criminal Code*.

In *R v Murray*, the offender was sentenced to a two-year penitentiary term followed by a two-year probation order as well as an order of restitution.¹¹² Murray was the Director of Financial Services for the House of Assembly in Newfoundland and Labrador. Using this position, Murray falsified expense claims. An agreed statement of facts provided that Murray received close to \$400,000, which went directly to feeding a \$500 a day gambling addiction. Justice Fowler considered the addiction a mitigating circumstance, alongside Murray's lack of a previous record, assumption of responsibility, remorse for his actions, agreement to make restitution, early guilty plea and lack of danger to the community. However, Justice Fowler stated that the breach of a high level of trust and the long-term nature of the offence were serious aggravating factors. Justice Fowler noted that cases of this nature have a broad range of sentencing options, ranging from a conditional sentence to a penitentiary term, the upper reaches of which appeared to be in the four-year range.

In *R v Gyles*, Justice Wein of the Ontario Superior Court imposed a sentence of two years imprisonment for municipal corruption and a concurrent sentence of two-and-a-half years for breach of trust.¹¹³ In the following excerpt, Justice Wein provides a helpful overview of the case law for sentencing of these forms of bribery and corruption:

- 17 The maximum sentence for breach of trust by a public officer, under s. 122 of the *Criminal Code*, and for municipal corruption, under s. 123(1) of the *Criminal Code*, is five years' imprisonment. The range of conduct referred to in the caselaw, and consequently the range of sentences imposed on conviction, is quite broad.
- 18 The underlying wrong addressed by these offences is of fundamental importance in a democratic society. It is a self-evident and long-standing principle that no concealed pecuniary self-interest should bias the judgment of a public officer: *R. v. McKitka* (1982), 66 C.C.C. (2d) 164 (B.C.C.A.)
- 19 In some cases, where there has been a plea of guilty, where the offence was instigated by others, or where the offender was following orders

¹¹¹ *Ibid* at para 72.

¹¹² *R v Murray*, 2010 NLTD 44.

¹¹³ *R v Gyles*, [2003] OJ No 6249.

of senior officials, conditional sentences or even a fine have been found to be appropriate: *R. v. Bedard*, [2000] N.W.T.J. No. 90 (S.C.); *R. v. MacEachern*, [1999] P.E.I.J. No. 85 (S.C.); *R. v. Currie*, [1994] O.J. No. 1440 (Gen. Div.); *R. v. Power*, [1992] N.S.J. No. 311 (Co. Ct.).

- 20 All of these cases are distinguishable, as they involved mitigating factors not present here, such as a plea of guilty or lack of personal gain.
- 21 In more serious cases, such as those involving repeated conduct, significant amounts of money, or a well-planned scheme, substantial periods of incarceration ranging from mid to upper range reformatory through to penitentiary terms have been imposed or upheld on appeal: *R. v. Bergeron* (1972), 17 C.R.N.S. 85 (Que. C.A.) (one year plus fine); *R. v. Gorman* (1971), 4 C.C.C. (2d) 330 (Ont. C.A.) (two years less a day definite and one year indeterminate); *R. v. Robillard* (1985), 18 C.C.C. (3d) 266 (Que. C.A.) (one year for one offender, eight months for others); *R. v. McLaren*, [1995] S.J. No. 565 (Q.B.) (three and one half years total, including two years on breach of trust); *R. v. Gentile*, [1994] O.J. No. 4446 (Ont. Ct. Gen. Div.) per Van Camp J. (Sept. 20, 1994), (two years total); *R. v. Achtem* (1978), 13 C.R. (3d) 199 (Alta. C.A.) (three years); *R. v. Cooper (No. 2)* (1977), 35 C.C.C. (2d) 35 (Ont. C.A.) (eighteen months reduced to twelve months); *R. v. Boudreau* (1978), 39 C.C.C. (2d) 75 (N.S.S.C.(A.D.)) (twelve months); *R. v. McKitka*, [1982] B.C.J. No. 2258, 7 W.C.B. 527 (B.C.C.A.) (three years)
- 22 Each of these cases balances different factors. The sentencing decision in *Gentile* is comparable in some respects. *Gentile* was convicted of breach of trust in relation to his duties as a municipal councillor by accepting benefits from a developer. He received about \$164,000 over a two-year period in various benefits including restaurant billings, credit cards, clothing and debt repayment. Like Mr. Gyles, Mr. Gentile had a well-deserved reputation for his long-standing involvement in the community. He too had no prior record. Although he did not plead guilty, the trial was based on an issue of law and as a result the trial was greatly shortened. A sentence of two years in the penitentiary was imposed. The Crown persuasively argued that the type of conduct considered in *Gentile* could be said to be less serious, since it involved the exercise of a subtle influence by introducing a developer to other city councillors rather than a blatant demand for cash, akin to extortion, as in the case of Mr. Gyles. I agree that it is an important aggravating factor that Mr. Gyles instigated the offences, and that they were obvious bribes.
- 23 Similar cases have attracted penitentiary sentences. In *McKitka*, the mayor of a city was charged with breach of trust and municipal corruption. A three-year sentence was upheld on appeal. The Court

emphasized that “corruption in public services cannot be countenanced”. In *McLaren*, a sentence of three and a half years’ imprisonment in total was imposed on charges of fraud, theft and breach of trust. The offences had higher maximum penalties and the circumstances involved larger quantities of money, but the accused pleaded guilty. Two years concurrent was given on the breach of trust count. The court held that although a long sentence was not needed to deter or reform the accused, it was necessary to deter others and to maintain the public’s confidence in the administration of justice.

...

- 28 In general, it has been held that a serious breach of trust requires a sentence of incarceration:

... the crimes are serious. No violence, of course, but on the other hand, they involve the underhanded deceit of a person who, holding a position of confidence in the public service, undermines the system for personal gain. Such behaviour, in my view, calls for deterrence, ... which would give rise to a term of imprisonment. To hold otherwise, would in my view bring the administration of justice into disrepute.

R. v. Robillard (supra) at 273-4.

...

- 30 In this case, considering the inherent seriousness of the offences, the repetition of the crime in separate instances, the length of time involved, and the need for effective deterrence, it is my view that only a sentence of penitentiary length will suffice to meet the needs of justice. Mitigating factors such as a plea of guilty or genuine remorse that are present in cases where shorter sentences are imposed, are not present here. The contribution that Mr. Gyles can now make to his community is to serve as a warning to others who might be tempted to abuse a position of public power. Realistically, the only effective way he can do this is by serving a sentence of incarceration.
- 31 While the facts of this case may be considered as serious or even more serious than those that have led the other courts to impose sentences of up to three and a half years in the penitentiary, recognition should be given to the fact that Mr. Gyles is now almost 60, and suffering from some health problems, partly as a result of the stress relating to these court proceedings. Weight must be given to the fact of his prior record of long public service.¹¹⁴

¹¹⁴ *Ibid* at paras 17–31.

6.3.2 Corruptly Defrauding the Government

In many cases of corruption, there is an underlying offence such as fraud or theft. In some instances, the individual is charged with a corruption offence alongside an underlying offence; in other instances the underlying offence is the only offence charged. The latter phenomenon occurred in the well-known Federal Sponsorship scandal. The sponsorship program ran from 1996 to 2004, but was shut down after widespread corruption was discovered. Several individuals were charged. The sentences of those individuals are briefly summarized below.

Jean LaFleur pled guilty to 28 fraud charges against the federal government involving over \$1.5 million. The offences took place over three years and involved 76 fraudulent invoices. Justice Coupal sentenced LaFleur to 42 months imprisonment, as well as restitution payments, and a \$14,000 victim surcharge. Mitigating the offence was the absence of a criminal record, remorse and an early guilty plea – 22 days after being charged. Aggravating factors included the breach of public trust. Justice Coupal noted that Lafleur “derived significant financial benefit from public funds, which were gathered in part through income tax paid by honest citizens, most of whom can never hope for a financial situation comparable to that of the accused.”¹¹⁵

Charles Guite, a senior civil servant, was found guilty of five counts of fraud after a trial by jury. Justice Martin imposed a sentenced of 42 months. While Guite did not benefit from the fraud, his breach of trust and fiduciary duty were key aggravating factors. In his capacity as a senior civil servant, Guite awarded five contracts, two of which were fictitious and three of which resulted in little or no benefit to the government. The total value of the fictional contracts was over \$2 million. In sentencing Guite, Justice Martin stated:

- 16** The purpose of the Government's rules and regulations are of course to ensure transparency and fairness. It is only in this way that the citizenry can expect to receive value for money. Guité systematically flouted these rules in order to confer an advantage in excess as I have said of over two million (\$2,000,000) dollars upon Brault and Groupaction Marketing.
- 17** Having regard for the authority which he possessed a breach of financial duty is nothing short of a breach of trust. In the context of sentencing, it is an important aggravating factor.¹¹⁶

Paul Coffin pled guilty to 15 counts of fraud against the government, with an estimated loss exceeding \$1.5 million. At first instance, Coffin received a conditional sentence of two years less a day (which did not involve house arrest, but simply a 9 pm-7 am curfew). The Quebec Court of Appeal allowed the Crown's appeal and substituted a sentence of 18 months

¹¹⁵ *R v Lafleur*, 2007 QCCQ 6652 at para 37.

¹¹⁶ *R v Guite*, 2006 QCCS 3927.

incarceration.¹¹⁷ The Court referred to the 18-month sentence of imprisonment imposed in a very similar case.¹¹⁸ The Court then stated:

The fallacious argument that “stealing from the government is not really stealing” cannot be used to downplay the significance of this crime. The government of the country has no assets itself; rather, it manages sums common to all of its citizens. Defrauding the government is equivalent to stealing from one’s fellow citizens. The respondent drew up 373 fraudulent invoices, one by one, over a period of more than five years. This cannot be dismissed as a momentary lapse of judgment. We also should not lose sight of the total amount stolen nor of the additional fact that the respondent has made only partial restitution. Finally, even though the respondent’s actions do not amount to a breach of trust within the meaning of section 336 *Cr.C.*, the fact remains that he illegitimately took advantage of his privileged position to misappropriate public funds for his own personal use. In short, the crime committed by the respondent is a particularly serious one, and the trial judge should have taken this fact into account. Denunciation and deterrence are crucial objectives. Their significance was downplayed by the trial judge, even though he did acknowledge it during oral argument and in his judgment.¹¹⁹

In the last chapter of the sponsorship scandal, former Liberal party organizer Jacques Corriveau, considered the central figure in the sponsorship scandal, was convicted of fraud against the government, forgery and laundering proceeds of crime in November, 2016. Despite the fact that he was 83 years old, he was sentenced to four years in prison. He is appealing the verdict and the sentence.

6.4 Sentencing Cases for Corruption and Bribery of Foreign Public Officials

The *CFPOA* prohibits the bribery of foreign officials. Since 2013, the two offences under the *CFPOA* are both punishable by a maximum of 14 years imprisonment. As stated in Chapter 2, prior to 2013, the maximum penalty for bribery of a foreign public official was five years. Under sections 730 and 742.1 of the *Criminal Code*, conditional sentences and conditional or absolute discharges are not available for offences punishable by a maximum of fourteen years imprisonment.¹²⁰ Fines for organizations convicted under the *CFPOA* have no upper

¹¹⁷ *R v Coffin*, 2006 QCCA 471. *Coffin* also includes a comprehensive list of sentencing decisions in fraud cases (see under “Case law cited by the Crown”).

¹¹⁸ *R v Bogart* (2002), 61 OR (3d) 75, leave to appeal to SCC refused.

¹¹⁹ *Ibid* at paras 46-49.

¹²⁰ 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*: Transparency International Canada, *Review of Canada’s Implementation of UNCAC* (October 2013) at 9.

limit. The sentencing jurisprudence on the *CFPOA* is still very limited. To date, three corporations have been sentenced following plea agreements and one natural person was convicted at trial and sentenced.

The first corporation to be charged and convicted of a crime under the *CFPOA* was Hydro Kleen Systems.¹²¹ In *R v Watts*, Hydro Kleen, Mr. Watts (president and major shareholder of Hydro Kleen) and Ms. Bakke (Hydro Kleen's operations coordinator) were charged with bribing a foreign public official.¹²² Hydro Kleen engaged in business in the US. To facilitate the easier passage of their employees into the US, the company hired Garcia, an American immigration officer who was stationed at the Calgary airport. Garcia's services were retained through his company Genesis Solutions 2000.

The agreed statement of facts, reproduced as part of the judgment, provided:

- 50 Garcia's services were retained by Hydro Kleen Systems Inc. in order to reduce legal fees paid to immigration lawyers and also because he knew all of the subtleties of the United States law, particularly as they vary over time.
- 51 Garcia's services would better ensure that fewer, if any, difficulties would confront Hydro Kleen Systems Inc. or its employees in attempting to enter the United States.
- 56 In return for these payments, as an immigration consultant, Garcia attended the Hydro Kleen Systems Inc. offices in Red Deer from time to time and advised Hydro Kleen Systems Inc. employees on what to say when crossing the border. As part of the process, he exchanged emails and telephone calls with Hydro Kleen Systems Inc. employees.
- 57 Garcia also assisted Hydro Kleen Systems Inc. officials and employees in drafting letters and documents that the Hydro Kleen Systems employees would use to apply for L1 visas and/or to gain entry at United States port of entry.
- 58 Under the terms of his employment with the Immigration and Naturalization Services, Garcia was prohibited from taking on outside work without permission from his superiors. At no time did he advise his superiors of his work for Hydro Kleen Systems, nor did he have permission to do this work.
- 59 Bakke told one of the Hydro Kleen Systems Inc. employees, Lisa Thiessen, not to acknowledge Garcia's employment with Hydro Kleen Systems Inc. in the event of outside inquiries.

¹²¹ Norm Keith, *Canadian Anti-Corruption Law and Compliance* (LexisNexis Canada, 2013) at 115.

¹²² *R v Watts*, [2005] AJ No 568.

- 60 Watts told Randy Cooper that Hydro Kleen Systems Inc. had a United States immigration officer on the payroll as a consultant. He also told Cooper that on one occasion Garcia attended at the Hydro Kleen Systems Inc. offices in uniform and that he, Watts, asked Garcia to put on his overcoat so that the rest of the employees would not see him in his Immigration and Naturalization Services uniform.
- 61 Without the knowledge of Hydro Kleen Systems Inc. and without instructions from Hydro Kleen Systems Inc., Garcia undertook an investigation of a number of persons employed by firms in competition with Hydro Kleen Systems Inc. It was his opinion that these persons were illegally gaining entry into the United States.
- 62 In particular, his investigation focussed on employees of Hydro Kleen Systems Inc.'s competitors, namely Innovative Coke Expulsion Inc., which is referred to as ICE, and Eliminator Piggig, referred to as Eliminator.
- 64 As a result of Garcia's actions, these individuals were denied entry into the United States, in some cases after further questioning by Immigration and Naturalization Services' officers.¹²³

Under a plea agreement, Hydro Kleen pled guilty to making 33 payments totalling \$28,299.98 to an American immigration officer and the charges against Watts and Bakke were withdrawn. The Crown and defence made a joint submission suggesting a fine of \$25,000 against Hydro Kleen, which was accepted by the court.

At the sentencing hearing, the president of Innovative Coke Expulsion Inc, Hydro Kleen's competitor, read a victim impact statement indicating that Hydro Kleen's corrupt activities had a serious economic impact on his company, as well as a moral impact.¹²⁴ He stated that "the damage inflicted went beyond the monetary value of the corrupt payment to Garcia by Hydro Kleen Group. Our own employees questioned the point in maintaining our own ethical values. What's the use, was the most asked question."¹²⁵

As stated above, Justice Sirrs accepted the joint sentencing submission. Regarding the amount of the fine, Justice Sirrs stated that, "[w]hether a \$25,000 fine is significant or not, I

¹²³ In separate proceedings, Garcia was charged under the *Criminal Code* and pleaded guilty to accepting secret commissions. He was sentenced to six months imprisonment. The court rejected Garcia's argument that his sentence should be a conditional sentence (i.e., served in the community). The court was informed that Garcia would also be prosecuted in the US once his Canadian sentence was completed.

¹²⁴ Section 722 of the *Criminal Code* states: "For the purpose of determining the sentence to be imposed on an offender...the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence."

¹²⁵ *R v Watts*, [2005] AJ No 568 at paras 128-29.

can only determine that Mr. Beattie [the Crown prosecutor] must have canvassed the significance and the amount of the fine and what effect it might have on Hydro Kleen as being a significant amount.”¹²⁶ Justice Sirrs expressed some discomfort with the idea of Watts and Bakke escaping criminal conviction and punishment, stating that “[i]t bothers the court that these people are able to plea from a corporation to protect the operating minds of the company from the stigma attached to a criminal record. However, the court does take into consideration that the operating minds of this corporation do not escape with their integrity intact.”¹²⁷ Justice Sirrs also acknowledged the mitigating effect of a guilty plea:

In this case, I take into consideration Mr. Wilson's statements that a guilty plea has been entered. In these types of charges, especially the mens rea elements are difficult for the Crown to prove. A guilty plea means that a three-week trial was avoided, that the individual has accepted responsibility. A significant fine has been agreed to, and on those factors, I am not able to determine that the sentence is unfit and would thus justify my interference with the penalty arrangements that counsel have worked out amongst themselves.¹²⁸

In the Phase 3 Report on Implementing the OECD Convention in Canada, there was legitimate criticism of the sentence imposed in *Watts*. The authors of the report stated:

[G]iven that the fine imposed in Hydro Kleen amounted to less than the bribe given to the foreign public official, which was around CAD 30 000, no proceeds obtained from the bribery act were forfeited, no restitution appears to have been paid to the victim company, and the Court did not consider whether measures were taken by the company to prevent further foreign bribery acts, the lead examiners find it difficult to see how the penalty imposed in Hydro Kleen could be an effective general or specific deterrent. Moreover, it is difficult to see how the penalty imposed takes into account the main factors that the PPSC [Public Prosecution Services of Canada] told the lead examiners are to be considered on a case-by-case basis, according to the jurisprudence – i.e. the size of the bribe and the proceeds of the bribery, as well as the circumstances of the offence.¹²⁹

The first significant *CFPOA* conviction was in *R v Niko Resources Ltd.*¹³⁰ Niko Bangladesh, a wholly owned subsidiary of Niko Canada, gave a motor vehicle worth \$190,948 CAD and approximately \$5,000 as travel expenses to the Bangladeshi State Minister for Energy and

¹²⁶ *Ibid* at para 184.

¹²⁷ *Ibid* at para 185.

¹²⁸ *Ibid* at para 188.

¹²⁹ OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada* (March 2011) at para 58.

¹³⁰ *R v Niko Resources Ltd*, 101 WCB (2d) 118, 2011 CLB 37508 (Alta QB).

Mineral Resources in order to influence the Minister.¹³¹ Niko Canada acknowledged its funding of the acquisition of the vehicle and its responsibility under Canadian criminal law. A fine of \$8,260,000 and a 15% victim surcharge fine¹³² resulted in a total penalty of \$9,499,000.¹³³ In addition, Niko Resources was placed on probation for three years and was to bear the costs of the probation order.¹³⁴ In accepting the joint submission on sentencing, Justice Brooker stated:

58 The fine reflects that Niko Canada made these payments in order to persuade the Bangladeshi Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko, as well as to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts, which represented potentially very large amounts of money. The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister.

...

61 It is also agreed that the sentence imposed appropriately reflects the degree of planning and duration and complexity of the offence. It further accepts that Niko Canada did not attempt to conceal its assets,

¹³¹ As stated in the judgment: “The relationship between Niko Canada and Niko Bangladesh was as follows: Niko Canada is the public company which owned 100% of Niko Resources Caymans, which was a holding company. The holding company in turn owned 100% of Niko Bangladesh. Niko Bangladesh was incorporated in Barbados. Although it was not incorporated in Bangladesh it does, however, maintain an office in Dhaka, which is the capital city of Bangladesh. Niko Bangladesh was funded solely by Niko Canada. Typically, money was transferred from Niko Canada’s accounts in Calgary, to Niko Resources Caymans then to the Niko Bangladesh accounts in Barbados and finally to the Niko Bangladesh accounts in Bangladesh. The CEO of Niko Canada sat on the Board of Directors of Niko Bangladesh.” See *ibid* at paras 10, 11.

¹³² Note that the victim surcharge contributes to provincial victim services rather than the victims of a particular offence (which, in cases of foreign corrupt practices, would be citizens of the bribed official’s country).

¹³³ Poonam Puri notes that this sentence, when compared with *R v Watts*, is evidence of a “troubling lack of consistency” in enforcement of the *CFPOA*. Hydro Kleen’s fine was roughly equal to the amount of its bribe, whereas Niko Resources was required to pay a \$9.5 million fine for a \$200,000 bribe. See Jennifer Brown, “Are anti-corruption laws really tackling the problem?”, *Canadian Lawyer* (10 November 2014), online: <<http://www.canadianlawyermag.com/5350/Are-anti-corruption-laws-really-tackling-the-problem.html>>. On the other hand, the same judge a year later in *Griffiths Energy International* (discussed on the next page) imposed a fine of approximately \$10 million for a \$2 million bribe.

¹³⁴ Niko Resources was required to adhere to compliance requirements in the probation order. Under s 32.1 of the *Criminal Code*, courts may order implementation of policies or procedures to prevent future crimes. Boisvert et al point out that such probation orders are underused and could provide a valuable tool in foreign bribery cases: 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 47.

or convert them to show it was unable to pay the fine or comply with the Probation Order.

- 62 In addition the Probation Order takes into consideration steps already taken by Niko Canada to reduce the likelihood of it committing a subsequent related offence.
- 63 In addition the sentence takes into consideration the fact that the company has never been convicted of a similar offence nor has it been sanctioned by a regulatory body for a similar offence.
- ...
- 65 The plea agreement in this case also takes into consideration the fact that the company agreed to enter a plea prior to charges formally being laid, and that the company agreed to enter a guilty plea without the requirement of a preliminary hearing or trial.¹³⁵

The second significant *CFPOA* case is *R v Griffiths Energy International*.¹³⁶ In *Griffiths Energy*, the corporation paid a bribe of over \$2,000,000 to the wife of Chad's ambassador to Canada. The purpose of the bribe was to persuade the ambassador to use his influence and help Griffiths Energy International secure a production sharing contract in Chad. A joint submission of a \$9,000,000 fine and a 15% victim surcharge, for a total penalty of \$10,350,000, was accepted by the court. In this case, Justice Brooker stated:

- 8 The bribing of a foreign official by a Canadian company is a serious matter. As I said in *R. v. Niko Resources Ltd.*, such bribes, besides being an embarrassment to all Canadians, prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries; and where, as here, the bribe is to an official of a developing nation, it undermines the bureaucratic or governmental infrastructure for which the bribed official works.
- 9 Accordingly, the penalty imposed must be sufficient to show the Court's denunciation of such conduct as well as provide deterrence to other potential offenders.
-
- 14 The major aggravating factor in this case is the size of the bribe made. It was a considerable sum; far more than the Toyota Land Cruiser and trips in the *Niko* case.
- 15 On the other hand, there are a significant number of mitigating factors present in this case. There is a new management team at Griffiths. The people involved in authorizing the bribe are no longer with the

¹³⁵ *Ibid.*

¹³⁶ *R v Griffiths Energy International*, [2013] AJ No 412 (Alta QB).

company. Most importantly, in my view, when new management came in at Griffiths and discovered the bribe, they acted quickly and decisively to fully investigate the matter and they self-reported the crime to the various relevant law enforcement authorities. Conceivably, had they not done so, this crime might never have been discovered.

- 16 Then, having reported the matter, Griffiths cooperated fully with the authorities, sharing the results of their investigation with the authorities, including privileged information and documents which the authorities were not otherwise entitled to.
- 17 In the end, to borrow Ms. Robidoux's submission, Griffiths delivered to the RCMP the evidence package "nicely organized and ready for prosecution."
- 18 The cost of this investigation is said to be in the range of \$5 million and thus sharing this information with the RCMP has obviously saved the prosecution a significant amount of money.
- 19 Further, I am satisfied from the representations made to me that Griffiths has instituted an effective, comprehensive and robust anti-corruption program such that it is unlikely that there will be any repetition of such illegal conduct.

....

- 23 I have been referred by counsel to a number of American cases, but they are not particularly helpful given that the sentencing regime in the U.S. is quite different and involves grids, offence levels, culpability scores and advisory ranges. However, what the U.S. cases to which I have been referred demonstrate is a significant reduction in penalty for self-reporting and cooperation in the investigation. Thus, for example, in the *Maxwell Technologies Inc.* case of January 2011, a one-count indictment for a bribe of \$2.789 million to a foreign official resulted in an \$8 million fine, which represented an approximate 25 percent discount from the bottom of the advisory fine range because of the company's voluntary disclosure and cooperation with the Department of Justice in the U.S.
- 24 In the *Data Systems & Solutions LLC* case of June 2012, a bribe of \$339,000 resulted in a fine of \$8.82 million, which was approximately a 30 percent reduction from the bottom end of the advisory fine range. This reduction was said to recognize the company's extraordinary cooperation with the Department of Justice.
- 25 Based on the cases referred to me by counsel, the range of fine seems to run from a low of \$25,000 in Canada to a high of approximately \$12 million in the U.S.A.

- 26 I am satisfied, therefore, that the proposed fine of \$9 million is within the range.¹³⁷

R v Karigar was the first sentence imposed under the *CFPOA* on a natural person, as well as the first sentence following a conviction at trial rather than a guilty plea.¹³⁸ In *Karigar*, a total of \$450,000 in bribes was given, while the entire scheme contemplated payment of millions of dollars and stock benefits over time. The purpose of the bribes was to win a multi-million dollar contract to sell facial recognition software to Air India. The Crown sought a penalty of three to five years imprisonment while the defence sought a community-based sentence. Justice Hackland imposed a sentence of three years imprisonment. In so doing, Justice Hackland stated:

- 5 The over-arching principle here is that bribery of foreign public officials should be subject to similar sanctions as would be applied to the bribery of Canadian public officials occurring in Canada.

...

- 11 I would identify the following aggravating factors in this case.

- (a) This was a sophisticated and carefully planned bribery scheme intended to involve senior public officials at Air India and an Indian Cabinet Minister. If successful, it would have involved the payment of millions of dollars in bribes and stock benefits, over time. The sum of \$450,000 was advanced for the purpose of bribery while Mr. Karigar remained involved with this scheme.
- (b) In addition to the contemplated bribes, the accused's participation in the bidding process involved other circumstances of dishonesty such as the entry of a fake competitive bid to create the illusion of a competitive bidding process and the receipt and use of confidential insider information in the bid preparation.
- (c) The accused behaved throughout with a complete sense of entitlement, candidly relating to a Canadian trade commissioner that bribes had been paid and then urging the Canadian Government's assistance in closing the transaction.
- (d) Mr. Karigan personally conceived of and orchestrated the bribery proposal including providing the identity of the officials to be bribed and the amounts proposed to be paid as reflected in financial spreadsheets he helped to prepare.

¹³⁷ *Ibid.*

¹³⁸ *R v Karigar*, 2013 ONSC 5199 (conviction); 2014 ONSC 3093 (3-year sentence of imprisonment); 2017 ONCA 576 (conviction appeal dismissed); leave to appeal to SCC refused, March 15, 2018.

Mitigating Factors

12 I would identify the following mitigating factors:

- (a) There was a high level of co-operation on the accused's part concerning the conduct of this prosecution. Indeed he exposed the bribery scheme to the authorities following a falling out with his co-conspirators. He unsuccessfully sought an immunity agreement. A great deal of trial time was avoided as a result of the accused's extensive admissions concerning the documentary evidence.
- (b) Mr. Karigar appears to have been a respectable business man all of his working life, prior to his involvement in this matter. He has no prior criminal involvements. He is also in his late 60s and not in the best of health.
- (c) Of considerable importance is the fact that the entire bribery scheme was a complete failure. The accused and his co-conspirators failed to obtain the sought after contract with Air India, or any other benefits. The harm resulting from this scheme was likely restricted to the promotion of corruption among a limited group of foreign public officials.

...

36 The evidence in this case discloses that you had a leading role in a conspiracy to bribe Air India officials in what was undoubtedly a sophisticated scheme to win a tender for a Canadian based company. Canada's Treaty Obligations as well as the domestic case law from our Court of Appeal requires, in my view, that a sentence be pronounced that reflects the principals [*sic*] of deterrence and denunciation of your conduct. Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.¹³⁹

The Crown presented evidence of the OECD Working Group on Bribery's concerns about Canada's enforcement leniency in the *Watts* case as well as evidence on the US Sentencing Guidelines. Like Justice Brooker in *Niko Resources*, Justice Hackland mostly rejected the notion that sentencing in corruption cases in the US should be given much weight, stating:

- 8 While helpful background, I am of the view that this information is not directly relevant to the sentencing issues at hand. Similarly, the evidence of U.S. sentencing guidelines based on tariffs and somewhat

¹³⁹ *Ibid.*

similar British guidelines are simply inapplicable in Canada. I do however take notice of the obvious reality that the corruption of foreign public officials, particularly in developing countries, is enormously harmful and is likely to undermine the rule of law. The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by Canadian firms competing for business in those countries, must be disavowed. The need for sentences reflecting principles of general deterrence is clear.¹⁴⁰

Justice Hackland also noted that the offence carried a maximum penalty of 5 years at the time of the conviction although the maximum was subsequently raised to 14 years. According to Justice Hackland, the higher penalty illustrated “Parliament’s recognition of the seriousness of this offence and of Canada’s obligation to implement appropriate sanctions.”¹⁴¹ It is possible that, given the increase of the maximum penalty under the *CFPOA*, individuals convicted in similar circumstances in the future may face longer prison sentences.

Following Karigar’s sentencing, the RCMP charged three individuals in connection with the same scheme. Two of the individuals are US citizens and one is a UK citizen. The publication notes that the “willingness of Canadian officials to prosecute foreign citizens is a new development.”¹⁴²

The limited jurisprudence under the *CFPOA* makes it difficult to predict how sentencing for corruption of foreign public officials will be treated as more convictions are obtained. It is noteworthy that two of the four judgments rejected arguments relating to American jurisprudence. It seems clear that Canadian judges will continue to sentence on a case-by-case basis rather than attempting to define a scale by which certain conduct merits certain punishments akin to the sentencing guideline table used in the US. Factors such as the size of the bribe are and will continue to be important in determining the sentence, but unlike the US, where a large bribe or loss to the government can result in an escalation of the guideline range despite potentially significant mitigating factors, all factors will be considered and weighed in a more holistic sense.

Canadian judges do appear to be considering guilty pleas, cooperation and subsequent measures to improve *CFPOA* compliance as significant mitigating factors. This mirrors the approaches taken in the US and UK. All three jurisdictions have recognized that the

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid* at para 6. By increasing the maximum sentence for all forms of foreign bribery under the *CFPOA* to 14 years, Karigar’s form of bribery (punishable if committed domestically to a maximum of 5 years: s 121(1)(a) of the *Criminal Code*) is now punishable by a higher maximum when committed in respect to the foreign official in that case.

¹⁴² Shearman & Sterling LLP, *FCPA Digest – Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act* (January 2015) at 11, online: <<http://www.shearman.com/~media/Files/NewsInsights/Publications/2015/01/Recent-Trends-and-Patterns-only-LT-010515.pdf>>.

complexity of corruption leads to difficulty in uncovering corruption offences, as well as difficulties and costs in prosecuting these crimes.

However, as pointed out by Berman and Wansbrough, the benefits of self-reporting potential violations of the *CFPOA* are unclear due to limited jurisprudence and the lack of formal guidelines on leniency and immunity for self-reporting companies and individuals.¹⁴³ Griffiths Energy self-reported and received a smaller fine in relation to its bribe than Niko Resources, which cooperated, but did not self-report. However, other mitigating factors were at play in *Griffiths Energy*, such as the company's contribution to investigation costs. In *Karigar*, the mitigating effect of self-reporting was lessened by other aggravating factors. This indicates that the benefit of self-reporting depends on the facts of each case. Because of this uncertainty and lack of assurance, companies may be reluctant to self-report breaches of the *CFPOA*. As mentioned below in Section 8.6, some critics argue that the appeal of self-reporting is further reduced by Canada's relatively harsh debarment regime and the unavailability of DPAs or NPAs to avoid that regime.¹⁴⁴

7. CRIMINAL FORFEITURE

Criminal forfeiture is introduced in a general way in Chapter 5, Section 2.4.1. The laws and procedures for criminal forfeiture under UNCAC and the OECD Convention and in the US, UK and Canada are discussed in Sections 3.1, 3.2, 4.1, 4.2 and 4.3 respectively of Chapter 5.

8. DEBARMENT AS A COLLATERAL CONSEQUENCE OF A BRIBERY CONVICTION

Debarment is a sanctioning tool by which an individual or corporation convicted of a corruption offence may face a period of ineligibility from bidding on government contracts. For companies that rely on public contracts and tenders as a large portion of their business, the prospect of debarment is a significant additional punishment.¹⁴⁵ For example, after debarment, a company may lose clients, suffer reputational damage, face insolvency or even go out of business.¹⁴⁶ The debarment process can be complex and multiple variables must be

¹⁴³ Wendy Berman & Jonathan Wansbrough, "A Primer on Canada's Foreign Anti-Corruption Enforcement Regime" (Cassels Brock & Blackwell LLP, 2014) at 25, online: <<http://www.mondaq.com/canada/x/345442/White+Collar+Crime+Fraud/Risky+Business+A+Primer+on+Canadas+Foreign+AntiCorruption+Enforcement+Regime>>.

¹⁴⁴ John Manley, "Canada needs new tools to fight corporate wrongdoing", *The Globe and Mail* (29 May 2015).

¹⁴⁵ Nicholas Lord, *Regulating Corporate Bribery in International Business: Anti-Corruption in the UK and Germany* (Ashgate Publishing, 2014) at 113.

¹⁴⁶ *Ibid* at 113.

considered, such as the length of the debarment; whether it is automatic or discretionary; and the jurisdictions and organizations where the debarment applies.¹⁴⁷ Moreover, the impact of debarment can be multiplied by cross-debarment whereby departments, governments, or other institutions or organizations agree to mutually enforce each other's debarment actions. One such example is a cross-debarment agreement between the Multilateral Development Banks (MDBs), consisting of the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank and the World Bank Group. As stated by the MDBs, "cross debarment creates a formidable additional deterrent to firms and individuals engaged in fraud and corruption in MDB-financed development projects, and possibly provides an incentive for firms to clean up their operations."¹⁴⁸

8.1 UNCAC

Article 34

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.¹⁴⁹

The reference in Article 34 to "any other remedial action" is clearly broad enough to include debarment of offenders from participation in public procurement.

8.2 OECD

Article 3

Sanctions

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Commentary

Re paragraph 4:

¹⁴⁷ *Ibid* at 113.

¹⁴⁸ Asian Development Bank, *Cross Debarment – Agreement for Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks*, online: <<http://lnadbg4.adb.org/oai001p.nsf/>>.

¹⁴⁹ United Nations Convention Against Corruption, 9 to 11 December 2003, A/58/422, (entered into force 14 December 2005), online: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; *temporary or permanent disqualification from participation in public procurement* or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.¹⁵⁰ [Emphasis added.]

8.3 The World Bank

The World Bank, a supra-national organization set up by member states, is comprised of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank Group consists of the World Bank and three other supra-national agencies: the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID).

The World Bank and the World Bank Group provide billions of dollars in loans to developing countries every year, funding large-scale infrastructure projects throughout the developing world. To control corruption, the World Bank has developed its own sanctions system. Although the World Bank cannot impose criminal sanctions, debarment from bidding on World Bank-financed projects provides a powerful weapon and is the World Bank's default sanction.¹⁵¹ In the World Bank President's 2011 Address, then-President Robert B. Zoellich stated:

For more than 10 years, our sanctions system has played a crucial role within the Bank Group's anticorruption efforts. Sanctions protect Bank Group funds and member countries' development projects by excluding proven wrongdoers from our operations and financing. Sanctions also deter other participants or potential bidders in Bank Group-financed operations from engaging in fraud, collusion, or corruption. By holding companies and individuals accountable through a fair and robust process, the Bank Group's sanctions system promotes integrity and levels the playing field for those committed to clean business practices.

Being in the forefront of antifraud and anticorruption efforts among multilateral development institutions, the Bank Group has continually explored new structures and strategies to deal most effectively with allegations of fraud and corruption. These efforts led, for instance, to the

¹⁵⁰ OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, online: <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>.

¹⁵¹ Graham Steele, *Quebec's Bill 1: A Case Study in Anti-Corruption Legislation and the Barriers to Evidence-Based Law-Making* (LLM Thesis, Dalhousie University Faculty of Law, 2015) [unpublished] at 54, online: <<http://dalspace.library.dal.ca/handle/10222/56272>>.

establishment of the Sanctions Board in 2007 as a new and independent body providing final appellate review. Composed of a majority of external members since its establishment, the Sanctions Board has also been led by an external Chair since 2009. The Bank Group worked with the regional multilateral development banks to reach a groundbreaking agreement on cross-debarment in 2010. Those who cheat and steal from one will be debarred by all. Most recently, the Bank Group took a major step toward greater transparency and accountability by authorizing the publication of decisions in new sanctions cases initiated in 2011 and onward.¹⁵²

As of June 30, 2015, the World Bank has debarred or otherwise sanctioned over 700 firms and individuals.¹⁵³ The World Bank Sanctions Board considers the totality of the circumstances and all the potential aggravating and mitigating factors to determine an appropriate sanction.¹⁵⁴ The following excerpt is from the World Bank Sanctioning Procedures:

BEGINNING OF EXCERPT

ARTICLE IX

SANCTIONS

Section 9.01. Range of Possible Sanctions

- (a) *Reprimand.* The Respondent is reprimanded in the form of a formal “Letter of Reprimand” of the Respondent’s conduct.

¹⁵² The World Bank Group Sanctions Board, *Law Digest* (December 2011) at 5, online: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23065125~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.htm>>.

¹⁵³ The World Bank Office of Suspension and Debarment, *Report on Functions, Data and Lessons Learned 2007-2015*, 2nd ed (World Bank Publications, 2015) at 4 online: <<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/OSDReport.pdf>>.

¹⁵⁴ Sanctions Board Decision No 75 at para 27, online: <[http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/SanctionsBoardDecisionNo.75\(SanctionsCaseNo.260\).pdf](http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/SanctionsBoardDecisionNo.75(SanctionsCaseNo.260).pdf)>. The full World Bank Sanctions Procedures can be found at: <<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf>>. In an effort to promote transparency in the debarment process, The World Bank has produced a sanctions digest. Sanctions Board decisions can be found at: <<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,contentMDK:23059612~pagePK:64168445~piPK:64168309~theSitePK:3601046,00.htm>>.

- (b) **Conditional Non-Debarment.** The Respondent is required to comply with certain remedial, preventative or other conditions as a condition to avoid debarment from World Bank Group projects. Conditions may include (but are not limited to) verifiable actions taken to improve business governance, including the introduction, improvement and/or implementation of corporate compliance or ethics programs, restitution or disciplinary action against or reassignment of employees.
- (c) **Debarment.** The Respondent is subject to one or both of the following forms of ineligibility:
- (i) For cases subject to the Bank's Anti-Corruption, Procurement or Consultant Guidelines, the Respondent is declared ineligible, either indefinitely or for a stated period of time, (x) to be awarded a contract subject to such Guidelines for any Bank Project; (y) to be a nominated¹⁴ sub-contractor, consultant, manufacturer or supplier, or service provider of an otherwise eligible firm being awarded a Bank-financed contract; and (z) to receive the proceeds of any loan made by the Bank or otherwise to participate further in the preparation or implementation of any Bank Project; and
 - (ii) For cases involving the violation of a Material Term of the VDP Terms & Conditions, where the only applicable sanction shall be a ten (10)-year debarment, the Respondent shall be debarred for a period of ten (10) years, pursuant to sub-paragraph (i) above, as the Evaluation Officer or Sanctions Board, as the case may be, deems appropriate under the circumstances.

The ineligibility resulting from debarment shall extend across the operations of the World Bank Group. Debarment arising out of an IFC, MIGA or Bank Guarantee Project shall also render the Respondent ineligible to be awarded a contract for a Bank Project or to receive the proceeds of any loan made by the Bank or otherwise to participate further in the preparation or implementation of any Bank Project.

- (d) **Debarment with Conditional Release.** The Respondent is subject to one or more of the forms of ineligibility outlined in Section 9.01(c) and is released from debarment only if the Respondent demonstrates compliance with certain remedial, preventative or other conditions for release, after a minimum period of debarment. Conditions may include (but are not limited to) verifiable actions taken to improve business governance, including the introduction, improvement and/or implementation of corporate compliance or ethics programs, restitution or disciplinary action against or reassignment of employees. Debarment with conditional release shall also result in extension cross the operations of the World Bank Group as outlined in Section 9.01(c).

- (e) *Restitution or Remedy.* The Respondent is required to make restitution to the Borrower or to any other party or take actions to remedy the harm done by its misconduct.

Section 9.02. Factors Affecting the Sanction Decision

Except for cases involving violation of a Material Term of the VDP Terms & Conditions for which there is a mandatory ten (10)-year debarment, the Evaluation Officer or Sanctions Board, as the case may be, shall consider the following factors in determining an appropriate sanction:

- (a) the severity of the misconduct;
- (b) the magnitude of the harm caused by the misconduct;
- (c) interference by the sanctioned party in the Bank's investigation;
- (d) the sanctioned party's past history of misconduct as adjudicated by the Bank Group or by another multilateral development bank in cases governed by Article XII;
- (e) mitigating circumstances, including where the sanctioned party played a minor role in the misconduct, took voluntary corrective action or cooperated in the investigation or resolution of the case, including through settlement under Article XI;
- (f) breach of the confidentiality of the sanctions proceedings as provided for in Section 13.06;
- (g) in cases brought under Section 1.01(c)(ii) following a determination of non-responsibility, the period of ineligibility decided by the Director, GSD;
- (h) the period of temporary suspension already served by the sanctioned party; and
any other factor that the Evaluation Officer or Sanctions Board, as the case may be, reasonably deems relevant to the sanctioned party's culpability or responsibility in relation to the Sanctionable Practice.¹⁵⁵

END OF EXCERPT

In light of the gravity of the consequences of a World Bank debarment, some lawyers, particularly defence lawyers in the US, are wary of the fact that the World Bank is not required to follow any country's rules of procedure or subscribe to American concepts of

¹⁵⁵ World Bank Sanctioning Procedures (2011), online: <<http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf>>.

due process.¹⁵⁶ The World Bank has developed its own procedures, but in a global context it can be argued that those procedures do contain a healthy dose of due process. Cross-debarment is also criticized as unfair, since the various development banks involved have different investigation and sanctioning procedures.

8.4 US Law

Under the US *Federal Acquisition Regulations*, an individual or corporation can be debarred from federal contracts for a number of reasons, including bribery or the commission of an offence indicating a lack of business integrity. Debarment from one government agency typically results in debarment from other agencies.¹⁵⁷ In May 2014, the Government Accountability Office reported a dramatic increase in suspension and debarment actions, increasing from 19 in 2009 to 271 in 2013.¹⁵⁸

The decision to debar is not made by the DOJ or SEC, but rather designated officials in other affected agencies. The decision to debar is always discretionary. As the US debarment regulations state:

It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.¹⁵⁹

Causes for debarment include a conviction or civil judgment for commission of fraud or a criminal offense in conjunction with obtaining, attempting to obtain, or performing a public contract or sub-contract; commission of an offence indicating a lack of business integrity; and violating federal criminal law involving fraud, conflict of interest or gratuity violations.¹⁶⁰

¹⁵⁶ Julie DiMauro, "World Bank combats corruption – but questions linger about process" (22 May 2014), *The FCPA Blog*, online: <<http://www.fcpcablog.com/blog/2014/5/22/world-bank-combats-corruption-but-questions-linger-about-pro.html>>.

¹⁵⁷ United States Federal Register, "Executive Order 12549 - Debarment and Suspension", online: <<http://www.archives.gov/federal-register/codification/executive-order/12549.html>>.

¹⁵⁸ United States Government Accountability Office, "Federal Contracts and Grants" (2014) online: <<http://www.gao.gov/assets/670/663359.pdf>>.

¹⁵⁹ US Government Publishing Office, *Electronic Code of Federal Regulations - Subpart 9.4 - Debarment, Suspension, and Ineligibility* at 9.406-1, online: <http://www.ecfr.gov/cgi-bin/text-idx?SID=9c026b9ecb084babcf763d793f929f64&node=48:1.0.1.2.9.4&rgn=div6#se48.1.9_1406_61>.

¹⁶⁰ *Ibid* at 9406-2.

Factors considered by the debarment official include standards of conduct and internal controls, self-reporting in a timely manner, internal investigation, cooperation with external investigation, payment of any fines, disciplinary actions and remedial measures.¹⁶¹

The regulations state that the period of debarment shall be commensurate with the seriousness of the cause(s) and generally should not exceed three years. The period can be extended if necessary to protect government interest. Contractors can request a reduction based on reasons including reversal of conviction or civil judgment, bona fide change in ownership or management and elimination of other causes for which debarment was imposed.¹⁶²

In addition to public procurement debarment, *FCPA* violations may lead to ineligibility to receive export licenses and SEC suspension and debarment from the securities industry.¹⁶³

8.5 UK Law

The UK debarment provisions are found in the *Public Contracts Regulations 2006*. The regulations state:

Criteria for the rejection of economic operators

23.—(1) Subject to paragraph (2), a contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of any of the following offences—

- (a) conspiracy within the meaning of section 1 of the Criminal Law Act 1977(a) where that conspiracy relates to participation in a criminal organisation as defined in Article 2(1) of Council Joint Action 98/733/JHA(b);
- (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889(c) or section 1 of the Prevention of Corruption Act 1906(d);
- (c) the offence of bribery;
- (d) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of

¹⁶¹ *Ibid* at 9406-1.

¹⁶² *Ibid* at 9.406-4.

¹⁶³ See Robert W Tarun, *The Foreign Corrupt Practices Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners*, 3rd ed (American Bar Association, 2013) at 28. For the full list of the United States Federal Acquisition Regulations, see: <<http://www.acquisition.gov/far/>>.

the Convention relating to the protection of the financial interests of the European Union, within the meaning of—

- (i) the offence of cheating the Revenue;
 - (ii) the offence of conspiracy to defraud;
 - (iii) fraud or theft within the meaning of the Theft Act 1968(a) and the Theft Act 1978(b);
 - (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985(c);
 - (v) defrauding the Customs within the meaning of the Customs and Excise Management Act 1979(d) and the Value Added Tax Act 1994(e);
 - (vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993(f); or
 - (vii) destroying, defacing or concealing of documents or procuring the extension of a valuable security within the meaning of section 20 of the Theft Act 1968;
- (e) money laundering within the meaning of the Money Laundering Regulations 2003(g); or
- (f) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant State.

(2) In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a contracting authority may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator.

(3) A contracting authority may apply to the relevant competent authority to obtain further information regarding the economic operator and in particular details of convictions of the offences listed in paragraph (1) if it considers it needs such information to decide on any exclusion referred to in that paragraph.

(4) A contracting authority may treat an economic operator as ineligible or decide not to select an economic operator in accordance with these Regulations on one or more of the following grounds, namely that the economic operator—

...

- (d) has been convicted of a criminal offence relating to the conduct of his business or profession;
- (e) has committed an act of grave misconduct in the course of his business or profession;

The *Public Procurement (Miscellaneous Amendments) Regulations 2011* added section 1(ca), which adds convictions for “bribery within the meaning of section 1 or 6 of the Bribery Act 2010” to the list of offences leading to debarment.¹⁶⁴

8.6 Canadian Law

Public Works and Government Services Canada (PWGSC) is responsible for acquiring goods and services on behalf of the departments and agencies of the Government of Canada. PWGSC awards hundreds of contracts annually and spends more than \$6 billion per year.¹⁶⁵

It can be fairly stated that PWGSC has developed a strong framework to support accountability and integrity in its procurement process. This framework includes policies, procedures and governance measures to ensure fairness, openness and transparency. In the past 20 years, PWGSC has put in place many measures that demonstrate a real commitment to transparency and integrity in the federal government procurement process.

PWGSC is responsible for implementing the federal government’s debarment policies. The history leading up to Canada’s current debarment policies reflects a trend of increasing severity, resulting in resistance from the business community and various interest groups, followed by attempts to introduce greater leniency into the debarment regime.¹⁶⁶

In November 2007, PWGSC began including a *Code of Conduct for Procurement* in its solicitation documents.¹⁶⁷ This code included provisions relating to debarment. The intent was to use debarment to ensure that government contracts are awarded only to “reliable and dependable” contractors. The primary purpose of debarment was seen as preserving the integrity of the public procurement process.

¹⁶⁴ *Public Procurement (Miscellaneous Amendments) Regulations 2011*, SI 2011/2053, s 15, online: <http://www.legislation.gov.uk/ukxi/2011/2053/pdfs/ukxi_20112053_en.pdf>.

¹⁶⁵ Public Works and Government Services Canada, “Overview of the Department”, online: <<https://www.tpsgc-pwgsc.gc.ca/apropos-about/cdi-mbb/1/survol-overview-eng.html>>.

¹⁶⁶ To track the evolution of Canada’s debarment policies, see Public Works and Government Services Canada, “Integrity Provisions”, Policy Notification 107 (9 November 2012), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107>>; Public Works and Government Services Canada, “Integrity Provisions”, Policy Notification 107U1 (1 March 2014), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107U1>>; Public Works and Government Services Canada, “New Integrity Regime”, Policy Notification 107R1 (3 July 2015), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R1>>; Public Works and Government Services Canada, “Update to the Integrity Regime”, Policy Notification 107R2 (4 April 2016), online: <<https://buyandsell.gc.ca/policy-and-guidelines/policy-notifications/PN-107R2>>.

¹⁶⁷ The most recent version of the *Code of Conduct for Procurement* can be found online at <<https://www.tpsgc-pwgsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html>>.

In October 2010, PWGSC added the following categories of offences that would render suppliers ineligible to bid on procurement contracts:

- corruption;
- collusion;
- bid-rigging; and
- any other anti-competitive activity.

In July 2012, PWGSC established a formal “Integrity Framework.” The Integrity Framework set out a rules-based system that left no room for the exercise of discretion with respect to debarment. The Integrity Framework provided for automatic disqualification from bidding on public contracts if the company or any of its affiliates was convicted of a list of Canadian offences. Initially, conviction under a foreign offence did not result in automatic ineligibility. In addition to the list of offences set out in its previous debarment policies, PWGSC added the following new categories of offences that would render suppliers ineligible to bid on procurement contracts:

- money laundering;
- participation in activities of criminal organizations;
- income and excise tax evasion;
- bribing a foreign public official (e.g., contrary to Canada’s *Corruption of Foreign Public Officials Act*); and
- offences in relation to drugs.

In March 2014, PWGSC introduced several fundamental changes to the Integrity Framework. PWGSC added the following new categories of offences that would render suppliers ineligible to bid on procurement contracts:

- extortion;
- bribery of judicial officers;
- bribery of officers;
- secret commissions;
- criminal breach of contract;
- fraudulent manipulation of stock exchange transactions;
- prohibited insider trading;
- forgery and other offences resembling forgery; and
- falsification of books and documents.

PWGSC also amended the Integrity Framework such that convictions under offences in foreign jurisdictions that are “similar” to the listed Canadian offences would result in ineligibility. Germany-based Siemens was the first major government supplier to receive confirmation of its debarment under the “similar offences” provision of the Integrity

Framework.¹⁶⁸ Siemens paid a US\$1.6-billion fine after pleading guilty in 2008 to corruption-related offences in the US and Germany.¹⁶⁹

PWGSC also added a new automatic ineligibility time period: all suppliers convicted of a relevant offence became automatically debarred for ten years. Once the ten-year debarment period has passed, bidders have to certify that adequate measures have been put in place to avoid recurrence. Prime contractors were also required to apply the provisions of the Integrity Framework to their subcontractors.

The March 2014 expansion proved highly controversial. Businesses, NGOs, and bar associations argued that Canada's Integrity Framework had become so inflexible, punitive and far-reaching that it had become counterproductive to its primary objective—namely, preserving the integrity of the public procurement process. Key criticisms included the following:

- The strictness of the Integrity Framework could deprive the government, and the taxpaying public, of certain specialized expertise and high-quality goods and services.
- The policy's harshness and inflexibility discouraged companies from acknowledging and remediating wrongdoing. Companies were offered no strong incentives to cooperate with authorities or to seek to bring about wide-ranging cultural reforms within the corporation.
- The mandatory ten-year ineligibility period failed to provide any scope for reduction or leniency in light of the gravity of the offence or the supplier's remediation efforts. This rigid stance stood in contrast with the more flexible, forgiving position taken in the US, the EU, and other jurisdictions whose procurement regimes grant credit for mitigating circumstances and remediation efforts. Notably, Transparency International criticized the finality and rigidity of the ten-year debarment policy, pointing out that the World Bank's debarment policy "provides for regular third-party reviews of a company's compliance measures which provide an opportunity for the World Bank to determine if the company's debarment should be lifted."¹⁷⁰
- Debarment based on the commission of "similar" foreign offences, with PWGSC being the arbiter of what constitutes a "similar" foreign offence, was seen as being too subjective. In many cases, it could not be said with any certainty whether a particular foreign offence would be sufficiently "similar" to be captured under the

¹⁶⁸ Barrie McKenna, "Ottawa Could Face Lawsuits for Strict Corruption Rules: Report", *The Globe and Mail* (24 November 2014), online: <<http://www.theglobeandmail.com/report-on-business/international-business/ottawa-could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/>>.

¹⁶⁹ *Ibid.*

¹⁷⁰ Letter from Transparency International to the Honourable Diane Finley, Minister of Public Works and Government Services (17 February 2015) at 5.

Integrity Framework. Furthermore, concerns were raised about the unfairness of the severe consequences that would follow if a company were to be convicted in a foreign jurisdiction under circumstances that, in Canada, would be seen as unfair or unjust. Such a conviction would result in the company's being debarred in Canada without having a meaningful opportunity to contest the unfair conviction.

- The foreign affiliates policy meant that law-abiding Canadian companies could be held responsible for a distant affiliate's criminal conduct occurring abroad in circumstances where the Canadian company had no participation or involvement. This policy came under considerable scrutiny after PWGSC announced that it was investigating whether Hewlett Packard, the Government of Canada's largest computer hardware supplier, might be at risk of debarment due to the actions of an overseas affiliate.¹⁷¹ In 2014, a Russian subsidiary of Hewlett Packard entered a guilty plea in the US for violating anti-bribery provisions contained in the US FCPA.¹⁷² Executives of the Russian subsidiary had bribed Russian government officials for the purpose of securing government contracts. It soon became apparent that, in light of the Integrity Framework's provisions regarding "similar foreign offences" and affiliate responsibility, Hewlett Packard might be debarred in Canada.¹⁷³ Although fears over Hewlett Packard's potential debarment were never realized, the notion that an important and well-respected government supplier might be debarred for ten years, with existing contracts being either terminated or continued under strict monitoring, raised eyebrows.

In November 2014, *The Globe and Mail* reported that the federal government might face a challenge from the World Trade Organization and NAFTA investor lawsuits due to the strictness of Canada's debarment rules.¹⁷⁴ Further concerns were expressed over the implications for trade. The severity of Canada's debarment policy gave rise to the possibility that Canadian companies could face "tit-for-tat retaliation" by countries in which major companies that have been debarred are headquartered.¹⁷⁵

In response to these and other criticisms, PWGSC replaced the "Integrity Framework" with a new "Integrity Regime" on July 3, 2015.¹⁷⁶ The new Integrity Regime emphasizes the

¹⁷¹ Andy Blatchford, "Anti-Corruption Rules on Suppliers a Threat to Canadian Economy: Study", *Ottawa Citizen* (23 November 2014), online: <<http://ottawacitizen.com/news/national/anti-corruption-rules-on-suppliers-a-threat-to-canadian-economy-study>>.

¹⁷² *Ibid.* Hewlett Packard's Russian subsidiary was fined \$58.7 million USD for the FCPA violation.

¹⁷³ Robert A Glasgow, Brenda C Swick & Tyler Wentzell, "The First Test of the Supplier Integrity Rules", McCarthy Tétrault LLP (29 September 2014), online: <http://www.mccarthy.ca/article_detail.aspx?id=6895>.

¹⁷⁴ McKenna (24 November 2014).

¹⁷⁵ *Ibid.*

¹⁷⁶ See Public Works and Government Services Canada, "Government of Canada's Integrity Regime" (14 July 2016), online: <<http://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html>>. See also John W Boscarior & Robert A Glasgow, "Canada Implements New Integrity Regime for Public Procurement", McCarthy Tétrault LLP (6 July 2015), online: <http://www.mccarthy.ca/article_detail.aspx?id=7126>.

importance of fostering ethical business practices and reducing the risk of Canada entering into contracts with suppliers convicted of an offence linked to unethical business conduct. Some commentators have applauded the Integrity Regime for moving away from the notion of punishment and retribution and moving toward the goal of preserving the integrity of public procurement processes. However, many have observed that the new Integrity Regime is still strict in comparison to US, UK, and World Bank debarment regimes.

The debarment policy contained in the 2015 Integrity Regime is more lenient than that contained in the previous Integrity Framework in several ways. For the purposes of this section, three policy changes are particularly noteworthy.

- First, the new Integrity Regime eliminates automatic debarment of companies for an affiliate's conduct. Only where a supplier is found to have participated or been involved in the impugned conduct will the supplier be debarred. This can be seen as a significant improvement, enhancing both the fairness and logic of PWGSC's debarment policy.
- Second, the ten-year debarment period is no longer set in stone. Where a supplier can demonstrate that it has (1) cooperated with law enforcement and/or (2) undertaken remedial actions, the debarment period can be reduced by up to five years, though this will require that an administrative agreement be put in place whereby enforcement authorities can monitor the corporation's ongoing behaviour. (Note, however, that a conviction on a charge of fraud against the government [or section 120] under the *Criminal Code* or *Financial Administration Act* [see section 750(3) of the *Criminal Code*] results in *permanent* debarment unless a record suspension [or exemption by the Governor in Council] is obtained.) The possibility of receiving a shortened debarment period gives companies a compelling incentive to cooperate with authorities and to remedy the misconduct. This new policy is more forward-looking in orientation, rather than retributive, as compared to the previous Integrity Framework.
- Third, Barutciski and Kronby point out that the new regime increases transparency in the process of determining ineligibility through the addition of the "due process" provisions.¹⁷⁷ Burkett and Saunders, both practitioners specializing in white-collar crime at Baker McKenzie LLP in Toronto, summarize the due process provisions in the following terms:

Suppliers are notified of their ineligibility/suspension and provided information of the process(es) available to them. A supplier is able

¹⁷⁷ Milos Barutciski & Matthew Kronby, "The New Integrity Regime Still Tilts Toward Punishment", *The Globe and Mail* (13 July 2015), online: <<http://www.theglobeandmail.com/report-on-business/rob-commentary/new-integrity-regime-of-procurement-rules-still-tilts-toward-punishment/article25475524/>>. See also Sean Silcoff, "Industry Players Say Ottawa's Revised Integrity Rules Still Too Harsh", *The Globe and Mail* (7 July 2015), online: <<http://www.theglobeandmail.com/report-on-business/industry-players-say-ottawas-integrity-regime-still-unfair/article25334479/>>.

to come forward at any time and ask for an advanced determination. Upon a determination of ineligibility, the supplier would see their ineligibility period begin immediately. This will incent suppliers to come forward and proactively disclose wrongdoing. An administrative review process of the assessment of affiliates would be available to the supplier.

This process is a step in the right direction, as it provides for proactive advance determinations and a review process for the assessment of affiliates, which will oversee the factually complex issue of control, participation or involvement. The due process provision does not appear to cover the decision as to whether the period should be reduced from 10 to five years, however.¹⁷⁸

Under the new Integrity Regime, debarment remains, for the most part, automatic, not discretionary. The Integrity Regime provides for automatic debarment if the company or any members of its board of directors have, in the past three years, been found guilty of or have been discharged (absolutely or conditionally) from a list of offences under Canadian law or a similar foreign offence. All prospective suppliers must certify upon bidding that the company, its directors, and its affiliates have not been charged, convicted, or absolutely or conditionally discharged of the listed offences or similar foreign offences in the past three years. Providing a false or misleading certification is itself cause for debarment. A supplier already doing business with the Government of Canada may be suspended for up to 18 months if the supplier admits guilt to an offence listed in the Integrity Regime or is charged with such an offence. This provision is discretionary, rather than automatic.

Despite the changes to PWGSC's debarment policy, many commentators continue to criticize Canada's debarment regime for being too strict. Barutciski and Kronby argue that the new regime still "tilts too heavily toward punishment and retribution at the expense of promoting a fair and competitive public procurement market and value for the taxpayer."¹⁷⁹ The authors note that a five-year debarment "can still be a death penalty for some companies" and criticize the lack of flexibility and relief for companies that cooperate and implement remedial measures.¹⁸⁰ Barutciski and Kronby conclude that "[t]he new integrity regime fails to strike the right balance between punishment and deterrence of misconduct (principally

¹⁷⁸ Christopher Burkett & Matt Saunders, "The New Integrity Regime in Canada: Revised Debarment Rules Still Too Strict?", Baker McKenzie LLP (16 July 2015), online:

<<http://www.canadianfraudlaw.com/2015/07/the-new-integrity-regime-in-canada-revised-debarment-rules-still-too-strict/>>.

¹⁷⁹ Barutciski & Kronby, (13 July 2015). See also "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online:

<<http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>>.

¹⁸⁰ Barutciski & Kronby, *ibid*.

the domain of criminal law) and protecting the integrity of federal procurement and taxpayer dollars (the domain of procurement rules)."¹⁸¹

John Manley, President and CEO of the Business Council of Canada and former deputy prime minister, points out that corporations in Canada have a strong disincentive to self-report wrongdoing or cooperate in investigations, since a guilty plea or conviction triggers the harsh debarment regime, and deferred prosecution agreements (DPAs) remain unavailable in Canada.¹⁸² Manley advocates for the introduction of DPAs in Canada to incentivize cooperation and provide prosecutors with an additional tool for fighting corporate crime. On the other hand, Stephen Schneider, professor of sociology and criminology at Saint Mary's University, sees DPAs as a means of allowing corporations that are "too big to fail" to escape criminal liability, which makes corporations "more apt to behave badly."¹⁸³ For further discussion of DPAs, as well as the debate around whether such agreements should be made available in Canada, see Chapter 6, Section 3.

Some have expressed concerns that the strictness of Canada's debarment policies may leave the government unable to call upon the specialized expertise and in-depth knowledge of certain goods and services providers who have no close competitors.¹⁸⁴ This, in turn, can result in economic losses to the government, as well as harm to Canadian taxpayers.¹⁸⁵ An added concern is the detrimental impact the Integrity Regime's debarment policy may have on Canadian companies and their employees. Responding to the severity of Canada's debarment policies, a report commissioned by the Canadian Council of Chief Executives emphasizes that "[d]ebarment imposes a direct cost on the debarred firms, but also on innocent parties and society at large."¹⁸⁶ The report suggests that a "typical" major supplier headquartered overseas would lose sales of over CAD\$350 million per year and lay off 400 workers as a result of debarment, resulting in a net loss to the Canadian economy of over CAD\$1 billion over the ten-year debarment period.¹⁸⁷ The report raises concerns over the following potential collateral effects of Canada's debarment policy:

- (1) a reduction in the number of potential suppliers, which could lead to less variety, poorer quality, and higher prices;
- (2) supply-chain impacts, such as small- and medium-sized firms losing contracts due to suspensions of larger companies;

¹⁸¹ *Ibid.*

¹⁸² Manley (29 May 2015).

¹⁸³ Stephen Schneider, "Deferred Prosecution Won't Put a Dent in Corporate Crime", *The Globe and Mail* (2 June 2015), online: <<http://www.theglobeandmail.com/report-on-business/rob-commentary/deferred-prosecution-wont-put-a-dent-in-corporate-crime/article24758293/>>.

¹⁸⁴ "The 'Integrity Framework' Is Still Too Tough", Editorial, *The Globe and Mail* (8 July 2015), online: <<http://www.theglobeandmail.com/opinion/editorials/the-integrity-framework-is-still-too-tough/article25373384/>>.

¹⁸⁵ Blatchford (23 November 2014).

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

- (3) a “chilling effect” on foreign investment in Canada by firms concerned about the stigma of being debarred in a G7 country; and
- (4) the Canadian government’s procurement rules being out of step with, and harsher than, those in many other countries.¹⁸⁸

A further basis for criticism is that Canada’s approach to debarment remains uncodified. The US, by contrast, has legally codified its debarment provisions under the *Federal Acquisition Regulation*. Canada’s lack of codified debarment policies may leave contractors with a lack of certainty and predictability. Moreover, an uncodified debarment framework is not subject to the sort of legislative review and scrutiny it would otherwise receive if it were codified.

Commentators have argued that the harshness of the Integrity Regime provides a disincentive for companies to participate in the Canadian Competition Bureau’s immunity and leniency programs.¹⁸⁹ Under the Integrity Regime, companies are automatically debarred if they are convicted of cartel offences (e.g., conspiracies and bid-rigging), and no exception or allowance is made in this regard for parties who participate in the Competition Bureau’s immunity and leniency program. Since the success of the immunity and leniency program depends upon cartel participants being incentivized to come forward and cooperate in return for either full immunity from prosecution or a reduction in penalties, and since the Integrity Regime works against such incentives, companies may feel reluctant to cooperate with either the Competition Bureau or PWGSC.

In April 2016, PWGSC added a new requirement that all bidders, offerors, or suppliers provide a complete list of all foreign criminal charges and convictions pertaining to themselves, their affiliates and their proposed first-tier subcontractors that, to the best of the entity’s knowledge and belief, may be similar to one of the listed offences.¹⁹⁰ In submitting a bid, the bidder, offeror, or supplier must certify that it has provided a complete list. If, in the opinion of PWGSC, a supplier has provided a false or misleading certification or declaration, the supplier is rendered automatically ineligible for ten years. Barutciski et al. criticize the new reporting requirement in the following terms:

... the certification requirement with respect to affiliate charges and convictions, in conjunction with the severe penalty for false reporting, seems destined to create compliance nightmares for large multinational companies. Given the broad range of offences – both in Canada and abroad

¹⁸⁸ *Ibid.*

¹⁸⁹ See Mark Katz, “Canada’s Integrity Regime and Cartel Enforcement”, Davies Ward Phillips & Vineberg LLP (5 July 2016), online: <<http://kluwercompetitionlawblog.com/2016/07/05/canadas-integrity-regimeunintended-consequences-for-canadian-cartel-enforcement/>>.

¹⁹⁰ See Milos Barutciski et al, “Changes to Canada’s Integrity Regime for Public Procurement Create Onerous New Reporting Requirement”, Bennett Jones LLP (8 April 2016), online: <[https://www.bennettjones.com/Publications/Updates/Changes to Canada s Integrity Regime for Public Procurement Create Onerous New Reporting Requirement](https://www.bennettjones.com/Publications/Updates/Changes%20to%20Canada%20s%20Integrity%20Regime%20for%20Public%20Procurement%20Create%20Onerous%20New%20Reporting%20Requirement)>.

– that might be captured by the new provisions, and the obligation to include charges as well as convictions, this requirement will inject yet further compliance cost and uncertainty into the process for uncertain benefits from the standpoint of preserving integrity in government procurement as opposed to punishment.¹⁹¹

Currently, the government and private industry are at odds about certain aspects of debarment practice. SNC-Lavalin, Canada's largest engineering firm, is currently debarred by the World Bank for corruption relating to the Padma Bridge project (see Chapter 1). After SNC-Lavalin agreed with the World Bank to a ten-year ban, the RCMP laid corruption and fraud charges against SNC-Lavalin and two subsidiaries over alleged bribery in Libya. While the company disputes the charges, it argues that the strict Canadian debarment rules could destroy the company.¹⁹² In December, 2015, SNC-Lavalin became the first corporation to sign an administrative agreement under the new Integrity Regime, which confirmed the company's eligibility as a supplier to the Canadian government while the foreign bribery charges are pending.¹⁹³

In September 2017, the government of Canada instituted a public consultation, which they referred to as "expanding Canada's toolkit to address corporate wrongdoing."¹⁹⁴ A major focus of the consultation was on whether Canada should enhance its Integrity Regime by making its current suspension and debarment policies more flexible. The consultation included a discussion paper on possible enhancements to the Integrity Regime, setting out 10 issues or considerations that should be taken into account in deciding whether and how to alter the current suspension and debarment policies.¹⁹⁵ 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 more flexible (and often times more lenient) scheme for suspensions and debarments. In February 2018, the Canadian government published a report on its consultations.¹⁹⁶ The report indicates that the government received 45 online submissions on the possible adoption of a DPA scheme with

¹⁹¹ *Ibid.*

¹⁹² Barrie McKenna, "SNC Case Shows Downside of Ottawa's Strict Anti-Corruption Regime", *The Globe and Mail* (19 February 2014), online: <<http://www.theglobeandmail.com/report-on-business/snc-case-shows-downside-of-ottawas-strict-anti-corruption-regime/article23087586/>>.

¹⁹³ SNC-Lavalin, Press Release, "SNC-Lavalin Signs an Administrative Agreement under the Government of Canada's New Integrity Regime" (10 December 2015), online: <<http://www.snclavalin.com/en/administrative-agreement-under-canada-new-integrity-regime>>.

¹⁹⁴ See the Government of Canada's website devoted to the consultation: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/index-eng.html>>.

¹⁹⁵ Government of Canada, "Expanding Canada's Toolkit to Address Corporate Wrongdoing: The Integrity Regime Discussion Guide", online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/ar-cw/examiner-review-eng.html>>.

¹⁹⁶ 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>>.

43% from business, 30% from individuals, 20% from law enforcement and other justice sectors, and 7% from NGOs.¹⁹⁷ Government officials also held 40 meetings with 370 participants to hear their views (some on DPAs, others on suspensions, debarments and the Integrity Regime). On the key question related to whether more discretion in fixing periods of debarment is desirable, the report indicated that this question “garnered the most comments and strongest views.”¹⁹⁸ On this issue, the report states:

Time period

The majority of participants suggested that the time periods associated with ineligibility be reduced from the current 10 years (reducible to five), which was seen as too long. The principal view was to favour full discretion in the determination of a period of ineligibility, including the ability to reduce the period to zero.

Other views were for:

- an ineligibility period aligned with those of Canada's major trading partners
- a maximum period of between three and five years

Factors to determine time period

Many provided a list of factors to be taken into account when determining an appropriate ineligibility period with some noting that these should be published as part of the policy; others suggested that such factors be used as guidelines rather than be an exhaustive list. Most proposals for factors for consideration included:

- the severity of the offence committed
- self-reporting and cooperation with law enforcement
- taking corrective action
- establishing compliance programs
- efforts at restitution
- repeat offences

Other factors raised were:

- the consideration of the impacts on employees, the economy and government
- the inclusion of exemptions from debarment for participants in pre-existing cooperation programs, such as the Competition Bureau's Leniency program

¹⁹⁷ *Ibid* at 7.

¹⁹⁸ *Ibid* at 9.

There was a recognition that introducing a considerable amount of discretion into the Integrity Regime could pose risks of inconsistent decision making and reduced predictability in determination processes. Therefore, the importance of transparency and due process in the determination process was stressed, including:

- an opportunity for suppliers to present their side / facts and submissions
- the publication of guidelines governing the exercise of discretion
- procedures to appeal and to reduce debarment periods

The need to integrate a safe-harbour provision that would allow companies to self-disclose adverse information without being punished was identified. The possibility of a reassessment of the debarment decision after a certain amount of time was also raised.¹⁹⁹

Quebec's *Act Respecting Contracting by Public Bodies*²⁰⁰ contains a debarment policy similar in nature to PWGSC's current debarment policy. Quebec's legislation provides for automatic debarment from the public sector bidding process where the corporation has been found guilty of prescribed offences—including offences under the *CFPOA*—in the preceding five years.

For further commentary on Canada's Integrity Framework and the role of debarment within that framework, see Chapter 11, Section 6.4.4.

8.7 Applicability of Integrity Provisions to Other Government Departments

Other government departments and agencies can apply PWGSC's integrity provisions to their solicitations and contracts. In order to assist these departments and agencies in applying the integrity provisions, PWGSC conducts supplier checks under memoranda of understanding (MOUs). PWGSC has entered into an MOU with:

- Aboriginal Affairs and Northern Development Canada;
- Agriculture and Agri-Food Canada;
- Canada Revenue Agency;
- Defence Construction Canada;
- Employment and Social Development Canada;
- Jacques Cartier and Champlain Bridges Crown Corporation; and
- Shared Services Canada.

¹⁹⁹ *Ibid* at 9-10.

²⁰⁰ *Act Respecting Contracting by Public Bodies*, RSQ, c-65.

9. DISQUALIFICATION AS COMPANY DIRECTOR

9.1 Introduction

Convictions for serious criminal offences such as bribery have various collateral consequences, some mandatory and others discretionary. For example, a conviction for a serious offence can result in disqualification to hold a public office or ineligibility to travel to a foreign country. In this section, the possibility of disqualification from being a director or officer of a company is discussed.

9.2 US Law

Pursuant to the US *Securities Exchange Act*,²⁰¹ the SEC can apply to a federal court for permanent or temporary injunctive relief.²⁰² A court can prohibit conditionally, unconditionally or permanently any person who has violated securities laws and who demonstrates unfitness from serving as an officer or director.²⁰³ The standard for a bar was substantially broadened with the passing of the *Sarbanes Oxley Act*,²⁰⁴ which changed the standard from “substantial unfitness” to “unfitness.”²⁰⁵

The SEC itself cannot impose the remedy via an administrative proceeding; it must be done by a court, although a “voluntary” director disqualification may be negotiated by the SEC as part of a settlement agreement or a DPA.²⁰⁶ The courts have broad discretion to impose an appropriate remedy.²⁰⁷ When determining the previous standard of substantial unfitness, courts looked at the non-exhaustive “*Patel* factors”: “(1) the ‘egregiousness’ of the underlying securities law violation; (2) the defendant’s ‘repeat offender’ status; (3) the defendant’s ‘role’ or position when he engaged in the fraud; (4) the defendant’s degree of scienter; (5) the defendant’s economic stake in the violation; and (6) the likelihood that misconduct will recur.”²⁰⁸ These factors remain relevant under the new lower standard.

²⁰¹ *Securities Exchange Act*, 15 USC, § 78(d)(2) (1934).

²⁰² *Ibid*, § 21(d)(1); see also *Securities Act of 1933*, c 38, 48 Stat 74, in which a similar provision has been enacted in § 20(b).

²⁰³ *Securities Exchange Act*, *ibid*, § 21(d)(2); See also *Securities Act*, *ibid*, § 20 (e) for a similar provision.

²⁰⁴ *Sarbanes Oxley Act of 2002*, Pub L No 107-204, 116 STAT 745.

²⁰⁵ *Ibid*, § 305(1).

²⁰⁶ Michael Dailey, “Comment: Officer and Director Bars: Who is substantially unfit to serve after *Sarbanes-Oxley*?” (2003) 40 Hous L Rev 837 at 850.

²⁰⁷ *SEC v Patel*, 61 F (3d) 137 at 141; *SEC v Posner*, 16 F (3d) 520.

²⁰⁸ *Patel*, *ibid*; see also *SEC v Boey*, 2013 US LEXIS 102102 at 6-7 and *SEC v Dibella*, 2008 US LEXIS 109378 at 40, 2008 WL 6965807 for further discussion. See also *SEC v Selden*, 632 F Supp (2d) 91, 2009 US LEXIS 59214, in which the US District Court of Massachusetts expressly endorses the *Patel* factors.

Since a permanent bar may result in a “loss of livelihood and stigma,” courts require more than what would be required for a non-permanent bar.²⁰⁹ In fact, Congress intended that the permanent bar remedy be used with caution.²¹⁰ A court is required to first consider a conditional bar.²¹¹ The following four cases are examples of the courts’ approach to these officer or director bars.

In *SEC v Posner*,²¹² the US Second Circuit Court of Appeals upheld a permanent bar imposed by a US District Court.²¹³ The Court focused on the high degree of scienter in violating the securities laws, several past violations (including conspiracy, tax evasion and filing false tax returns), the high likelihood of future violations, and the fact that the defendants had refused to testify (the Court inferred that the defendants’ testimony would have negatively impacted their case). The Court stated that such a punishment would serve as a “sharp warning” to other violators.²¹⁴

In *SEC v Boey*, the US District Court of New Hampshire refused to issue a permanent bar because the Defendant had no prior history of violations and there was no plausible risk that he would reoffend.²¹⁵ Over a decade had passed since his violation. As such, a five-year bar was held to be sufficient. The Court also refused to issue a permanent injunction because adequate punishment had already been imposed (e.g., the five-year officer and director bar, a civil penalty and disgorgement).

In *SEC v Selden*, the US District Court of Massachusetts imposed a two-year officer and director bar along with other monetary penalties.²¹⁶ The Court noted that the offences were particularly serious because the defendant was a director and CEO, made misleading statements over several years and acted with a high degree of scienter. Although it was his first and only violation, there was a strong probability of reoccurrence. The Court also pointed out that the defendant had a minimal economic stake in the violation and that he cooperated with the investigation, although his acknowledgement of responsibility was “less than stellar.”

In *SEC v Dibella*, the US District Court of Connecticut refused both an officer and director bar and a permanent injunction.²¹⁷ The Court focused on the fact that the defendant was not

²⁰⁹ *Patel, ibid.*

²¹⁰ Dailey, (2003) at 851.

²¹¹ *SEC v Patel*, 61 F (3d) 137 at 142.

²¹² *SEC v Posner*, 16 F (3d) 520.

²¹³ See *SEC v Drexel Burnham Lambert Inc*, 837 F Supp 587, 1993 US LEXIS 17027 for the lower court’s reasons.

²¹⁴ *SEC v Posner*, 16 F (3d) 520 at 522.

²¹⁵ *SEC v Boey*, 2013 US LEXIS 102102 at 6-7.

²¹⁶ *SEC v Selden*, 632 F Supp (2d) 91.

²¹⁷ *SEC v Dibella*, 2008 US LEXIS 109378 at 40.

serving on any boards of publicly traded companies, had never served as an officer, had no prior history of violations and would be unlikely to commit an offence in the future.

9.3 UK Law

Individuals convicted of indictable offences in the management of a company face disqualification from being a director or officer of a company under the *Company Directors Disqualification Act 1986*. The disqualifications are mandatory in some circumstances and discretionary in other circumstances. The Act sets out the following provisions:

1 Disqualification orders: general.

- (1) In the circumstances specified below in this Act a court may, and under sections 6 and 9A shall, make against a person a disqualification order, that is to say an order that for a period specified in the order—
 - a) he shall not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court, and
 - b) he shall not act as an insolvency practitioner.
- (2) In each section of this Act which gives to a court power or, as the case may be, imposes on it the duty to make a disqualification order there is specified the maximum (and, in section 6, the minimum) period of disqualification which may or (as the case may be) must be imposed by means of the order and, unless the court otherwise orders, the period of disqualification so imposed shall begin at the end of the period of 21 days beginning with the date of the order.
- (3) Where a disqualification order is made against a person who is already subject to such an order or to a disqualification undertaking, the periods specified in those orders or, as the case may be, in the order and the undertaking shall run concurrently.
- (4) A disqualification order may be made on grounds which are or include matters other than criminal convictions, notwithstanding that the person in respect of whom it is to be made may be criminally liable in respect of those matters.

1A Disqualification undertakings: general.

- (1) In the circumstances specified in sections 7 and 8 the Secretary of State may accept a disqualification undertaking, that is to say an undertaking by any person that, for a period specified in the undertaking, the person—

- a) will not be a director of a company, act as receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of a court, and
 - b) will not act as an insolvency practitioner.
- (2) The maximum period which may be specified in a disqualification undertaking is 15 years; and the minimum period which may be specified in a disqualification undertaking under section 7 is two years.
- (3) Where a disqualification undertaking by a person who is already subject to such an undertaking or to a disqualification order is accepted, the periods specified in those undertakings or (as the case may be) the undertaking and the order shall run concurrently.
- (4) In determining whether to accept a disqualification undertaking by any person, the Secretary of State may take account of matters other than criminal convictions, notwithstanding that the person may be criminally liable in respect of those matters.²¹⁸

Disqualification can also occur by voluntary arrangement. In *R v Hibberd and another*, two company directors defrauded a bank and loan company of over £1.5 million.²¹⁹ The Court declined to make a disqualification order because such an order had already been made under a voluntary arrangement with the Department of Trade and Industry.²²⁰

The leading case on disqualification is the 1998 case of *R v Edwards*. In *Edwards*, the court stated:

The rationale behind the power to disqualify is the protection of the public from the activities of persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public. Frauds of the kind in this case archetypally give rise to a situation in which the exercise of the court's power is appropriate.²²¹

The Court in *Edwards* drew on guidance from the case of *R v Millard*, where disqualification was divided into three brackets:

- (i) the top bracket of disqualification for periods over ten years should be reserved for particularly serious cases. These may

²¹⁸ *Company Directors Disqualification Act 1986* (UK), c 46.

²¹⁹ *R v Hibberd and another*, [2009] EWCA Crim 652.

²²⁰ *Ibid* at para 3.

²²¹ *R v Edwards*, [1998] 2 Crim App R (S) 213 (sentencing reasons of Potter LJ.).

include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again.

- (ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is relatively not very serious.
- (iii) The middle bracket of disqualification from six to ten years should apply for serious cases which do not merit the top bracket.²²²

In *Edwards*, the offender was unemployed and persuaded to participate in a fraudulent enterprise as a director, a role for which he was inexperienced and unsuited. The Court found that a ten-year disqualification order was too harsh and substituted a three-year order.

In *R v Cadman*,²²³ the Court of Appeal Criminal Division reviewed a number of decisions regarding disqualification orders:

Sevenoaks Stationers (Retail) Limited [1991] CH 164, Court of Appeal Civil Division, dealt with an accountant who over five years with five separate companies which had all become insolvent had accrued total indebtedness of approximately £560,000. There were no audited accounts and he had traded whilst insolvent in relation to at least one company. This amounted to incompetence or negligence in a very marked degree falling short of dishonesty. His disqualification period was reduced to five years. This case is memorable for the trio of brackets it established, later to be adopted with approval in *Millard*. (1) The top bracket, periods over ten years, should be reserved for particularly serious cases. These may include cases where a doctor who has already one period of disqualification imposed upon him falls to be disqualified yet again. (2) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (3) The middle bracket of disqualification, from six to ten years, should apply to serious cases which do not merit the top bracket.

- 25. In *Millard* [1994] 15 Cr App R(S) 445 that approach was not only approved but applied so as to substitute for a 15-year disqualification one of eight years. An appellant had fraudulently traded using six company vehicles, creating a deficiency of £728,000-odd. He had been convicted and the fraudulent trading spanned nearly four years. He had three previous convictions for dishonesty. Miss Small readily accepts that what assistance that case can offer is tempered by its age.
- 26. *Robertson* [2006] EWCA Crim 1289 was an appellant of 49 and of good character. He was convicted of fraudulent trading during some six

²²² *R v Millard* [1994] 15 Crim App R 445.

²²³ *R v Cadman*, [2012] EWCA Crim 611.

months. His business defrauded the DFES in respect of an ILA. The department paid his company £1.4 million. His disqualification period, which was not challenged in the Court of Appeal, was five years.

27. *Sukhdabe Singh More* [2007] EWCA Crim 2832 was an appellant pleading guilty to one money laundering offence. Over some two months he had allowed his business account to be used to launder £136,000. He had two previous convictions for dishonesty. The Court of Appeal reduced his disqualification to three years.
28. *Jules Paul Simpson* [2007] EWCA Crim 1919 was an appellant who had pleaded guilty to conspiracy to defraud. For the last months of his legitimate business he carried on knowing it to be insolvent. The loss to creditors was £200,000. He was disqualified for six years.
29. *Nigel Corbin* (1984) 6 Cr App R(S) 17 is even older than Robertson but Miss Small prays it in aid since it featured an appellant involved with three originally legitimate businesses. Over 18 months he admitted nine counts of deception. A criminal bankruptcy order was made in the sum of £35,000. The Court of Appeal left untouched his disqualification period of five years.
30. In *Anthony Edwards* [1998] 2 Cr App R(S) 213 the assistance to this court lies in a comment:

“The rationale behind the power to disqualify is the protection of the public from ... persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public.”
31. In *Attorney General’s Reference No 88 of 2006* [2006] EWCA Crim 3254 the disqualification periods were in excess of six years, more often seen in cases involving carousel frauds. Those tended to involve greater sums and greater sophistication, making the perpetrators a great risk to the public if permitted to act in the management of companies in the future. The first three appellants had caused a £20 million loss over 16 months. To the clear astonishment of the Court of Appeal no disqualification period had been imposed in the court below. On the first three appellants the court imposed an eight year disqualification. The final appellant secured a benefit of £1.5 million during one month and was disqualified for four years.
32. In *Sheikh and Sheikh* [2011] 1 Cr App R(S) 12 the court upheld a ten year period of disqualification. The case featured illegal production of pirated DVDs. The appellants were 29 and 27. They had been convicted after a lengthy trial and there was no evidence of remorse. The turnover was in excess of £6 million. The offending lasted a number of years and

was very sophisticated, crossing international boundaries and exploiting vulnerable immigrants.

33. In *Brealy* [2010] EWCA Crim 1860 disqualification of a director convicted of corruption showed that for six years he had allowed a local counsellor to live rent free whilst being a director of a property business which required a number of building consents. The value of the non-payment of rent was some £34,000. The disqualified appellant was of good character, but the court said that his offending struck at the very heart of a democratic government. It was an aggravating feature that the offending continued for some six years. Five years' disqualification was upheld.

9.4 Canadian Law

Some provincial corporate statutes, including those in British Columbia and New Brunswick, have a “director disqualification” rule for persons convicted of certain offences. For example, a person is not qualified to become or to continue as a director of a British Columbia company for five years after the completion of a sentence for an offence in connection with the management of a business or an offence involving fraud.²²⁴ However, the *Canada Business Corporations Act*,²²⁵ the *Ontario Business Corporations Act*²²⁶ and most other provincial corporate statutes have no such disqualification provision.

However, disqualification can arise under provincial securities legislation. The powers of disqualification can be quite broad. For example, under section 127(1)(8) of the *Ontario Securities Act*, the Securities Commission may “in the public interest” make an order that “a person is prohibited from becoming or acting as a director or officer of any issuer [i.e., a company issuing securities under the *Ontario Securities Act*].”²²⁷ The “public interest” is a very broad term and includes prior acts of fraud and corruption. Other provincial securities legislation confer similar disqualification powers.

10. MONITORSHIP ORDERS

10.1 UNCAC and OECD

There is no specific mention in either Convention of imposing an independent monitor on a corporation that has been convicted of a corruption offence.

²²⁴ *British Columbia Business Corporations Act*, SBC 2002, c 57.

²²⁵ *Canada Business Corporations Act*, 1985 RSC 1985, c C-144.

²²⁶ *Ontario Business Corporations Act*, RSO 1990, c B.16.

²²⁷ *Ibid.*

10.2 US Law

According to Tarun, the imposition of an independent monitor on an offending corporation is a frequent condition of a DOJ or SEC settlement.²²⁸ Typically, the monitorship lasts for three years with the monitor filing two or three reports yearly with DOJ or SEC. The criteria for appointing monitors and the scope of their duties are set out in a DOJ policy memorandum known as the Morford Memorandum.²²⁹ Tarun notes that there is a trend “away from imposing three-year monitorships to lesser sanctions such as periodic reporting to the DOJ or SEC or the requirement of a corporate compliance consultant.”²³⁰

10.3 UK Law

There does not seem to be any specific legislative power authorizing the imposition of a monitorship order after a company is convicted of an offence of corruption or fraud. Nonetheless, Nicholls et al. describe at least three ways in which corporate behaviour can be monitored to prevent future criminal conduct.²³¹ First, a Serious Crime Prevention Order (SCPO) for up to five years can be made against a company convicted of a serious offence (which includes bribery and corruption) where there are reasonable grounds to believe such an order would prevent, restrict or disrupt involvement in future serious crime. The SCPO is a civil remedy imposed by courts and can involve a wide range of restrictions and notification conditions on the company’s conduct.²³²

Second, a court may impose, in addition to any other sentence, a Financial Reporting Order (FRO) on an individual or a company who has been convicted of an offence under sections 1, 2 or 6 of the *Bribery Act* if the Court “is satisfied that the risk of that person committing another listed offence is sufficiently high to justify the making of the order.”²³³ As noted by Nicholls et al., the FRO specifies the frequency with which financial reports must be filed and the financial details and supporting documents that must be in the financial reports.²³⁴ A FRO can be imposed for a maximum of 15 years.

Third, as Nicholls et al. report, the SFO has in recent years been moving to a US-style policy of resolving bribery allegations through plea agreements rather than trials.²³⁵ The SFO has a

²²⁸ Tarun (2013) at 288-89.

²²⁹ “Selection and Use of Monitors in Deferred Prosecution Agreements with Corporations” (7 March 2008), online: <<https://www.justice.gov/sites/default/files/dag/legacy/2008/04/15/dag-030708.pdf>>. The memo is reproduced in Tarun, *ibid*, as Appendix 9.

²³⁰ Tarun, *ibid* at 288.

²³¹ Nicholls et al (2011) at 212-14.

²³² *Ibid* at 212-13. The SCPO is authorized by the *Serious Crime Act 2007* (UK), c 27, ss 1-41 and Schedules 1 and 2.

²³³ *Serious Organized Crime and Police Act (SOCPA) 2005* (UK), c 15, s 76 as amended by the *Bribery Act 2010* (UK), c 23, Schedule 1, s 9.

²³⁴ Nicholls et al (2011) at 213.

²³⁵ *Ibid* at 213-14.

policy of encouraging corporate self-reporting of bribery in exchange for more lenient civil sanctions or criminal or administrative offences other than bribery, which do not involve debarment under the EU Public Procurement Directive.²³⁶ Nicholls et al. note that in addition to fines, the terms of a plea agreement could include monitoring and other matters such as the following:

- Civil recovery, to include the amount of the unlawful property, plus interest and costs;
- Independent monitoring (with an agreed and proportionate scope) by an appropriately qualified individual nominated by the corporation and agreed by the SFO;
- An agreed programme of culture change and training within the corporation;
- Dealing with individuals involved in the wrongdoing;
- Possible assistance from the SFO in settling with authorities in other relevant jurisdictions.²³⁷

Nicholls et al. also discuss a number of more recent SFO cases that reflect the SFO's tendency to not proceed with bribery charges (which entail debarment consequences) and allow companies to plead guilty instead to the offence of failing to maintain accurate business records under section 221 of the *Companies Act 1985*: see, e.g. *Balfour Beatty* case, *AMEC* case and the *BAE* case.²³⁸

10.4 Canadian Law

The *Canada Business Corporations Act*, along with those provincial corporate statutes modeled after the federal Act, does not contain a power to specifically impose a monitorship order on a corporation convicted of a serious crime of fraud or corruption.²³⁹ However, the provincial securities acts generally do have a power somewhat analogous to monitorship. For example, section 127(1)(4) of the *Ontario Securities Act* authorizes the Ontario Securities Commission to make an order in the public interest "that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Securities Commission."²⁴⁰

Under the 2015 Integrity Regime, quoted in Section 8.6 above, a third-party monitor may be imposed on a company through an administrative agreement if the company's ten-year debarment period is reduced, if a public interest exception to debarment is made, or if the company is suspended.

²³⁶ SFO Guidelines (2009) cited by Nicholls et al, *ibid* at 213-14.

²³⁷ *Ibid* at 214.

²³⁸ See *ibid* at 218-21 for a description of these cases.

²³⁹ *Canada Business Corporations Act*, RSC 1985, c C-44.

²⁴⁰ *Ontario Securities Act*, RSO 1990, c S.5.

Another route for monitoring a corporation is the use of a probation order. Organizations that are convicted of a *Criminal Code* offence, including fraud, bribery and corruption, can be placed on probation for a maximum of three years and the judge can impose, as conditions of that probation order, one or more of the following:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
 - (i) the offence of which the organization was convicted,
 - (ii) the sentence imposed by the court, and
 - (iii) any measures that the organization is taking – including any policies, standards and procedures established under paragraph (b) – to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.²⁴¹

Section 732.1(3.2) of the *Criminal Code* provides that before imposing the conditions in (b) above, the court “shall consider whether it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures referred to in that paragraph.”

²⁴¹ *Criminal Code*, RSC 1985, c C-46, s 732.1 (3.1).

PART B: CIVIL AND ADMINISTRATIVE ACTIONS AND REMEDIES

11. NON-CONVICTION BASED FORFEITURE

Non-conviction based (NCB) forfeiture is introduced in Section 2.4.2 of Chapter 5 (Asset Recovery). The law and procedures for NCB forfeiture under UNCAC, the OECD Convention and US, UK and Canadian law are discussed in Chapter 5 in Sections 3.1, 3.2, 4.1, 4.2 and 4.3 respectively.

12. CIVIL ACTIONS AND REMEDIES

Civil actions provide a means of deterring corruption and compensating victims. Victims of corruption can bring personal claims against corrupt actors for damages, for example in tort or contract. Punitive damages may also be awarded. Victims may also make proprietary claims to assets acquired through corruption, forcing the corrupt actor to return assets to their true owner. Disgorgement of profits is another tool used to punish wrongdoers and is frequently employed by the US SEC. Civil actions and remedies are dealt with more thoroughly in Sections 2.4.5 to 2.4.7 of Chapter 5 (Asset Recovery).

13. INTERNATIONAL INVESTMENT ARBITRATION

by Dmytro Galagan

[Section 13 was specifically written for this book by Dmytro Galagan, LL.M. candidate, Law Faculty, University of Victoria]

13.1 Introduction

Administrative, civil, and criminal actions and remedies against corrupt public officials, entities, and private individuals are instruments to directly combat corruption. In contrast, arbitration is a private and consensual dispute resolution mechanism where the disputants agree to submit their disputes to an independent decision maker whose judgment (an arbitral award) will be final and binding on the parties.²⁴² This system of dispute settlement has a long history, which may be traced back to medieval merchant guilds and even ancient

²⁴² Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford University Press, 2015), paras 1.04-1.05.

Greek mythology, and, at least at first sight, does not have much in common with the global fight against corruption.²⁴³

However, increasing involvement of States and State-owned enterprises in the globalized economy, as well as rising sophistication of regulatory and reporting schemes in various countries, inevitably leads to complex disputes arising out of international trade and investment transactions. For instance, the International Chamber of Commerce reported that in 13.1% of arbitration cases initiated in 2015, at least one of the parties was a State or parastatal entity.²⁴⁴ The following sections will demonstrate that in international arbitration, private investors and sovereign states may make allegations of corruption and use them either as a “sword” to seek compensation for the losses caused by corrupt public officials, or as a “shield” to escape liability in cases arising out of contracts or investments tainted by corruption.²⁴⁵ Therefore, the manner in which allegations of corruption are and should be

²⁴³ Gary Born, *International Commercial Arbitration*, 2nd ed (Kluwer Law International, 2014) at 6-70.

²⁴⁴ International Chamber of Commerce (ICC), “Statistics”, online: <<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>>.

²⁴⁵ For the most recent commentary on global corruption and international arbitration, see Domitille Baizeau & Richard Kreindler, eds, *Addressing Issues of Corruption in Commercial and Investment Arbitration* (Kluwer Law International, 2015); Utku Cosar, “Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Kluwer Law International, 2015) at 531; Zachary Douglas, “The Plea of Illegality in Investment Treaty Arbitration” (2014) 29:1 ICSID Rev 155; Yves Fortier, “Arbitrators, Corruption, and the Poetic Experience: ‘When Power Corrupts, Poetry Cleanses’” (2015) 31:3 Arb Intl 367; Jarrod Hepburn, “In Accordance with *Which* Host State Laws? Restoring the ‘Defence’ of Investor Illegality in Investment Arbitration” (2014) 5:3 J Intl Disp Settlement 531; Bruce Klaw, “State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities” (2015) 33:1 BJIL 60; Carolyn Lamm, Brody Greenwald & Kristen Young, “From *World Duty Free* to *Metal-Tech*: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption” (2014) 29:2 ICSID Rev 328; Carolyn Lamm & Andrea Menaker, “The Consequences of Corruption in Investor-State Arbitration” in Meg Kinnear et al, *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International, 2015) at 433-46; Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014); Aloysius Llamzon & Anthony Sinclair, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct” in Albert Jan van den Berg, ed, *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series (Kluwer Law International, 2015) at 451-530; Michael Losco, “Charting a New Course: *Metal-Tech v. Uzbekistan* and the Treatment of Corruption in Investment Arbitration” (2014) 64 Duke LJ 37; Michael Losco, “Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction” (2014) 63 Duke LJ 1201; Michael Nueber, “Corruption in International Commercial Arbitration – Selected Issues” in Christian Klausegger et al, eds, *Austrian Yearbook on International Arbitration* (Manz, 2015) at 3-13; Cecily Rose, “Circumstantial Evidence, Adverse Influences, and Findings of Corruption: *Metal-Tech Ltd. v. The Republic of Uzbekistan*” (2014) 15:3-4 J World Investment & Trade 747; Cecily Rose, “Questioning the Role of International Arbitration in the Fight against Corruption” (2014) 31:2 J Intl Arb 183; Dai Tamada, “Host States as Claimants: Corruption Allegations” in Shaheez Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Brill, 2015) at 103-22; Joe Tirado, Matthew Page & Daniel Meagher, “Corruption

dealt with in the international arbitration process, and the remedies arising therefrom, are important components in the fight against global corruption.

This section starts with a brief overview of the system of international arbitration to provide students and practitioners of anti-corruption law with a necessary background in this method of dispute resolution. It then outlines the reasons why parties may agree to arbitrate their disputes, including neutrality and flexibility of the procedure, enforceability of arbitration agreements, and the final and binding character of arbitral awards. This section also discusses cases where allegations of corruption were made by foreign investors and States, and concludes by formulating several principles on the treatment of corruption and bribery in international investment arbitration practice.

13.2 International Arbitration Explained

Arbitration, as stated above, is a dispute settlement mechanism where two or more parties (corporations, individuals or States) agree to refer their existing or future disputes to an individual, who is called a “single arbitrator,” or a group of persons collectively referred to as an “arbitral tribunal.” This subsection explains the differences between institutional and *ad hoc* arbitration, as well as between commercial and investment arbitration.

13.2.1 Institutional and *ad hoc* Arbitration

International arbitration exists in different forms and shapes. To begin with, arbitration can be either “institutional” or “*ad hoc*.”²⁴⁶ Institutional arbitrations are overseen by international organizations that may appoint members of arbitral tribunals, resolve challenges to arbitrators, designate the place of arbitration, fix the sum of the arbitrators’ fees or review drafts of arbitral awards to ensure their compliance with formal requirements. Arbitral institutions do not issue judgments on the merits of the parties’ dispute—that is the responsibility of the individuals selected by the parties or appointed by the institution—but ensure, within the limits of their authority, the smooth, speedy and cost-efficient conduct of the proceedings. Among the best-known arbitral institutions are the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), which was established by the American Arbitration Association (AAA), JAMS International, the Kuala Lumpur Regional Centre for Arbitration (KLRCA), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Center (SIAC), the Hong Kong International Arbitration Centre (HKIAC), and the Vienna International Arbitration Centre (VIAC). Where the parties

Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship” (2014) 29:2 ICSID Rev 493; Sergey Usoskin, “Illegal Investments and Actions Attributable to a State under International Law” in Shaheeza Lalani & Rodrigo Polanco, eds, *The Role of the State in Investor-State Arbitration* (Brill, 2015) at 334-49.

²⁴⁶ Born (2014) at 168–71.

agree to arbitrate their dispute at a particular arbitral institution, a set of procedural rules promulgated by such an institution applies to the proceedings.

In contrast, *ad hoc* arbitrations are not conducted under the auspices of a particular institution. Instead, the parties merely agree to arbitrate their disputes, rather than to litigate them in state courts, and may choose an appointing authority that will select the arbitrators if the parties cannot reach an agreement on this issue. The United Nations Commission on International Trade Law (UNCITRAL) has prepared a set of procedural rules that the parties may use to organize their arbitration proceedings.²⁴⁷

13.2.2 Commercial and Investment Arbitration

International arbitration is usually divided into “investment” arbitration, which may be either contract-based or treaty-based, and “commercial” arbitration. The boundary between these two categories sometimes gets blurry and largely depends on the definition of what constitutes an “investment.” In general, arbitration is deemed “commercial” if it concerns a dispute arising out of a purely commercial transaction, such as a contract for the sale of goods, and where the parties’ consent to arbitration is expressed in an arbitration clause contained in their contract. On the other hand, the subject matter of the dispute in international investment arbitration is an “expenditure to acquire property or assets to produce revenue; a capital outlay.”²⁴⁸ Consent to arbitrate the disputes with foreign investors may be found in an international treaty concluded between the investor’s “home state” and the “host state” where the investment was made (hence “treaty-based international investment arbitration”), in the host state’s domestic law on foreign investment, or in an investment contract between the foreign investor and the host state or its instrumentality, such as a ministry or a state-owned enterprise (hence “contract-based international investment arbitration”).

The backbone of the international investment treaty-based arbitration system is a web of more than 3,300 international investment agreements (IIAs), including 2,946 bilateral investment treaties (BITs) and 358 treaties with investment provisions (TIPs), such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT).²⁴⁹ Another important element of the investment protection regime is the ICSID Convention, which established the International Centre for Settlement of Investment Disputes (ICSID), a specialized arbitral institution that is part of the World Bank Group, together with the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the

²⁴⁷ UNCITRAL Arbitration Rules, available online at

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html>.

²⁴⁸ Bryan A Garner, ed, *Black’s Law Dictionary*, 10th ed (2014), “investment”.

²⁴⁹ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2016* (United Nations, 2016) at 101.

Multilateral Investment Guarantee Agency (MIGA).²⁵⁰ The US, UK, and Canada are all parties to the ICSID Convention, which entered into force for those countries on 14 October, 1966, 18 January, 1967 and 1 December, 2013, respectively.²⁵¹ The US is a party to 46 BITs and 67 TIPs, the UK is party to 106 BITs and 64 TIPs, and Canada is party to 38 BITs and 19 TIPs.²⁵²

International commercial and contract-based investment arbitration, and international treaty-based investment arbitration, both have a lot in common when one views how proceedings are conducted, how the evidence is admitted and how the tribunals issue procedural orders and awards.²⁵³ Furthermore, the same experienced commercial lawyers may act either as the arbitrators or the parties' counsel in different arbitration cases, and arbitration proceedings are governed by the same rules promulgated by the UNCITRAL or various arbitral institutions.

However, while the procedure and the personalities involved may be the same, contract-based and treaty-based arbitration are different in several significant ways. To begin with, parties to commercial transactions typically insert a clause into their contract agreeing to refer to arbitration any dispute arising out of or in connection with the contract. By contrast, the host state's consent to arbitration in an IIA is usually expressed as an open offer to arbitrate any future dispute with any investor-national of the counterparty state to the IIA, and such an offer is deemed to be accepted and becomes a binding arbitration agreement when the investor commences arbitration against the host state.²⁵⁴ For instance, the 2012 US Model BIT and the 2004 Canadian Model FIPA provide that a foreign investor may submit to arbitration a claim that the host state has breached an obligation under the treaty and the investor has thus incurred loss or damage,²⁵⁵ and the claimant may choose between submitting the claim for resolution under (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (if both the host state and the investor's home state are parties to the ICSID Convention), (ii) the ICSID Additional Facility Rules (if either the home state or the host state is a party to the ICSID Convention), (iii) the UNCITRAL Arbitration Rules, or (iv) any other arbitration rules agreed on between the investor and the host state.²⁵⁶

²⁵⁰ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159.

²⁵¹ ICSID, Database of Member States, online: <<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?ViewMembership=All>>.

²⁵² UNCTAD Investment Policy Hub, *International Investment Agreements Navigator*, online: <<http://investmentpolicyhub.unctad.org/IIA/IiasByCountry>>.

²⁵³ Aloysius Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014) at paras 5.06-5.07.

²⁵⁴ *Ibid* at para 5.11.

²⁵⁵ 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA), arts 22-23, online: <<http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>>; 2012 United States Model Bilateral Investment Treaty, art 24(1), online: <<http://www.state.gov/documents/organization/188371.pdf>>.

²⁵⁶ Canadian Model FIPA, *ibid*, art 27; US Model BIT, *ibid*, art 24(3).

This distinction has important implications as to the rules of law applicable to the merits of the dispute. In a purely commercial setting, the arbitral tribunal will resolve the parties' dispute in accordance with the national law applicable to the contract concluded by the parties. The parties may either agree on the applicable law themselves or, in the absence of such agreement, the arbitral tribunal will apply the law determined by the conflict-of-laws rules that the tribunal considers applicable.²⁵⁷ In contrast, in a treaty-based arbitration, a tribunal applies the relevant BIT or TIP and relevant rules and principles of public international law. A typical BIT requires each state party to accord to investors of the other state party treatment no less favorable than the treatment it accords, in like circumstances, to its own investors ("national treatment") and to investors of other state parties ("most-favored-nation treatment"), as well as to treat foreign investments fairly and equitably and accord them full protection and security.²⁵⁸ Furthermore, BITs prohibit either state party from nationalizing or expropriating an investment, either directly or indirectly through measures equivalent to expropriation or nationalization, unless the expropriation or nationalization is effected for a public purpose, in accordance with due process of law, in a non-discriminatory manner and with prompt, adequate and effective compensation.²⁵⁹

13.3 Why Parties Agree to Arbitrate

There are several reasons why arbitration has become the primary means for the settlement of international commercial and investment disputes.²⁶⁰ In general, this is because arbitration is often perceived as a "neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions."²⁶¹ This subsection concentrates on three distinct characteristics of international arbitration: (i) neutrality and flexibility, (ii) enforceability of arbitration agreements, and (iii) the final and binding nature of arbitral awards.

13.3.1 Neutrality and Flexibility

To begin with, international arbitration is neutral and flexible. Naturally, a party to a transaction may be hesitant to agree to litigate its disputes in the domestic courts of a State where the other party resides or has its place of business, as the party will face litigation in foreign courts, before foreign judges, in a foreign language and with the assistance of foreign

²⁵⁷ UNCITRAL Model Law on International Commercial Arbitration, art 28.

²⁵⁸ 2004 Canadian Model Foreign Investment Promotion and Protection Agreement (FIPA), arts 3-5, online: <<http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf>>; 2012 United States Model Bilateral Investment Treaty, arts 3-5, online: <<http://www.state.gov/documents/organization/188371.pdf>>.

²⁵⁹ Canadian Model FIPA, *ibid*, art 13; US Model BIT, *ibid*, art 6.

²⁶⁰ Blackaby et al, (2015), paras 1.94-1.107; Born, (2014) at 73-93.

²⁶¹ Born, *ibid* at 73.

legal counsel. This is particularly true in cases where one of the parties is located in a country with high corruption risk or is itself a sovereign state or state entity.

In international arbitration, the parties are free to agree on a neutral place and language of proceedings. For instance, a corporation from Germany and a state-owned enterprise from Indonesia may agree to arbitrate their disputes pursuant to the ICC Arbitration Rules with the proceedings being held in a major business center (such as Geneva, Hong Kong, London, New York, Paris or Singapore) in English. Furthermore, the parties are generally given an opportunity to participate in the selection of the tribunal (usually, both parties jointly choose a sole arbitrator or, if the arbitral tribunal is to consist of three arbitrators, each party may nominate one and the presiding arbitrator will be either agreed on by the two party-appointed arbitrators or chosen by the appointing authority), but each arbitrator is required to be and remain independent and impartial.

In other words, the parties are free to tailor their arbitration agreement to their wishes and the specifics of a particular transaction. For instance, if their venture concerns construction, exploration activities, insurance or the telecommunications business, the parties may provide for specialized procedures for presenting expert evidence or agree that prospective arbitrators have to possess certain technical expertise or be members of a particular professional association.

13.3.2 Enforceability of Arbitration Agreements

Another important characteristic of international arbitration is the enforceability of arbitration agreements. Article II(3) of the New York Convention, which is in force in some 156 states,²⁶² requires the courts to refer the parties to arbitration if one of them commences litigation in respect of a matter subject to an arbitration agreement.²⁶³ In the same manner, the US *Federal Arbitration Act*²⁶⁴ stipulates that court proceedings must be stayed where the matter in dispute is referable to arbitration. Similarly, the *Arbitration Act* in the UK provides for a stay of proceedings.²⁶⁵

In Canada, arbitration legislation adopted at federal, provincial and territorial levels is based on the UNCITRAL Model Law on International Commercial Arbitration,²⁶⁶ which states that:

²⁶² UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), Status [UNCITRAL Status], online:

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.

²⁶³ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739.

²⁶⁴ 9 USC 1, § 3.

²⁶⁵ *Arbitration Act 1996* (UK), c 23, s 9.

²⁶⁶ See Canada *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp); British Columbia *Arbitration Act*, RSBC 1996, c 55; Ontario *Arbitration Act*, 1991, SO 1991, c 17; Alberta *Arbitration Act*, RSA 2000, c A-43; UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* [UNCITRAL Model Law] (1985), with amendments as adopted in 2006, UNCITRAL Status (1958).

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.²⁶⁷

In conclusion, if a claim which is subject to an arbitration agreement is brought before the court in the US, UK or Canada, the court will stay the proceedings and refer the parties to arbitration, as long as the arbitration agreement is not null and void, inoperative or incapable of being performed. Furthermore, it is a well-established principle that an arbitration clause is deemed to be separate from the contract of which it forms a part and, as such, it survives the termination or invalidation of that contract.²⁶⁸

In the UK, the principle of the separability of an arbitration agreement is embodied in section 7 of the *Arbitration Act 1996*:

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

The UNCITRAL Model Law has a similar provision:

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.²⁶⁹

The principle of separability prevents parties from frustrating an arbitration agreement by attempting to terminate or invalidate the contract in which the arbitration clause appears. For instance, if a high-ranking public official solicits a bribe by threatening to terminate a procurement contract and the party refuses to comply, the arbitration clause in the contract remains valid and the dispute will be settled by independent and impartial arbitrators rather than courts in the public official's state. However, if the arbitration agreement itself was procured by corruption, the state courts would recognize it as null and void, and thus refuse to refer the matter to arbitration.

²⁶⁷ UNCITRAL Model Law (1985), art 8(1).

²⁶⁸ Blackaby et al (2015), at para 2.101.

²⁶⁹ UNCITRAL Model Law (1985), art 16(1).

13.3.3 Arbitral Awards Are Final and Binding

Not only are arbitration agreements enforceable, but the tribunal's awards are final and binding on the parties and may be enforced around the globe. In general, there is no possibility to appeal an arbitral award to a superior tribunal or national court, but a party may file an application with a competent state court to set the award aside on limited (mostly procedural) grounds. Also, under certain circumstances state courts may deny a request to enforce an arbitral award. This subsection gives an overview of setting aside and recognition and enforcement proceedings under the New York Convention, ICSID Convention, and national laws of the US, UK and Canada. It explains that state courts may set aside (or refuse to enforce) arbitral awards procured by corruption or based on an investment or commercial agreement tainted by corruption.

13.3.3.1 New York Convention

The New York Convention requires Contracting States to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”²⁷⁰ Article V(1) of the New York Convention provides that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if that party furnishes proof that (a) the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid; (b) the party against whom the award is invoked was not given proper notice or was otherwise unable to present his case; (c) the award contains decisions on matters beyond the scope of the submission to arbitration; (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority.

Furthermore, recognition and enforcement of an arbitral award may also be refused pursuant to Article V(2) of the New York Convention if the competent court in the country where recognition and enforcement is sought finds that (a) the subject matter of the dispute is not capable of settlement by arbitration under the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

If an award is based on a contract tainted by bribery or corruption, the courts may deny its enforcement on public policy grounds.²⁷¹ For instance, in an English case, the High Court of England and Wales refused to enforce an arbitral award ordering the respondent to pay commission to a public official because the court found that the commission was effectively

²⁷⁰ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739, art III.

²⁷¹ Born (2014) at 3673-74; Dirk Otto & Omaia Elwan, “Article V(2)” in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) at 372-73.

a bribe to be paid in exchange for the official procuring a contract between the respondent and a government entity.²⁷² Similarly, the Paris Court of Appeal denied enforcement of an award where the defendant used part of the commission fee to bribe Iranian officials.²⁷³ The Court noted that a “contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.”²⁷⁴

13.3.3.2 ICSID Convention

The ICSID Convention requires each contracting state to “recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”²⁷⁵ Execution of an award rendered by an ICSID tribunal will be governed by the laws concerning the execution of judgments in the State where execution is sought.²⁷⁶

ICSID awards are binding on the parties and may not be subject to any appeal.²⁷⁷ The ICSID Convention also does not provide for the possibility of arbitral awards to be set aside by national courts, but instead creates a self-contained annulment mechanism. Within 120 days after the date on which the award was rendered, a party may submit an application to the ICSID Secretary-General requesting annulment of the award.²⁷⁸ An *ad hoc* committee of three persons will be formed,²⁷⁹ which may annul an award only on the basis of the following grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.²⁸⁰

13.3.3.3 US

In the US, the *Federal Arbitration Act* provides that a court in the district where the award was made may, upon application of a party to the arbitration, make an order vacating the award if:

²⁷² *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*, [1988] 1 QB 448 (HC).

²⁷³ *European Gas Turbines SA v Westman International Ltd*, Court of Appeal, Paris, 30 September 1993 in XX Yearbook Commercial Arbitration 198 (1995).

²⁷⁴ *Ibid* at 202, para 6.

²⁷⁵ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159, art 54(1).

²⁷⁶ *Ibid*, art 54(3).

²⁷⁷ *Ibid*, art 53(1).

²⁷⁸ *Ibid*, art 51(1) & (2).

²⁷⁹ *Ibid*, art 52(3).

²⁸⁰ *Ibid*, art 52(1).

- (1) the award was procured by corruption, fraud, or undue means;
- (2) there was evident partiality or corruption in the arbitrators, or either of them;
- (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
- (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²⁸¹

Within three years after an arbitral award under the New York Convention is made, a party to the arbitration may apply for an order confirming the award as against any other party to the arbitration.²⁸² Federal district courts have original jurisdiction in proceedings for recognition and enforcement of foreign arbitral awards.²⁸³ The court will confirm the award unless it finds one of the grounds for refusal of recognition or enforcement specified in Article V of the New York Convention,²⁸⁴ which has been in force in the US since 29 December 1970.²⁸⁵

13.3.3.4 UK

In the UK, a party to arbitration proceedings may apply to a court to challenge the award of an arbitral tribunal as to its substantive jurisdiction or on the ground of a serious irregularity affecting the tribunal, the proceedings or the award.²⁸⁶ In this context, “serious irregularity” means any of the following, if the court considers that such an irregularity has caused or will cause substantial injustice to the applicant:

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;

²⁸¹ 9 USC 1, § 10(a).

²⁸² 9 USC 2, § 207.

²⁸³ 9 USC 2, § 203.

²⁸⁴ 9 USC 2, § 207.

²⁸⁵ UNCITRAL Status (1958).

²⁸⁶ *Arbitration Act 1996* (UK), c 23, ss 67(1) and 68(1).

- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.²⁸⁷

Also, unlike many other jurisdictions, the *Arbitration Act 1996* provides a party to arbitration proceedings with an opportunity to appeal to the court on a question of law arising out of an award made in the proceedings.²⁸⁸ An appeal may be brought only (a) with the agreement of all the other parties to the proceedings or (b) with the leave of the court.²⁸⁹ Leave to appeal will be given only if the court is satisfied that:

- (a) the determination of the question will substantially affect the rights of one or more of the parties,
- (b) the question is one which the tribunal was asked to determine,
- (c) on the basis of the findings of fact in the award
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.²⁹⁰

Any application or appeal must be brought within 28 days of the date of the award and may not be brought unless the applicant or appellant has already exhausted any available arbitral process of appeal or review.²⁹¹

The *Arbitration Act 1996* provides that a New York Convention award (i.e., an arbitral award made in the territory of a State which is a party to the New York Convention) is binding on the persons as between whom it was made and may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.²⁹² Recognition or enforcement of an award may be refused only on the grounds enumerated in Article V of the New York Convention,²⁹³ which has been in force in the UK since 23 December 1975.²⁹⁴

²⁸⁷ *Ibid*, s 68(2).

²⁸⁸ *Ibid*, s 69(1).

²⁸⁹ *Ibid*, s 69(2).

²⁹⁰ *Ibid*, s 69(3).

²⁹¹ *Ibid*, ss 70(3) and 70(2)(a).

²⁹² *Ibid*, ss 100(1) and 101(1)-(2).

²⁹³ *Ibid*, ss 103(1)-(4).

²⁹⁴ UNCITRAL Status (1958).

13.3.3.5 Canada

Under the UNCITRAL Model Law, which in Canada has been adopted at federal, provincial and territorial levels, recourse to a court to challenge an arbitral award is only available through an application for setting aside.²⁹⁵ The grounds for the setting aside of an arbitral award, enumerated in Article 34(2) of the UNCITRAL Model Law, mirror the grounds for refusal of recognition or enforcement of arbitral awards in Article V of the New York Convention.²⁹⁶ An application for setting aside must be made within three months after the date on which the party making the application received the award.²⁹⁷

An arbitral award, irrespective of the country in which it was made, must be recognized as binding and will be enforced upon application in writing to the competent court.²⁹⁸ The grounds for refusal of recognition or enforcement of arbitral awards, enumerated in Article 35(1) of the UNCITRAL Model Law, mirror those listed in Article V of the New York Convention, which has been in force in Canada since 10 August, 1986.²⁹⁹

13.4 Treatment of Allegations of Corruption in International Investment Arbitration

This subsection gives an overview of contract- and treaty-based international investment arbitration cases where parties made allegations of corruption. It shows that corruption has been invoked by private investors as claimants to seek compensation for the losses caused by the actions of corrupt public officials, and by States as respondents to escape liability in cases arising out of investments tainted by corruption.

13.4.1 Cases where Claimants Made Allegations of Corruption

Four cases described below show where the question of corruption was raised by the investors who alleged that public officials in the host state solicited bribes from them (*EDF*

²⁹⁵ *Ibid*, art 34(1).

²⁹⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 4739, arts V(1)(a)-(d) & V(2).

²⁹⁷ UNCITRAL Model Law (1985), art 34(3).

²⁹⁸ *Ibid*, art 35(1).

²⁹⁹ UNCITRAL Status (1958).

*v. Romania*³⁰⁰) or were corruptly influenced by the investors' competitors (*Methanex v. United States*,³⁰¹ *Oostergetel v. Slovakia*,³⁰² and *ECE and PANTA v. Czech Republic*³⁰³).

13.4.1.1 *Methanex v United States*

In *Methanex v United States*, the claimant initiated arbitration proceedings under Chapter 11 of NAFTA seeking compensation from the US in the amount of US\$970 million for losses caused by the State of California's ban on the sale and use of the gasoline additive MTBE, a key ingredient of which is methanol.³⁰⁴ Methanex, a Canadian producer of methanol, alleged that the then-California Governor Gray Davis' decision to issue the ban on MTBE was motivated by corruption, as the Governor received more than US\$200,000 in political campaign contributions from ADM, the principal US producer of ethanol.³⁰⁵

Although the tribunal ultimately found that it did not have jurisdiction over some of the claimant's claims and dismissed all other claims on their merits,³⁰⁶ the importance of this case is its approach to evaluating the evidence of corruption.³⁰⁷ Methanex invited the tribunal to base the finding of corruption on the totality of factual inferences and interpretations:

Counsel for Methanex's description of this methodology can be summarised, colloquially, as one of inviting the Tribunal to "connect the dots," i.e., while individual pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events, which will support Methanex's claims.³⁰⁸

The tribunal agreed with the methodology proposed by the claimant, but the dots did not connect for Methanex:

Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that all the relevant dots be assembled; and, second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a

³⁰⁰ *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009).

³⁰¹ *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).

³⁰² *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012).

³⁰³ *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013).

³⁰⁴ *Methanex Corporation v United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part I at para 1.

³⁰⁵ *Ibid*, Part I at para 5.

³⁰⁶ *Ibid*, Part VI at para 1.

³⁰⁷ Llamzon, (2014) at para 6.106.

³⁰⁸ *Methanex Corporation v United States of America*, (3 August 2005), Part III, Chapter B at para 2.

self-serving interpretation of each of those selected, may produce an account approximating verisimilitude, but it will not reflect what actually happened. Accordingly, the Tribunal will consider the various “dots” which Methanex has adduced - one-by-one and then together with certain key events (essentially additional, noteworthy dots) which Methanex does not adduce - in order to reach a conclusion about the factual assertions which Methanex has made. Some of Methanex’s proposed dots emerge as significant; others, as will be seen, do not qualify as such. In the end, the Tribunal finds it impossible plausibly to connect these dots in such a way as to support the claims set forth by Methanex.³⁰⁹

In particular, the tribunal observed that in the US, political campaigns at the federal and state level may accept private financial contributions, and “no rule of international law was suggested as evidence that the USA and other nations which allow private financial contributions in electoral campaigns are thereby in violation of international law.”³¹⁰ The tribunal also rejected Methanex’s suggestion that the fact that ADM hosted a “secret” dinner for Mr. Davis confirms an intent to favor ethanol and thus injure methanol producers (including Methanex).³¹¹ While the contribution of campaign funds, if made under circumstances that suggest a deal or a *quid pro quo*, could be unlawful and amount to a breach of NAFTA’s provisions on national treatment, minimum standard of treatment, and expropriation, Methanex itself acknowledged that it was unable to prove any *quid pro quo* or handshake deal.³¹²

13.4.1.2 *EDF v Romania*

In *EDF v Romania*, a UK company that formed two joint ventures with Romanian state-owned entities claimed that Romania failed to accord fair and equitable treatment to EDF’s investment. EDF claimed that the revocation of its duty-free store licenses and non-renewal of its lease agreements resulted from EDF’s refusal to pay US\$2.5 million in bribes allegedly solicited by the Prime Minister of Romania and other senior public officials.³¹³ The respondent denied the allegations of corruption and noted that the claimant did not provide “reliable evidence” that the numerous decision-makers involved in the process of deciding whether to extend the contract or to approve the act governing duty-free licenses “were even aware of, let alone influenced by, alleged bribes solicited by the Prime Minister’s staff members.”³¹⁴ The claimant did not report the alleged bribe solicitations when they occurred in August and October of 2001, but published them in a German newspaper in November, 2002, following which an investigation was opened by the Romanian Anti-Corruption

³⁰⁹ *Ibid*, Part III, Chapter B at para 3.

³¹⁰ *Ibid*, Part III, Chapter B at para 17.

³¹¹ *Ibid*, Part III, Chapter B at paras 34-46.

³¹² *Ibid*, Part III, Chapter B at paras 37-38.

³¹³ *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) at paras 1, 46, 101-106, 221-222.

³¹⁴ *Ibid* at para 144.

Authority (DNA).³¹⁵ The DNA has twice investigated the claimant's allegations of bribery solicitation and twice (in 2003 and 2006) rejected them, and the criminal courts in Romania have twice reviewed and affirmed the DNA's findings that the claimant's allegations are groundless.³¹⁶

The tribunal agreed that solicitation of bribes by the host state's officials would amount to a violation of the BIT, but ruled that the claimant failed to furnish "clear and convincing" evidence of the respondent's corruption:

The Tribunal shares the Claimant's view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that "exercising a State's discretion on the basis of corruption is a [...] fundamental breach of transparency and legitimate expectations." ... Respondent flatly denies that such a request for a corrupt payment was made. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.³¹⁷

Furthermore, the tribunal seemed to imply that, in order to attribute bribe solicitation by a public official to the official's state, the investor would need to prove, by clear and convincing evidence, that such a public official was soliciting the bribe "on behalf and for the account of the Government."

The burden of proof lies with the Claimant as the party alleging solicitation of a bribe. Clear and convincing evidence should have been produced by the Claimant showing not only that a bribe had been requested from Mr. Weil [the CEO of EDF], but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf and for the account of the Government authorities in Romania, so as to make the State liable in that respect. In the absence of such evidence, the Tribunal is compelled to draw the conclusion that Claimant did not sustain its burden of proof.³¹⁸

³¹⁵ *Ibid* at para 222.

³¹⁶ *Ibid* at para 228.

³¹⁷ *Ibid* at para 221 (internal quotations omitted).

³¹⁸ *Ibid* at para 232.

13.4.1.3 *Oostergetel v Slovakia*

In *Oostergetel v Slovakia*, the claimants contended that the bankruptcy proceedings of BCT, their investment vehicle, were conducted in an illegitimate manner.³¹⁹ They alleged that, possibly due to corruption, the state officials involved in the bankruptcy proceedings (tax authorities, ministers, judges and trustees) supported the so-called “Slovak financial mafia” in depriving the claimants of their real estate.³²⁰

With regard to the claimants’ allegation that they were denied justice in the Slovak courts, the tribunal observed that despite the seriousness of the allegations of corruption and conspiracy to ruin the claimants’ investment, the investors “made no serious attempt to establish that the adjudication of the bankruptcy of BCT by the Slovak Courts was so bereft of a basis in law that the judgment was in effect arbitrary or malicious.”³²¹ The claimants appealed the adjudication of bankruptcy only on procedural grounds (and did not contest the substantive reasons for the bankruptcy), and the claimants’ own legal expert largely supported the correctness of the proceedings.³²² Accordingly, the tribunal rejected the claimants’ allegations of a denial of justice:

296. In light of these statements, it is clear that a claim for denial of justice must fail. The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.

297. Even accepting that irregularities did occur in the course of the proceedings, the record shows that the bankruptcy of BCT was the lawful consequence of the Claimants’ persistent default on their tax debts, and no proof was found that the State organs conspired with the so-called “financial” or “bankruptcy mafia” against the investors or their investment in the Slovak Republic.³²³

The tribunal was also not convinced by the claimants’ suggestion that bribery was a possible explanation for the alleged conduct of the relevant public officials. The claimants relied on

³¹⁹ *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012) at para 88.

³²⁰ *Ibid* at paras 92-93, 178.

³²¹ *Ibid* at para 292.

³²² *Ibid*.

³²³ *Ibid* at paras 296-97.

general reports about corruption in Slovak courts, local news clippings concerning irregularities in bankruptcy proceedings handled by the Regional Court of Bratislava, and reports by the European Union and US which mentioned that bribery is widespread in Slovak courts:

While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence. In the present case, both are entirely lacking. Mere insinuations cannot meet the burden of proof which rests on the Claimants.³²⁴

13.4.1.4 *ECE and PANTA v Czech Republic*

In *ECE and PANTA v Czech Republic*, the dispute arose out of an unsuccessful real estate project attempted by two German investors in the Czech Republic.³²⁵ The claimants alleged that the conduct of the Czech authorities in respect to permits required for the construction of a shopping center resulted in excessive delays and ultimately left the claimants no choice but to abandon their investment.³²⁶ The claimants thus sought compensation for the alleged breaches of their treaty rights to fair and equitable treatment, admission of lawful investments, non-discrimination and protection against arbitrary measures, as well as for expropriation.³²⁷ The investors admitted that they had no direct proof that a competitor bribed officials to halt their permit applications, but presented what they believed to be “numerous serious indices that leave no other option but to conclude that a corruption scheme exists.”³²⁸ The claimants cited several NGO reports on systematic corruption in the Czech Republic generally and the city in which the proposed project was located.³²⁹ The claimants also relied on the testimony of a Czech lawyer who was involved in advising ECE on the permit proceedings. She testified that local officials admitted to her that they had been instructed to obstruct the permit proceedings.³³⁰

The tribunal noted that it “cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof”³³¹ and accepted that it had

³²⁴ *Ibid* at paras 302-303 (internal quotations omitted).

³²⁵ *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013) at paras 1.1-1.4, 1.9-1.15.

³²⁶ *Ibid* at paras 1.13, 4.1-4.7.

³²⁷ *Ibid* at paras 1.14, 4.8-4.22.

³²⁸ *Ibid* at para 4.394.

³²⁹ *Ibid* at paras 4.846-4.847.

³³⁰ *Ibid* at paras 4.848-4.849.

³³¹ *Ibid* at para 4.871.

to “examine with care the facts alleged to prove corruption.”³³² However, as in *Methanex v United States*, the “dots” did not connect for the claimants who alleged corruption:

4.876 When considering the Claimants’ evidence the Tribunal has borne in mind the difficulties of obtaining evidence of corruption. It is well aware that acts of corruption are rarely admitted or documented and that tribunals have discussed the need to “connect the dots”. At the same time, the allegations that have been made are very serious indeed. Not only would they (if true) involve criminal liability on the part of a number of named individuals, they also implicate the reputation, commercial and legal interests of various business undertakings which are not party to these proceedings and which are not represented before the Tribunal. Corruption is a charge which an arbitral tribunal must take seriously. At the same time, it is a charge that should not be made lightly, and the Tribunal is bound to express its reservations as to whether it is acceptable for charges of that level of seriousness to be advanced without either some direct evidence or compelling circumstantial evidence. That said, the Tribunal must of course decide the case on the basis of the evidence before it. If the burden of proof is not discharged, the allegation is not made out. The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.³³³

...

4.879 The Tribunal must begin by stating that it finds to be deeply unattractive an argument to the effect that ‘everyone knows that the Czech Republic is corrupt; therefore, there was corruption in this case ...’. The Tribunal acknowledges that some effort was made to adduce specific evidence of corruption, but it did feel that there was a strain of the ‘everyone knows’ argument in the overall case, for example in the reliance on reports of NGOs as to the general presence of corruption within the Czech Republic. The Tribunal does not close its eyes to the fact that the Czech Republic, like other countries, has had, and reportedly still has, problems with corruption. But the Tribunal remains vigilant against blanket condemnatory allegations which can have the appearance of an attempt to ‘poison the well’ in the hopes of making up for a lack of direct proof. Reference to other instances of alleged corruption may prove that corruption exists in the State, but it does little to advance the argument that corruption existed in the specific events giving rise to the claim. Nor do allegations of this kind, however seriously advanced, give rise to a burden on the Respondent to ‘disprove’ the existence of corruption. While the present Tribunal is therefore willing to “connect the dots”, if that is appropriate, the dots have to exist and they

³³² *Ibid* at para 4.873.

³³³ *Ibid* at para 4.876.

must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.³³⁴

Therefore, after reviewing the evidence, the tribunal found no substantial evidence of corruption, be it in respect to individual acts or in respect to an alleged “scheme” of corruption.³³⁵

13.4.2 Cases where Respondents Made Allegations of Corruption

This subsection describes four cases where host states alleged that the claimants’ investments had been procured by corruption and the claimants thus were not entitled to any recovery of their losses or damages.

13.4.2.1 *World Duty Free v Kenya*

The importance of the tribunal’s decision in *World Duty Free v Kenya*³³⁶ lies in the fact that it was the first contract-based investment arbitration case in which a tribunal made a determinative finding of corruption.³³⁷ In 2000, World Duty Free (WDF) filed a claim at the ICSID pursuant to the arbitration clause in a 1989 contract (governed by English and Kenyan law) for construction and operation of duty free complexes at two international airports.³³⁸ WDF alleged that Kenya, through its executive, judiciary, and agents, improperly used WDF in election campaign finance fraud, illegally expropriated the company, wrongfully placed it in receivership, caused damage through mismanagement in receivership, refused to protect WDF from crime and unlawfully deported its CEO.³³⁹ Subsequently, the owner and CEO of WDF acknowledged that, in order to be able to engage in business in Kenya, WDF was required to make a “personal donation” in the amount of US\$2 million to the then-President of Kenya in March 1989.³⁴⁰ In response, Kenya submitted an application alleging that the 1989 contract was unenforceable because the contract was procured by paying a bribe and requesting dismissal of WDF’s claims in their entirety.³⁴¹

The tribunal held that payments made by WDF’s owner and CEO were bribes rather than a “personal donation for public purposes,” because they were made not only in order to obtain an audience with the President, but “above all to obtain during that audience the agreement of the President on the contemplated investment.”³⁴² The arbitrators noted that “bribery or

³³⁴ *Ibid* at para 4.879.

³³⁵ *Ibid* at para 4.932.

³³⁶ *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006).

³³⁷ Llamzon (2014) at para 6.01.

³³⁸ *World Duty Free Company Limited v Republic of Kenya*, at paras 62, 75.

³³⁹ *Ibid* at paras 68-74.

³⁴⁰ *Ibid* at para 66.

³⁴¹ *Ibid* at para 105.

³⁴² *Ibid* at para 136.

influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries,”³⁴³ including Kenya. The tribunal reviewed several international anti-corruption treaties, court decisions and arbitral awards³⁴⁴ and concluded that even though in some countries or economic sectors bribery is “a common practice without which the award of a contract is difficult – or even impossible,” arbitrators “always refused to condone such practices,”³⁴⁵ and thus contracts based on corruption may not be upheld in arbitration:

In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.³⁴⁶

The tribunal, therefore, found that Kenya was legally entitled to avoid the contract tainted by corruption, and WDF was “not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract’s applicable laws.”³⁴⁷

The tribunal, however, noted that Kenya’s failure to either recover the bribe in civil proceedings or to prosecute the former President, who appears to have solicited the bribe, was “highly disturbing”:

It remains nonetheless a highly disturbing feature in this case that the corrupt recipient of the Claimant’s bribe was more than an officer of state but its most senior officer, the Kenyan President; and that it is Kenya which is here advancing as a complete defence to the Claimant’s claims the illegalities of its own former President. Moreover, on the evidence before this Tribunal, the bribe was apparently solicited by the Kenyan President and not wholly initiated by the Claimant. Although the Kenyan President has now left office and is no longer immune from suit under the Kenyan Constitution, it appears that no attempt has been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings.³⁴⁸

Nevertheless, the tribunal ruled that “the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest

³⁴³ *Ibid* at para 142.

³⁴⁴ *Ibid* at paras 143-156.

³⁴⁵ *Ibid* at para 156.

³⁴⁶ *Ibid* at para 157.

³⁴⁷ *Ibid* at para 188.

³⁴⁸ *Ibid* at para 180.

countries in the world,” and thus refrained from imposing a duty to prosecute upon the responding state as a precondition to successfully raising the corruption defence.³⁴⁹

13.4.2.2 *Metal-Tech v Uzbekistan*

*Metal-Tech v Uzbekistan*³⁵⁰ was the first investment *treaty* arbitration case where the tribunal decided that it did not have jurisdiction because the investment was tainted by corruption.³⁵¹ Metal-Tech, an Israeli company, commenced ICSID proceedings alleging that Uzbekistan failed to accord fair and equitable treatment and protection and security to the company. Metal-Tech also alleged that Uzbekistan had expropriated Metal-Tech’s investment in Uzmetal, a joint venture formed with two Uzbek state-owned companies.³⁵²

In November, 2011, Uzbekistan informed the tribunal that it had recently become aware of the details of a criminal investigation by the Prosecutor General’s Office into questionable payments to Uzbek public officials and individuals affiliated with Metal-Tech and Uzmetal.³⁵³ Uzbekistan alleged that several consulting agreements, which Metal-Tech entered into between 2000 and 2005, were a sham designed to cover illegal payments to Uzbek public officials or their close affiliates.³⁵⁴ Metal-Tech’s CEO admitted that about US\$4 million had been paid to consultants who were “primarily engaged in ‘lobbying’ activities.”³⁵⁵ Therefore, the tribunal concluded that it lacked jurisdiction over the investor’s claims because Metal-Tech breached both the Uzbek Criminal Code and the legality requirement under the Israel-Uzbekistan BIT by making payments to a governmental official and a close relative of a high-ranked public official for the purpose of influence peddling.³⁵⁶

The arbitrators decided that the investor had lost protection under the BIT, but denied Uzbekistan’s request that costs be assessed against the claimant:

The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this

³⁴⁹ *Ibid* at para 181.

³⁵⁰ *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013).

³⁵¹ Llamzon (2014) at para 6.43.

³⁵² *Metal-Tech Ltd v The Republic of Uzbekistan*, at paras 1, 3, 7, 19, 55.

³⁵³ *Ibid* at para 76.

³⁵⁴ *Ibid* at paras 28-30.

³⁵⁵ *Ibid* at para 240.

³⁵⁶ *Ibid* at paras 325, 327, 337, 351-52, 389.

participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.³⁵⁷

Although the claimant's insistence that "there is no evidence that [the claimant's consultant] is being investigated or has been arrested for any crime"³⁵⁸ and that "no official was charged with unlawful conduct in connection with its project"³⁵⁹ did not preclude the tribunal from refusing to hear the investor's claims, the arbitrators found it necessary to state:

While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.³⁶⁰

13.4.2.3 *Niko Resources v Bangladesh*

The "recent and highly significant"³⁶¹ case of *Niko Resources v Bangladesh* was a contract-based investment arbitration arising out of the 2003 joint venture agreement (JVA) and the 2006 Gas Purchase and Sales Agreement (GPSA) concluded between Niko Resources and state-owned companies Bapex and Petrobangla.³⁶² Niko Resources claimed US\$35.71 million, alleging it had not been paid for deliveries of gas.³⁶³

During negotiations for the GPSA, the claimant delivered a car to the Bangladeshi State Minister for Energy and Mineral Resources, while the claimant's Canadian parent company provided the Minister with an all-expenses-paid trip to an exposition in Calgary.³⁶⁴ Following an investigation in Canada, Niko Canada, on the basis of an agreed statement of facts, was convicted of bribery in 2011 and ordered to pay about CA\$9.5 million in fines.³⁶⁵ The respondents objected to the tribunal's jurisdiction, arguing that the claimant "has

³⁵⁷ *Ibid* at para 422.

³⁵⁸ *Ibid* at para 308.

³⁵⁹ *Ibid* at para 336.

³⁶⁰ *Ibid* at para 389.

³⁶¹ Llamzon (2014) at para 6.275.

³⁶² *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No ARB/10/18, Decision on Jurisdiction (19 August 2013)

³⁶³ *Ibid* at paras 1-7, 45, 88.

³⁶⁴ *Ibid* at para 6.

³⁶⁵ *Ibid*. See *R v Niko Resources Ltd*, 2011 CarswellAlta 2521 (Alta QB) discussed in Chapter 2 at 2-45 of this book.

violated the principles of good faith and international public policy” and the tribunal was thus “empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law.”³⁶⁶ The tribunal noted that the question, therefore, was “whether any instance of bribery and corruption in which the Claimant has been or may have been involved deprives the Claimant from having its claims considered and ruled upon by the present Tribunal.”³⁶⁷

The arbitrators confirmed that bribery is contrary to international public policy,³⁶⁸ but made a distinction between contracts *of* corruption and contracts *obtained by* corruption:

There is indeed a fundamental difference between the two types of situations. In contracts of corruption, the object of the contract is the corruption of a civil servant and this object is intended by both parties to the contract. In contracts obtained by corruption, one of the parties normally is aware of the corruption and intends to obtain the contract by these means. But this is not necessarily the case for the other side. As explained in the *World Duty Free* award, bribes normally are covert. In that case the bribe was received not by the Government or another public entity but by an individual, the then President of the country. As the World Duty Free tribunal held, the receipt of the bribe is “not legally imputed to Kenya itself. If it were otherwise, the payment would not be a bribe.”³⁶⁹

The tribunal observed that contracts of corruption have been found void or unenforceable and denied effect by international arbitrators,³⁷⁰ whereas in the case of covert bribes, the side innocent of corruption may have a justifiable interest in preserving the contract.³⁷¹ In the present case, the contracts giving rise to the investor’s claims had a legitimate object (the development of a gas field),³⁷² there was no causal link between the corruption and conclusion of the agreements (the JVA was concluded before the acts of corruption and the GPSA was concluded 18 months after the Minister resigned),³⁷³ and the respondents did not seek to avoid the agreements or to declare them void *ab initio*.³⁷⁴

Instead, the respondents asserted that, because of the act of bribery linked to the investment and for which the investor’s parent company was convicted in Canada, ICSID jurisdiction should be denied to the claimant.³⁷⁵ The respondents invoked three arguments: (i) ICSID

³⁶⁶ *Ibid* at paras 374, 376.

³⁶⁷ *Ibid* at para 380.

³⁶⁸ *Ibid* at paras 432-433.

³⁶⁹ *Ibid* at para 443 (italics in the original, internal quotations omitted).

³⁷⁰ *Ibid* at paras 434-436.

³⁷¹ *Ibid* at para 444.

³⁷² *Ibid* at para 438.

³⁷³ *Ibid* at para 453-455.

³⁷⁴ *Ibid* at para 456.

³⁷⁵ *Ibid* at para 465.

arbitration applies only to investments made in good faith, (ii) accepting jurisdiction would jeopardize the integrity of the ICSID dispute settlement mechanism, and (iii) the doctrine of clean hands.³⁷⁶ With respect to the first argument, the tribunal ruled that in a contractual dispute, “alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute.”³⁷⁷ Secondly, the integrity of the investment arbitration system is “protected by the resolution of the contentions made (including allegations of violation of public policy) rather than by avoiding them.”³⁷⁸ Finally, in response to the third objection, the arbitrators pointed that Petrobangla and Bapex, with the approval of the Bangladesh Government, entered into the GPSA even after the corruption scandal and resignation of the Minister, so that even if the claimant and Niko Canada had unclean hands, the respondents disregarded this situation and may no longer rely on these events to deny jurisdiction under an arbitration agreement which they then accepted.³⁷⁹ The tribunal thus held that Niko Canada’s corruption conviction in Canada could not be used as grounds to refuse jurisdiction over the merits of a dispute which the parties to the JVA and GPSA had agreed to submit to ICSID arbitration.³⁸⁰

Niko Resources v Bangladesh is thus a rare case where corruption was found to exist but did not determine the outcome, as the tribunal rejected the respondents’ objection to jurisdiction despite the claimant’s admissions of wrongdoing.³⁸¹ The dispute, however, continues. In 2014, the tribunal ordered Petrobangla to pay Niko US\$25.5 million for gas delivered from November 2004 to April 2010.³⁸² In March, 2016, the respondents submitted a new request seeking declarations that the JVA and the GPSA have been procured through corruption and the claimant is thus not entitled to use international arbitration to pursue its claims or, alternatively, that the JVA and the GPSA were void.³⁸³ The tribunal affirmed that it is “conscious of the seriousness of corruption offenses” and, being “[m]indful of [the tribunal’s] responsibility for upholding international public policy,” decided it would examine whether the JVA or the GPSA were procured by corruption.³⁸⁴ The arbitrators thus invited the parties to produce information and documents in relation to the negotiation and conclusion of the JVA and the GPSA.³⁸⁵

³⁷⁶ *Ibid* at para 466.

³⁷⁷ *Ibid* at para 471.

³⁷⁸ *Ibid* at para 474.

³⁷⁹ *Ibid* at para 484.

³⁸⁰ *Ibid* at para 485.

³⁸¹ Llamzon (2014) at para 6.289.

³⁸² *Niko Resources v Bangladesh*, ICSID Case No ARB/10/11 & ARB/10/18, Decision on the Payment Claim (11 September 2014) at para 292(1), online: <<http://www.italaw.com/sites/default/files/case-documents/italaw6326.pdf>>.

³⁸³ *Niko Resources v Bangladesh*, ICSID Case No ARB/10/11 & ARB/10/18, Procedural Order No 13 Concerning the Further Procedure Regarding the Corruption Issue and Related Issues (26 May 2016) at paras 1-3, online: <<http://www.italaw.com/sites/default/files/case-documents/italaw7340.pdf>>.

³⁸⁴ *Ibid* at para 7.

³⁸⁵ *Ibid* at para 2.

13.4.2.4 *MOL v Croatia*

Another case in which a host state's allegations of corruption may be determinative is currently in the making. In *MOL v Croatia*,³⁸⁶ the investor alleges that Croatia breached its obligations under the Energy Charter Treaty in connection with MOL's investments in INA, an oil company.³⁸⁷ In 2003, following the Croatian government's decision to privatize INA, MOL acquired a 25%+1 share in INA while the government remained the majority shareholder. Further negotiations culminated in two agreements which allowed MOL to increase its stake in INA to 49% (the "2009 Agreements"). Whereas Croatia alleges that the 2009 Agreements were procured by MOL's CEO through bribery of then-Prime Minister of Croatia Ivo Sanader, the investor points out that neither MOL nor its CEO has been convicted of any crime in relation to the 2009 Agreements and alleges that criminal charges against MOL's CEO are "baseless" and represent an attempt by Croatia to take control of INA.³⁸⁸ The investor asserts that allegations of bribery constitute an "illegal effort to harass and intimidate MOL"³⁸⁹ and Croatia maintains that initiation of the ICSID proceedings was "just another attempt [made by the investor's CEO] to evade justice."³⁹⁰

In November 2012, Ivo Sanader was convicted in Croatia for accepting a EUR5 million bribe from MOL in exchange for facilitating the conclusion of the 2009 Agreements. However, in July, 2015, Croatia's Constitutional Court annulled the conviction and ordered a retrial, which began in September of 2015. Croatian law enforcement authorities also issued an indictment against MOL's CEO and chairman Zsolt Hernádi, but Hungarian authorities declined Croatia's requests to question him.

On 2 December, 2014, the ICSID tribunal declined Croatia's application to dismiss the investor's claims on a summary basis and decided that consideration of the objections put forward by the respondent should be postponed to a later stage of the proceedings.³⁹¹ It remains to be seen how the tribunal will approach the issue of corruption in light of the

³⁸⁶ *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (2 December 2014).

³⁸⁷ For the facts of the case, see *ibid* at paras 1-21; Margareta Habazin, "MOL v. Republic of Croatia: The ICSID Case Where Investor Corruption as a Defense Strategy of the Host State in International Investment Arbitration Might Succeed" (16 November 2015), *Kluwer Arbitration Blog*, online: <<http://kluwerarbitrationblog.com/2015/11/16/mol-v-republic-of-croatia-the-icsid-case-where-investor-corruption-as-a-defense-strategy-of-the-host-state-in-international-investment-arbitration-might-succeed/>>; Luke Eric Peterson, "Croatia Fails in Bid to Argue that Umbrella Clause Carve-out Should Knock Out Claim; UNCITRAL Tribunal Finalized in Separate Case", *Investment Arbitration Reporter* (3 December 2014), online: <<https://www.iareporter.com/articles/croatia-fails-in-bid-to-argue-that-umbrella-clause-carve-out-should-knock-out-claim-uncitral-tribunal-finalized-in-separate-case/>>.

³⁸⁸ *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (2 December 2014) at para 17.

³⁸⁹ *Ibid* at para 19.

³⁹⁰ *Ibid* at para 39.

³⁹¹ *Ibid* at paras 46, 52.

ongoing criminal investigation and what effect, if any, the allegations of corruption by the host state will have on the outcome of the case.

13.5 Conclusions: International Investment Arbitration and the Global Fight against Corruption

International arbitration is, by nature, a private and consensual procedure. Its neutrality and flexibility, as well as the enforceability of arbitration agreements and final and binding character of arbitral awards, make international arbitration the primary mechanism for the settlement of disputes arising out of international commercial and investment transactions. But the global nature of modern business, increasing involvement of states and state-owned enterprises in international investment and rising sophistication of regulatory and reporting schemes in various countries inevitably result in a corresponding surge in the number of investment disputes. In 2015, investors initiated 70 known treaty-based international investment arbitrations, the highest number of cases ever filed in a single year, and the respondent was a developing country in approximately 40% of these cases.³⁹² As of 2015, 107 countries have been named as respondents in one or several known treaty-based investment arbitration disputes.³⁹³

Not surprisingly, the issue of corruption has found its way into some investment disputes. Arbitration cases reviewed in this section demonstrate that both foreign investors and host states may make allegations of corruption. On the one hand, investors have made attempts to seek compensation from host states for damages or losses caused by public officials who allegedly solicited bribes or were corruptly influenced by the investors' competitors. Tribunals have hinted that corruption on the side of the host state's public officials, if proven, may engage the host state's liability for the breach of national treatment or fair and equitable treatment standards, as well as for illegal expropriation. However, while the arbitrators accepted the possibility that corruption may be proven with circumstantial evidence, by "connecting the dots," the investors failed to furnish "clear and convincing" evidence of corruption. On the other hand, where the claimants' investments were tainted by corruption, the arbitrators exercised their duty to uphold international public policy and thus rejected the investors' claims.

In summary, international arbitration principles and procedures discourage investors from getting involved in corrupt activities, as such activities deny recovery to claimants whose investments are tainted by bribery. At the same time, international arbitration remains a private and consensual dispute resolution mechanism in which arbitrators have no power or authority to investigate allegations of corruption on their own. This means that in some cases (at least theoretically), public officials may get away with soliciting bribes or being bribed by the investors' competitors.

³⁹² UNCTAD, *World Investment Report 2016* (United Nations, 2016) at 104-105.

³⁹³ *Ibid* at 104.